



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUSIA

ELC CASE NO. 154 OF 2017

CONSOLINE ATIENO ONONIA.....PLAINTIFF

- VERSUS -

SAMUEL MULERA LUKIRI.....DEFENDANT

J U D G M E N T

1. The plaintiff filed this suit against the defendant through a plaint dated 28th August 2015 seeking to be granted the following prayers by the court;

a. Refund of Kshs.170,000/=.

b. Costs.

c. Interest on (a) and (b) above.

2. The suit initially filed in the Chief Magistrates' Court was transferred to this court for hearing and determination via an order dated 24th August 2017. The plaintiff pleaded that on 18/12/2009, the defendant offered to sell land and the plaintiff accepted to purchase a portion measuring 50ft by 100ft comprised in land parcel L.R. SAMIA/LUCHULULO-BUKHULUNGU/1596 at a total consideration of Kshs.100,000/=. An agreement was duly executed and the plaintiff paid the full agreed purchase price to the defendant who duly acknowledged receipt. The plaintiff incurred a further cost of Kshs.45,000/= on account of surveyors and other expenses pursuant to the agreement which she now claims from the defendant.

3. She further claimed that the defendant failed to cause the subdivision, transfer of the purchased portion and registration to the plaintiff. The plaintiff averred that the defendant has breached the agreement and consequently clause 7 of the agreement has taken effect and the claim against the defendant is for;

i. Refund of purchase price paid of Kshs.100,000/=.

ii. Expenses incurred totalling Kshs.45,000/=.

iii. The agreed penalty/general damages Kshs.25,000/=.

4. The defendant was duly served with the summons wherefore he entered appearance and filed a defence dated 2nd November 2015. He admitted that there was a land sale agreement and pleaded that the plaintiff has been and is in actual possession, farming and doing all that she so deems good to her without interference from him. He prayed that the court does order the plaintiff to bring up and sign all the relevant documents and pay all the land documents and pay all the requisite fees within the given period. He also challenged the plaintiff to get another purchaser on her own in case she is no longer interested in the portion she purchased rather than demanding for a refund when she has been using the land uninterrupted for 6 years.

5. The hearing began on 3rd June 2021 with the plaintiff calling three witnesses. She testified as **PW1** and stated that she lives in Burumba East and works as a tailor. She adopted her witness statement dated 24th August 2015 as her part of evidence. It is her evidence that she purchased a plot of 50ft by 100ft portion of L.R. SAMIA/LUCHULULO-BUKHULUNGU/1596 for Kshs.100,000/=. They executed a sale agreement between them and she did pay the consideration in 3 instalments totalling to Kshs.100,000/=. She spent a further Kshs.45,000/= on surveyors and other related costs and did perform her part of the agreement. She claimed that the defendant has refused to cause subdivision and transfer the plot to her. She stated that the defendant has been unco-operative and breached the agreement.

6. The plaintiff continued that there was a clause in the agreement that in the event of breach by the vendor, the purchase price shall become refundable together with 5% per annum of the purchase price as general damages for breach the contract and development and expenses incurred by the purchaser shall become refundable in monetary value. It is her contention that the money was paid to the surveyor brought by the defendant in the advocate's office and she was not given a receipt for that payment but it was paid in the presence of witnesses. She prayed to recover the purchase price, general damages and expenses incurred totalling to Kshs.170,000/= as the reliefs in the plaint. In support of her case, the plaintiff produced copies of the sale agreement dated 18/12/2009 as PEX 1, acknowledgement of payment dated 10/3/2010 and 9/9/2010 as PEX 2 & 3, demand notice as PEX 4.

7. PASCAL OTIENO JUMA, testified as **PW2** stating that he stays at Matayos and was a civil servant working at the county commissioner's office. He adopted his witness statement dated 24/8/2015 as his evidence. He stated that he was a witness to the sale agreement between the parties herein made on 18.12.2009. He stated that the plaintiff paid Kshs.50,000/= and later the balance of Kshs.50,000/=. He stated that the defendant has failed to transfer the plot to PW1 claiming his brother is against it. He further stated that the defendant agreed to the terms including refund of the purchase price, expenses and general damages in case of default.

8. GABRIEL FWAYA, testified as **PW3** and stated he is an advocate of the High Court. On 13/12/2019, he prepared a sale agreement which was produced as PEX 1. He further states that the purchaser paid Kshs.50,000/= on execution of the agreement and the balance of Kshs.50,000/= was paid in September 2010. The witness stated that there was a clause on penalty of 5% in case of default. He stated that he also witnessed the payment of Kshs.45,000/= to the surveyor who indicated he had no receipt.

9. The defendant never appeared for the hearing despite being served with a hearing notice as per the Affidavit of Service dated 2nd June 2021. The case was closed and the parties were given two weeks within which to file their submissions. The plaintiff filed her submissions on 7th June 2021 and submitted that her evidence was unchallenged and she has proved her case on a balance of probabilities and should be granted the reliefs sought in the plaint.

10. Having considered the pleadings, the evidence adduced in court and the submissions filed in court, the issues for determination before this court are;

a. Whether the defendant breached the sale agreement dated 18/12/2009;

b. Whether the plaintiff is entitled to the prayers sought in the plaint;

c. Who should pay costs of the suit?

11. It is trite law that courts do not re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592, Scrutton L.J.** held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”

12. Even though the plaintiff's evidence is uncontroverted as the defendant never testified, the court still has a duty to analyse the evidence adduced before it and make a decision on a balance of probabilities. The plaintiff stated that she entered into a sale agreement for a plot of 50ft by 100ft of L.R. SAMIA/LUCHULULO-BUKHULUNGU. She paid the purchase price in instalments and this was corroborated by the evidence of PW2 who was a witness to the sale agreement and PW3 the advocate who prepared the sale agreement. The plaintiff claimed that the defendant has refused to cause subdivision and transfer of the plot to her. She testified that the defendant has been uncooperative and as such has breached the agreement.

13. In copy of the sale agreement produced in evidence which the parties signed, paragraph 4 it states as follows;

“That the vendor shall attend all relevant land control board meetings and sign all relevant forms to facilitate the transfer of the purchased portion into the purchase's name.”

14. Thus the defendant (the vendor), was the one obligated to obtain the Land Control Board consent. Instead the defendant thinks that the duty was imposed on the plaintiff according to paragraph 4 of his defence when he pleaded thus;

“That having perused all the list of documents and witness statements filed by the plaintiff in support to her claim, he does not see any document or a statement by an officer from the Land's office supporting the plaintiff's claim in paragraph 6 and 7 just as the averment in paragraph 5 is not supported”.

15. Under section 8 of the Land Control Act the application must be obtained within six months of the making of the agreement for the controlled transaction by any party thereto. Though there was no set duration for when the defendant was to comply with the application for the Land Control Board consent, the defendant was yet to comply with said obligations by the time the plaintiff filed this suit. I therefore find that the defendant breached the sale agreement for non-compliance with the clause 4 of sale agreement rendering the agreement as void.

16. On the basis of finding that the defendant breached the sale agreement, the next issue is whether the plaintiff is entitled to the prayers sought. The plaintiff has prayed for Kshs.170,000/= and costs. The plaintiff has explained the additional expenses to include payment to a surveyor of Kshs.45,000/= as was agreed between the parties in the sale agreement. Her evidence was corroborated by PW2 and PW3 who confirmed the payment although she was not issued with a receipt. In the case of **Millicent Perpetua Atieno Vas Louis Onyango Otieno (2013) e KLR**, the Court of Appeal quoted with approval **Halsbury's Law of England, Volume 12, 4th Edition at paragraph 1183** on the

type and measure of damages recoverable by a purchaser upon breach by a seller of land.

“where it is the vendor who wrongfully refuses to complete, the measure of damage is similar to the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain.....”

17. The sale agreement dated 13/12/2009 contained a default clause in paragraph 7 which stated;

“That in event of breach of this contract by the Vendor the purchase price shall be refundable together with 5% P.A. of the purchase price as general damages for breach of contract and development and expenses incurred by the purchaser shall become refundable in monetary value.”

18. From the foregoing evidence adduced on record and which has not been contradicted, I find that the plaintiff has proved her case on a balance of probabilities and give judgement in her favour as follows;

- a. She is entitled to a refund of Kshs.170,000/=**
- b. Costs of the suit.**
- c. Interest on (a) and (b) above at court rates until payment in full.**

DATED, SIGNED AND DELIVERED AT BUSIA THIS 17TH DAY OF NOVEMBER, 2021

A. OMOLLO

JUDGE