



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 1016 OF 2007

JOSEPH NJUI MUNGAI.....1ST PLAINTIFF

PHILISILA NJERI MUNGAL.....2ND PLAINTIFF

=VERSUS=

MARGARET NYAMBURA KARANJA.....DEFENDANT

JUDGMENT

The 1st plaintiff is a legal representative of the estate of Mary Wanjiru Mungai, deceased. Mary Wanjiru Mungai, deceased and the 2nd plaintiff were at all material times the legal representatives of the estate of Andrew Mungai Njui, deceased (hereinafter referred to as “Andrew Mungai”). The defendant is the legal representative of the estate of Joel Karanja Njoroge, deceased (hereinafter referred to as “the deceased”). Andrew Mungai was at all material times the registered proprietor of all that parcel of land known as L.R No. 4953/543, Thika. On 27th June, 1988, Mary Wanjiru Mungai, deceased and the 2nd plaintiff (hereinafter referred to only as “the plaintiffs”) as the legal representatives of the estate of Andrew Mungai entered into an agreement for sale with the deceased, Joel Karanja Njoroge in respect of the suit property the salient terms of which provided as follows;

1. The plaintiffs agreed to sell the suit property together with the developments hereon to the deceased at Kshs. 950,000/=.
2. The deceased paid a sum of Kshs. 400,000/= as part of the purchase price to the plaintiff’s on execution of the agreement.
3. The balance of the purchase price in the sum of Kshs. 550,000/= was to be paid by the deceased to the plaintiffs “on completion of transfer”.
4. The deceased was to take possession of the suit property upon execution of the agreement and was at liberty to commence business therein and to carry out further developments on the same.

The plaintiffs sold the suit property to the deceased before confirmation of grant of letters of administration that had been issued to them in respect of the estate of Andrew Mungai on 26th November, 1987. The said grant of letters of administration was confirmed on 19th October, 1988 and the plaintiffs were registered as proprietors of the suit property on 15th July, 1993. They were subsequently issued with a provisional certificate of title in respect of the suit property on 15th December, 1993 while the deceased was still alive. The deceased died on 26th July, 1996 and a grant of letters of administration in respect of his estate was issued to the defendant on 19th February, 1997. The said grant of letters of administration was confirmed on 26th September, 1997.

The plaintiffs brought his suit against the defendant on 24th June, 1997. The suit was initially filed in the Principal Magistrate’s Court at Thika. On 16th October, 2001, the suit was transferred to this court. It was initially registered as HCCC No. 406 of 2003 before it was given its current number, ELC No. 1016 of 2007. In their plaint dated 23rd June, 1997, the plaintiffs averred that in or about the month of July, 1996, the defendant trespassed on the suit property and commenced business thereon. The plaintiffs averred that the defendant entered the suit property on the mistaken belief that her deceased husband, Joel Karanja Njoroge (deceased) had a right to occupy the suit property. The plaintiffs averred that they had terminated the deceased’s right to occupy the suit property on 14th March, 1996 when he failed to fulfill the conditions under which he was allowed to occupy the property. The plaintiffs averred that despite demands made upon her, the defendant had neglected or refused to vacate the suit property. The plaintiffs sought judgment against the defendant for eviction from the suit property and costs of the suit.

The defendant filed a statement of defence on 1st August, 1997 which was amended on 6th July, 2001 to plead a counter-claim against the plaintiffs. When the suit came up for hearing on 30th October, 2018, the defendant made oral application for leave to further amend her defence and counter-claim which was allowed. In her amended defence and counter-claim, the defendant denied that she had trespassed on the suit property on or about the month of July, 1996. The defendant averred that she entered into the suit property pursuant to an agreement

for sale which her deceased husband, Joel Karanja Njoroge (deceased) entered into with the plaintiffs. The defendant averred that under the terms of the said agreement, the deceased paid a deposit of Kshs.493,028/= and was given possession of the suit property awaiting payment of the balance of the purchase price on completion.

The defendant averred that when the plaintiffs entered into the said agreement with the deceased, the plaintiffs did not have a title for the suit property in their name and that it was agreed that the suit property would be transferred to the deceased once the plaintiffs transferred the property from the name of Andrew Mungai to their names. The defendant averred that the plaintiffs did not cause the property to be registered in their names until 1996 by which time a financier who had agreed to lend money to the deceased for the balance of the purchase price had withdrawn the offer. The defendant averred that when the plaintiffs demanded the payment of the balance of the purchase price from the deceased in 1996 after they obtained a title for the suit property, the deceased was sick and was hospitalised from which sickness he did not recover as he passed away in July, 1996. The defendant averred that it took her sometime after the death of the deceased to collect debts that were owed to the deceased to enable her pay the balance of the purchase price to the plaintiffs.

The defendant averred that the deceased put up a development on the suit property valued at Kshs. 19,550,000/=. The defendant averred that she was ready to pay the balance of the purchase price to the plaintiffs so that the plaintiffs could transfer the property to her as the legal representative of the deceased but the plaintiffs had refused to accept the payment.

In her Counter-claim, the defendant sought judgment against the plaintiffs for specific performance of the agreement for sale dated 27th June, 1988 and an order that the plaintiffs accept the balance of the purchase price in the sum of Kshs. 470,000/= and transfer to her the suit property. In the alternative, the defendant sought a refund of Kshs. 480,000/= with interest together with a further sum of Kshs. 19,550,000/= being the value of the development put up by the deceased on the suit property. The defendant also sought the cost of the counter-claim and any other relief the court would deem fit to grant.

The plaintiffs filed a reply to defence and defence to counter-claim on 3rd October, 2003. The plaintiffs denied that the deceased had put up any development on the suit property. The plaintiffs averred that on 14th March, 1996, they terminated the agreement for sale that they had entered into with the deceased on 27th June, 1988 when he failed to fulfill his part of the said agreement. The plaintiffs averred that since the said agreement was lawfully terminated, the same was not enforceable. The plaintiffs averred that the defendant was not entitled to a refund of the deposit of the purchase price since it was the deceased who breached the agreement for sale and also on account of the fact that the deceased had been in occupation of the suit property. The plaintiffs urged the court to dismiss the defendant's counter-claim with costs. In her reply to defence to counter-claim, the defendant averred that she was not aware of the alleged termination of the said agreement for sale on 14th March, 1996.

At the trial, the 1st plaintiff gave evidence for the plaintiffs while the defendant gave evidence and called one witness. The 1st plaintiff, Joseph Njui Mungai (PW1) adopted his witness statement dated 14th May, 2012 as part of his evidence in chief. He produced a copy of the agreement for sale dated 27th June, 1988 between the plaintiffs and the deceased as P.Exh. 1 and a copy of the Provisional Certificate a title dated 15th December, 1993 as P.Exh.2. PW1 told the court that the plaintiffs were paid a sum of Kshs. 400,000/= on the execution of the agreement for sale and received a further payment of Kshs. 56,972/= making a total of Kshs. 456,972/= the amount paid by the deceased on account of the purchase price for the suit property.

PW1 stated that when the plaintiffs entered into the agreement for sale with the deceased, the title for the suit property was lost and as such the completion period was not specified in the agreement for sale. He stated that the new title for the suit property was issued to the plaintiffs on 15th December, 1993 after about 5½ years from the date of the agreement for sale. He stated that at all material times Mwangi Thuo & Co. Advocates were acting for the plaintiffs while S. P. Punja Advocate was acting for the defendant. PW1 stated that on 30th June, 1994 the defendant's said advocate wrote to the plaintiff's then advocates, Mwangi Thuo & Co. Advocates requesting on behalf of the defendant to be given more time to pay the balance of the purchase price.

PW1 stated that the plaintiffs' advocates wrote to the defendant's said advocate informing him that the balance of the purchase price was Kshs. 493,028/= and that the plaintiffs were willing to be paid the amount within the 4 months that the defendant had requested for in the said advocate' letter dated 30th June, 1994. These correspondences are at pages 25 to 27 of D.Exh. 1. PW1 stated that even after the defendant was given more time to pay the balance of the purchase price, she failed to do so and continued in possession of the suit property even after failing to honour her part of the bargain. He stated that after the plaintiffs obtained a title for the suit property, they gave the defendant an opportunity to pay the balance of the purchase price which the defendant failed to raise to enable the plaintiffs to transfer the suit property to the defendant. PW1 urged the court to grant the reliefs sought in the amended plaint with costs.

In her evidence, the defendant Margaret Nyambura Karanja (DW1) told the court that she was the wife of the late Joel Karanja (deceased). She stated that the deceased entered into an agreement for sale with the plaintiffs in respect of the suit property and made some payment. DW1 adopted her witness statement dated 7th March, 2014 as part of her evidence in chief. She stated that when the deceased purchased the suit property, it had a building foundation and that was the only structure on the suit property. She stated that after they were put in possession of the property they developed the same by putting up residential houses thereon which she had rented out to tenants. DW1 denied that it was the plaintiffs who had put up the said residential houses on the suit property. She stated that the purchase price for the property was Kshs.950,000/= which was inclusive of the land and the building foundation that had been put up on the property. She denied that she was a trespasser on the suit property as the deceased was put in possession of the suit property by the plaintiffs. DW1 produced as D.Exh.1 the documents attached to the defendant's list of documents filed on 27th March, 2012 save for the correspondence that was exchanged without prejudice. DW1 stated that according to the valuation report that was produced as part of D Exh. 1, the improvements on the suit property together with land were valued at Kshs. 19,550,000/=. DW1 stated that the balance of the purchase price due to the plaintiffs was Kshs. 470,000/= and that she was ready and willing to pay the same so that the suit property could be transferred to her. She stated that if the plaintiffs were unwilling to accept the balance of the purchase price and to transfer the suit property to her, she would seek the value of the land together with the improvements thereon.

DW2, Waweru Waihenya told the court that the defendant and the deceased were known to him. He stated that he used to work with the

deceased who was the defendant's husband in Thika in 1973. He stated that the deceased was his friend. He adopted his witness statement dated 7th March, 2014 as part of his evidence in chief. He stated that the suit property was known to him and that when the plaintiffs wanted to sell the property, he was the one who looked for the deceased and introduced him to the plaintiffs after which they entered into an agreement for sale. DW2 stated that the suit property was bushy at the material time and that the plaintiffs had put up a building foundation on the property. He stated that after the agreement for sale, the deceased took possession of the property and continued with construction of a storey building thereon which he had not completed as at the time of his death. DW2 denied that the buildings on the suit property were put up by the plaintiffs.

After the conclusion of evidence, the parties made closing submissions in writing. The plaintiffs filed their submissions on 9th May, 2019 while the defendant filed her submissions on 26th March, 2019. I have considered the evidence tendered by the parties in proof of their respective cases and the written submissions by counsels. The parties did file agreed issues for determination by the court. From the pleadings, the following in my view are the issues that arise for determination in this suit;

1. Who breached the agreement for sale dated 27th June, 1988 as between the plaintiffs and the defendant?
2. Whether the defendant is a trespasser on the suit property?
3. Whether the plaintiffs are entitled to the reliefs sought in the amended plaint.
4. Whether the defendant is entitled to the reliefs sought in the amended defence and Counter-claim.
5. Who is liable for the costs of the suit?

Who breached the agreement for sale dated 27th June, 1988 as between the plaintiffs and the defendant?

I have at the beginning of this judgment set out the main terms of the agreement for sale dated 27th June, 1988 between the plaintiffs and the deceased. It was not disputed that the plaintiffs and the deceased entered into the said agreement for sale dated 27th June, 1988 in respect of the suit property. It was also not disputed that the deceased paid to the plaintiffs a sum of Kshs. 400,000/= on the execution of the said agreement for sale leaving a balance of Kshs. 550,000/= which was to be paid on completion. The agreement did not have a completion date. It was common ground that the parties did not fix a completion date because when the plaintiffs entered into the agreement for sale with the deceased, they did not have in their possession the certificate of title for the suit property. It was also common ground that the agreement for sale was to be completed once the plaintiffs had obtained the said certificate of title for the suit property. On completion, the plaintiffs were to execute an instrument of transfer of the suit property in favour of the deceased and were also to furnish the deceased with all necessary consents. The deceased on his part was to pay to the plaintiffs the balance of the purchase price.

The evidence placed before the court by both the parties shows that the plaintiffs were issued with a Provisional Certificate of title for the suit property on 15th December, 1993. The evidence on record also shows that after the plaintiffs obtained a certificate of title, they called upon the deceased to complete the agreement by paying the balance of the purchase price. The evidence placed before the court by the defendant shows that when the deceased was called upon to pay the balance of the purchase price, he was unable to raise the same. The explanation that was given by the deceased for his failure to raise the balance of the purchase price was that a financier who had undertaken to lend him money for the balance of the purchase price had withdrawn the offer. Through his advocates letter dated 30th June, 1994, the deceased requested for 4 months to raise the balance of the purchase price which request the plaintiffs acceded to through their advocates letter dated 1st September, 1994. The deceased did not come up with the balance of the purchase price within the 4 months that he had asked for. By the time the plaintiffs filed this suit on 24th June, 1997, the defendant had not paid the balance of the purchase price which the plaintiff put at Kshs. 493,028/=. Although the defendant claimed that in addition to the initial sum of Kshs. 400,000/= the deceased paid a further sum of Kshs.83,944/= making the total amount paid to be Kshs.483,944/= and leaving a balance of Kshs.466,056/=, there was no evidence placed before the court showing that the deceased paid the alleged additional sum of Kshs.83,944/=. The evidence placed before the court by the defendant in proof of payment of the said additional sum of Kshs. 83,944/= does not add up to the amount. I am satisfied from the evidence on record that the deceased paid to the plaintiffs additional sum of Kshs.56,972/= making the total amount paid to be Kshs. 456,972/= which left a balance of Kshs.493,028/=. The defendant who is the legal representative of the deceased had not paid the said amount to the plaintiffs as at the time the plaintiffs filed this suit and had not expressed readiness and willingness to make the payment.

It is my finding that the deceased failed and/or neglected to complete the agreement for sale dated 27th June, 1988 when called upon to do so by the plaintiffs who were ready and willing to complete. The fact that a financier which had undertaken to advance money to the deceased to settle the balance of the purchase price had pulled out of the transaction due to delay is in my view not a reasonable excuse for the deceased's failure to complete the agreement. There was no indication in the agreement for sale that the deceased was obtaining financial assistance from a bank to pay the balance of the purchase price. The defendant did not also place any evidence before the court showing that the deceased had been offered a loan facility by a bank to clear the balance of the purchase price and that the facility had been withdrawn. I am also not in agreement with the contention by the defendant that the plaintiffs had failed to comply with clause 4 of the agreement for sale. Under that clause, the plaintiffs were to execute all the requisite documents and obtain all consents necessary for the transfer of the suit property to the deceased. The deceased had expressly informed the plaintiffs that he did not have the balance of the purchase price and did not come up with the same by the time this suit was filed. Even after the suit was filed, the defendant did not tender the balance of the purchase price. Execution of a transfer in favour of the deceased when he was unable to pay the balance of the purchase price and had not furnished any undertaking to make such payment within a specified period after receipt of the transfer could not have been expected under the agreement between the parties. The plaintiffs could not transfer the suit property to the deceased or the defendant without payment of the balance of the purchase price. I have noted from the affidavit of Joseph Njui Mungai sworn on 8th June, 2012 in the court file a copy of which was produced as evidence by the defendant without annexures as part of DExh. 1 (See Pages 33 to 34 of D.Exh.1) that the plaintiffs had already obtained consent of the Commissioner of Lands on 11th March, 1994 to transfer the suit property. The said consent was attached to the said affidavit as annexure "JNM II". The plaintiffs having obtained consent to transfer the suit property to the deceased, it is not clear

as to what other consent the plaintiffs were expected to make available.

For the foregoing reasons, it is my finding that it is the defendant, who breached the agreement for sale dated 27th June, 1988.

Whether the defendant is a trespasser on the suit property.

Trespass has been defined as any intrusion by a person on the land in the possession of another without any justifiable cause. See, Clerk & Lindsell on Torts, 18th Edition, page, 923, paragraph, 18-01. In the case of Gitwany Investments Limited v Tajmal Limited & 3 others [2006] eKLR, it was held that title to land carries with it legal possession. It was common ground that the deceased entered the suit property with the permission of the plaintiffs pursuant to the terms of the agreement for sale dated 27th June, 1988. As I have held above, the deceased breached the said agreement by his failure to pay the balance of the purchase price when demanded by the plaintiffs. I am of the view that when the deceased breached the said agreement for sale by failing to pay the balance of the purchase price when demanded, his continued occupation of the suit property ceased to be with the consent of the plaintiffs and he became a trespasser in the premises. It is my finding therefore that the defendant is a trespasser on the suit property.

Whether the plaintiffs are entitled to the reliefs sought in their amended plaint.

The plaintiffs have sought eviction of the defendant from the suit property. I have held that the defendant is a trespasser on the suit property. That means that she is occupying the suit property without any lawful cause. The plaintiffs are entitled in the circumstances to an order for the defendant's eviction from the suit property.

Whether the defendant is entitled to the reliefs sought in the amended defence and counter-claim.

The defendant sought an order of specific performance of the agreement for sale and in the alternative, a refund of the purchase price in the sum of Kshs. 480,000/= being the deposit that was paid to the plaintiffs with interest and Kshs. 19,550,000/= being the value of the development the deceased had put up on the suit property. The law is settled that specific performance is a discretionary remedy. I have held above that the deceased breached the agreement for sale between him and the plaintiffs. An order for specific performance cannot be made in favour of a party in breach of a contract. The defendant is not entitled in the circumstances to an order for specific performance. As for the refund of the deposit of the purchase price, the same was not provided for in the agreement for sale. I am of the view however that the agreement having been terminated by breach, it would amount to unjust enrichment if the plaintiffs were to keep the deposit in the absence of any clause in the agreement allowing them to do so. The defendant is however not entitled to interest on the said deposit because the plaintiffs are not to blame for the breach of the agreement for sale.

With regard to the claim for compensation for the developments on the suit property, I am of the view that there is no basis upon which the plaintiffs can be compelled to pay the same. By developing the suit property before acquiring the same, the deceased did so at his own risk. Secondly, the plaintiffs are not to blame for the deceased's failure to complete the agreement for sale. Finally, the defendant has been in occupation of the suit property for over 30 years and has been deriving income for all those years from whatever improvements the deceased made on the suit property. The plaintiffs did not call upon the defendant to account for such income. I am of the view that the defendant recouped the deceased's investment on the property during that long period of occupation. It is my finding that the defendant is not entitled to compensation for the developments that the deceased carried out on the suit property.

Who is liable for the costs of the suit?

As correctly submitted by the defendant, costs follow the event and the same is at the discretion of the court. Due to the nature of the dispute and the fact that each party has succeeded to some extent, I would order that each party bears his own costs.

Conclusion:

In conclusion, I hereby make the following orders:

1. Judgment is entered for the plaintiffs against the defendant in terms of prayer (a) in the amended plaint dated 4th May, 2012.
2. The defendant shall vacate and hand over possession of L.R No. 4953/453 together with the developments thereon to the plaintiffs within ninety (90) days from the date hereof in default of which the plaintiffs shall be at liberty to apply for warrants for her forceful eviction from the property.
3. After the defendant has handed over to the plaintiffs the suit property together with the developments thereon as aforesaid or after the defendant's forceful eviction from the suit property in the event that she fails to handover the property, the plaintiffs shall pay to the defendant a sum of Kshs.456,972/= being a refund of the payment that was made to the plaintiffs as a deposit. The said amount shall attract interest at court rates from the date it falls due in accordance with this order.
4. Each party shall bear his own costs of the suit and the counter-claim

Delivered and Dated at Nairobi this 30th Day of January, 2020

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Ms. Obwangi h/b for Mr. Karanja for the Plaintiffs

Mr. Mboha h/b for Ms. Ngala for the Defendant

C. Nyokabi-Court Assistant