



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 93 OF 2015**

**(Formerly Nyeri HCCC 43 OF 2008)**

**MARGARET WANGECHI NDERI.....PLAINTIFF**

**-VERSUS-**

**JULIA WANJIKU JUSTUS.....DEFENDANT**

**JUDGMENT**

**A. INTRODUCTION**

1. By a plaint dated 5<sup>th</sup> May, 2008 and amended on 15<sup>th</sup> February, 2019 the Plaintiff sought the following reliefs against the Defendant:

- (a) *An order for specific performance of the sale agreement dated 22<sup>nd</sup> February, 2001.*
- (b) *In the alternative, an order for compensation in the current value of the suit property and developments thereon.*
- (c) *Costs of the suit.*
- (d) *Any other relief the court may deem fit to grant.*

**B. THE PLAINTIFF'S CASE**

2. The Plaintiff pleaded that vide a sale agreement dated 22<sup>nd</sup> February, 2001 the late Justus Karuigi Chuani (*the deceased*) agreed to sell his *Title No. Nyeri Municipality/Block 1/1133 (the suit property)* to the Plaintiff at an agreed price of Kshs.700,000/-. It was further pleaded that the Plaintiff paid Kshs.500,000/- upon execution of the sale agreement and that the balance of Kshs.200,000/- was to be paid upon execution of the transfer instruments as per the terms of the sale agreement. It was the Plaintiff's case that she thereupon took possession of the suit property and developed it but the deceased had refused to complete the transfer process.

3. The Plaintiff contended that she had always been willing and able to pay the balance of the purchase price but the deceased had failed to abide by the terms of the sale agreement hence the suit. The Plaintiff, therefore, wanted an order for specific performance of the agreement for sale dated 22<sup>nd</sup> February, 2001 or, in the alternative, compensation for the current market value of the suit property together with all the development she had effected thereon.

**C. THE DEFENDANT'S RESPONSE AND COUNTERCLAIM**

4. By a defence dated 19<sup>th</sup> June, 2008 the deceased admitted the existence of the sale agreement dated 22<sup>nd</sup> February, 2001 but contended that the Plaintiff's occupation before completion was unlawful and an act of trespass. The deceased further denied that he was in breach of the sale agreement and contended that it was the Plaintiff who was in breach by failing to pay the balance of the purchase price and failing to sign the transfer form.

5. By his counterclaim, the deceased reiterated the contents of the defence and pleaded that the sale agreement dated 22<sup>nd</sup> February, 2001 was incapable of specific performance due to breach on the part of the Plaintiff. It was further pleaded that the deposit of the purchase price was refunded to the Plaintiff's advocate on 3<sup>rd</sup> March, 2008 but the banker's cheque for the amount was returned to the deceased. The deceased, therefore, prayed for the following orders in the counterclaim:

(a) An eviction order against the Plaintiff from the suit property.

(b) That the Plaintiff be ordered to accept a refund of the purchase price less 20% being the agreed liquidated damages.

(c) Costs of the counterclaim.

#### **D. THE PLAINTIFF'S REPLY AND DEFENCE TO COUNTERCLAIM**

6. By a reply to defence and defence to counterclaim dated 30<sup>th</sup> June, 2008 the Plaintiff joined issue with the Defendant on his defence. The Plaintiff pleaded that she took possession of the suit property with the consent of the deceased upon making part payment awaiting completion. The Plaintiff further reiterated the contents of the plaint in defence to the counterclaim and denied that she was in breach of the sale agreement dated 22<sup>nd</sup> January, 2001. The Plaintiff also pleaded that she was not legally bound to accept a refund of the deposit of the purchase price since was not in breach of the agreement.

#### **E. SUMMARY OF THE PLAINTIFF'S EVIDENCE**

7. At the trial hereof, the Plaintiff adopted her witness statement dated 18<sup>th</sup> July, 2019 as her evidence-in-chief. She also produced the documents listed in her list of documents as exhibits. It was her evidence that she bought the suit property from the deceased vide a sale agreement dated 22<sup>nd</sup> February, 2001 and that she took possession thereof and developed it extensively by building a permanent house thereon. She testified that she had been residing on the suit property for more than 12 years and that it was the deceased who had defaulted on the sale agreement by failing to execute the transfer instruments and obtain the consent to transfer from the Commissioner of Lands.

8. During cross examination, the Plaintiff conceded that she had not paid the balance of the purchase price which was Kshs.120,000/-. During re-examination, she contended that the letter dated 26<sup>th</sup> July, 2001 from the Commissioner of Lands was not a consent letter to transfer but a letter communicating approval subject to fulfilment of certain conditions. It was her case that the balance of the purchase price was never paid because the deceased had failed to avail the completion documents as per the sale agreement.

#### **F. SUMMARY OF THE DEFENDANT'S EVIDENCE**

9. The defence evidence was given by Julia Wanjiku Justus who was the widow and personal representative of the deceased. The deceased was said to have died in 2015 during the pendency of the suit hence Julia Wanjiku was joined as the substituted Defendant. The record shows that the Defendant adopted her witness statement dated 8<sup>th</sup> November, 2017 and 18<sup>th</sup> February, 2020 and the deceased's statement dated 30<sup>th</sup> April, 2014 as her evidence in chief.

10. It was the Defendants' testimony that the deceased had complied with the terms of the agreement by obtaining a rates clearance certificate and consent to transfer from Commissioner of Lands hence the Plaintiff was the one in default in payment of the balance of the purchase price in the sum of Kshs.120,000/-. It was further the Defendant's case that the completion period for the sale agreement was 90 days and that it was never completed with 90 days hence it was no longer valid and enforceable. Moreover, the Defendant contended that the deceased had rescinded the sale agreement due to the failure of the Plaintiff to pay the balance of the purchase price.

#### **G. DIRECTIONS ON SUBMISSIONS**

11. When the trial was concluded on 24<sup>th</sup> February, 2021 the parties were granted timelines within which to file and exchange their written submissions. The Plaintiff was granted 30 days to file and serve her submissions whereas the Defendant was granted 30 days to do the needful upon the lapse of the Plaintiff's period. The record shows that the Plaintiff filed her submissions on 31<sup>st</sup> March, 2021 whereas the Defendant filed hers on 1<sup>st</sup> April, 2021. The record further shows that the Plaintiff filed supplementary submissions on 21<sup>st</sup> April, 2021 in reply to the Defendant's submissions on various points of law.

#### **H. THE ISSUES FOR DETERMINATION**

12. The court has perused the pleadings, documents and evidence on record in this matter. The court has also perused the submissions of the parties on record. The court is of the opinion that the following issues arise for determination herein:

(a) Whether the Plaintiff's suit is time-barred under the Limitation of Actions Act (Cap. 22).

(b) Whether the sale agreement dated 22<sup>nd</sup> February, 2001 is admissible in evidence.

(c) Whether it was the Plaintiff or the deceased who was in breach of the sale agreement dated 22<sup>nd</sup> February, 2001.

(d) Whether the Plaintiff is entitled to the reliefs sought in the suit.

(e) Whether the Defendant is entitled to the reliefs sought in the counter-claim.

(f) Who shall bear costs of the suit and counterclaim.

#### **H. ANALYSIS AND DETERMINATION**

**(a) Whether the Plaintiff's suit is time-barred under the Limitation of Actions Act (Cap. 22)**

13. The court has considered the pleadings and submissions on record on this issue. Whereas the Defendant submitted that the Plaintiff's suit was time-bared. The Plaintiff submitted that the issue was never pleaded in the defence and counterclaim hence it cannot be a legitimate issue for determination. The Defendant relied upon the case of **Richard Toroitich v Mike K. Lemeltet and 3 Others [2014] eKLR** in support of the plea of limitation whereas the Plaintiff relied upon **Raila Amolo Odinga and Another v Independent Electoral and Boundaries Commission and 2 Others [2017] eKLR** and **Stephen Onyango Achola and Another v Edward Hongo Sule and Another [2004] eKLR** in support of the submission that an unpleaded issue ought not to be taken into account in adjudication of disputes.

14. The court has considered the submissions and the authorities cited by the parties on the issue of limitation. The court has noted that the issue of limitation was never pleaded by the Defendant in the defence or counterclaim hence it cannot be the legitimate subject of consideration. In the case of **Stephen Onyango Achola and Another v Edward Hongo Sule and Another (supra)** the Court of Appeal held as follows on the question of limitation of actions in similar circumstances:

**“The second respondent having failed to specifically plead the issue of limitation in its defence it was not entitled to rely on that issue and base its preliminary objection on it; nor will the second Respondent be entitled to rely on that defence during the trial unless it amends its defence. It is trite law that cases must be decided on the issues pleaded and we need not cite any authority for that proposition. It is equally not to be forgotten that a party who is entitled to a defence of limitation is perfectly entitled to waive such a defence and thus let the suit proceed to trial on its merit.”**

15. The court is thus satisfied on the basis of the said authorities and the provisions of **Order 2 rule 4(1) of the Civil Procedure Rules** that the deceased was required to specifically plead the defence of limitation if he wished to rely upon it at the trial. The court therefore agrees with the Plaintiff's advocates that the issue of limitation cannot be a legitimate issue for determination herein.

**(b) Whether the sale agreement dated 22<sup>nd</sup> January, 2001 is admissible in evidence**

16. The court has similarly considered the material and submissions on record on this issue. The Defendant submitted that the sale agreement dated 22<sup>nd</sup> January, 2001 was not admissible because it had not been stamped as required under **Section 5 of the Stamp Duty Act (Cap. 480)**. It was further submitted that under **Section 19 (1) of the said Act**, no instrument chargeable with stamp duty shall be admissible in civil or criminal proceedings unless it is duly stamped. The Defendant relied upon the cases of **Charles Nderitu Gitoi (suing on behalf of and as legal representative of Charity Nyaguthii Gitoi – deceased) v Christopher Muchumba Warui and Others [2014] eKLR** and **Julius Maina and Julius Maina Gitoi and 2 Others v Christopher Muchomba Warui and Another Nyeri Civil Appeal No. 166 of 2009** (unreported) in support of her submissions.

17. The Plaintiff on the other hand, contended that under **Section 19 (3) of the Stamp Duty Act**, the court had discretion to extend the time for payment of stamp duty. The Plaintiff was of the view that non-payment of stamp duty in the first instance was not fatal to her claim and she relied upon the case of **Keshavji Jivraj Shah v Kanwal Sarjit Singh Dhiman [2019] eKLR** in support of her submission.

18. In the said case it was held, inter alia, that:

**“...under Section 19(3) and 20 of the Stamp Duty Act, there is a statutory right availed for unstamped documents to be stamped out of time for payment of requisite Stamp Duty and penalties and their being unstamped do not make an agreement unenforceable nor fatally defective or inadmissible. As the Stamp Duty over Memorandum of Agreement of 17<sup>th</sup> December, 1996 has already been assessed by the collector of Stamp Duty, I direct the Plaintiff to pay the assessed Stamp duty to the collector of Stamp Duty within 14 days from the date of the judgment herein and cause the same to be filed in court Registry within 4 days from the date of stamping”.**

19. The court is of the opinion that the Defendant ought to have objected to the production of the sale agreement at the trial on the basis that it was not stamped under the **Stamp Duty Act**. That would have given the Plaintiff an opportunity to seek leave to pay the stamp duty out of time before conclusion of the trial. The record shows that the Defendant did not object to its production at the trial hence the court is of the opinion that it would be just to direct payment by the stamp duty and any outstanding penalties upon delivery of judgment and that the Plaintiff shall file evidence of payment within a specific period. That is the course which the court followed in the case of **Keshavji Jivraj Shah v Kanwal Sarjit Dhiman (supra)** and this court is inclined to follow suit given that the agreement had already been admitted in evidence.

**(c) Whether it was the Plaintiff or the deceased who was in breach of the sale agreement dated 22<sup>nd</sup> February, 2001**

20. Whereas the Plaintiff contended that it was the deceased who was in breach of the said sale agreement, the Defendant contended otherwise. The Defendant contended that the deceased had availed all the required completion documents as per the agreement and that it was the Plaintiff who had defaulted in payment of the balance of the purchase price in the sum of Kshs.120,000/-. The Plaintiff's contention was that the deceased had failed to avail the consent to transfer from the Commissioner of Lands and signed transfer form.

21. The court has fully considered the submissions and material on record on this issue. Clause 9 of the sale agreement dated 22<sup>nd</sup> January, 2001 provided that the completion period was 90 days whereas clause 3 provided that the deceased **“shall obtain rates clearance certificate and consent to transfer from the Commissioner of Lands at his cost”**. The agreement further provided that the balance of the purchase price was to be paid **“at the time of signing the transfer instruments”**.

22. The court has noted that although the deceased obtained a rates clearance certificate on 13<sup>th</sup> February, 2002, there is no evidence to

demonstrate that he ever obtained the consent of the Commissioner of Lands within the completion period or at all. The Defendant relied on the letter dated 26<sup>th</sup> July, 2001 from the Commissioner of Lands and contended that it was the consent envisaged under clause 3 of the sale agreement.

23. The court has considered the contents of the said letter dated 26<sup>th</sup> July, 2001 and is unable to agree that it was the consent envisaged in the sale agreement. The court is of the opinion that the said letter merely communicated conditional approval subject to fulfilment of 4 conditions one of which was payment of “*consent fees at 2% of the consideration*”. There is no evidence on record to show that the consent fee was ever paid to the Commissioner of Lands. The court is of the opinion that where approval is granted subject to conditions, then such approval can only become valid upon fulfilment of the conditions imposed. Clause 3 of the sale agreement was clear that the deceased was to obtain the consent “*at his cost*” hence he was obligated to pay the consent fee of 2% of the purchase price to the Commissioner of Lands.

24. There is also no evidence on record to demonstrate that the deceased ever executed the transfer instrument to facilitate payment of the balance of the purchase price in the sum of Kshs.120,000/- and none was produced at the trial. The court is thus satisfied on the basis of the material on record that it was the deceased who was in breach of the sale agreement dated 22<sup>nd</sup> February, 2001 by failing to avail the completion documents namely, the consent to transfer and duly signed transfer instruments as per clause 2 of the agreement.

***(d) Whether the Plaintiff is entitled to the reliefs sought in the suit***

25. The court has already found and held that it was the deceased who was in breach of the sale agreement dated 22<sup>nd</sup> February, 2001. The court does not agree with the Defendant’s submission that the Plaintiff was unable or unwilling to pay the balance of the purchase price. The material on record shows that the Plaintiff was only obligated to pay a deposit of Kshs.500,000/- whereas the balance of Kshs.200,000/- was payable upon presentation of the completion documents including duly executed transfer instruments. The record further reveals that the Plaintiff, in fact, paid an extra sum of Kshs.80,000/- thereby leaving an outstanding balance of Kshs.120,000/- only.

26. The court does not take the view that a defaulting party can purport to rescind or terminate an agreement for sale and refund the deposit of the purchase price as the deceased purported to do. A party in breach of an agreement cannot purport to rescind it to his advantage. In the premises, the court is of the opinion that the Plaintiff is entitled to an order for specific performance of the sale agreement dated 22<sup>nd</sup> January, 2001. The court is satisfied that the Plaintiff is ready and willing, and has always been ready and willing, to fulfil her side of the bargain. The court is further of the opinion that the Plaintiff is entitled to satisfy the conditions of the conditional consent letter dated 26<sup>th</sup> July, 2001 by paying the consent fee of 2% of the purchase price and offsetting the same against the balance of the purchase price.

***(e) Whether the Defendant is entitled to the reliefs sought in the counterclaim***

27. The court has considered the submissions and material on record on the issue. The Defendant contended that the Plaintiff was unlawfully and illegally in occupation of the suit property hence she should be evicted therefrom and compelled to accept a refund of the deposit of the purchase price less 20% as liquidated damages. The court has already found and held that the Plaintiff was not in breach of the terms of the sale agreement and that it was the deceased who was in breach. It would, therefore, follow that a defaulting party cannot be entitled to any remedies as a result of his own breach of contract. Accordingly, the court finds that the Defendant has not proved her counterclaim as required by law hence the court is not inclined to grant her the reliefs sought, or any one of them.

***(f) Who shall bear costs of the suit and counterclaim***

28. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court finds no good reason why the successful party should not be awarded costs of the action. Accordingly, the Plaintiff shall be awarded costs of the suit and counterclaim.

**(I) CONCLUSION AND DISPOSAL**

29. The upshot of the foregoing is that the court finds and holds that the Plaintiff has proved her claim against the Defendant to the required standard. The court also finds that the Defendant has failed to prove her counterclaim against the Plaintiff as required by law. Accordingly, the court makes the following orders for disposal of the suit and counterclaim:

*(a) The Plaintiff’s suit is hereby allowed in terms of prayer (a) and an order for specific performance of the sale agreement dated 22<sup>nd</sup> February, 2001 is hereby made directing the Defendant to transfer the Title No. Nyeri Municipality Block 1/1133 to the Plaintiff within 14 days from the date hereof.*

*(b) That in default of the Defendant’s compliance the Deputy Registrar of the court shall sign and execute all necessary documents to facilitate transfer of the suit property to the Plaintiff.*

*(c) That the Plaintiff shall be at liberty to pay the consent fee of 2% on behalf of the Defendant and set off the same against the balance of the purchase price.*

*(d) The Plaintiff shall pay stamp duty on the sale agreement dated 22<sup>nd</sup> January, 2001 together with any penalties and interest thereon within 14 days from the date hereof and file evidence of payment in court.*

*(e) The Defendant’s counterclaim is hereby dismissed in its entirety.*

*(f) The Plaintiff is hereby awarded costs of the suit and the counterclaim.*

30. It is so decided.

**JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYERI AND DELIVERED VIA MICROSOFT TEAMS PLATFORM  
THIS 30<sup>TH</sup> DAY OF JUNE 2021.**

In the presence of:

Mr. Muriungi holding brief for Mr. Oonge for the Plaintiff

The Defendant in person

Court assistant – Wario

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**Y. M. ANGIMA**

**ELC JUDGE**