



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 167 OF 2013

TERESA WANJIRU GACHERU.....PLAINTIFF

- VERSUS -

TERESIA WAMBUI NJUGUNA.....DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendant by way of a plaint dated 30th January, 2013. The plaintiff averred that on or about the 25th day of January, 2011, she entered into an agreement for sale with the defendant in respect of a residential plot held under ballot No. Z127 and share certificate No. B 3808 issued by Githunguri Constituency Ranching Co. Limited (hereinafter referred to as “the suit property”). The plaintiff averred that the defendant agreed to sell and the plaintiff agreed to buy the suit property at a price of Kshs. 200,000/- which the plaintiff paid in full.

The plaintiff averred further that after purchasing the suit property, the same was transferred to her by Githunguri Constituency Ranching Co. Limited which issued her with a new share certificate No 3813 dated 25th January, 2011 after paying the requisite legal and transfer fees therefor. The plaintiff averred that she thereafter visited the parcel of land that she was shown by the defendant as the suit property and found that the same belonged to someone else. The plaintiff averred that the defendant neither owned nor had a good title to the suit property.

The plaintiff averred that when he raised the issue with the defendant, the defendant opted to refund to him the purchase price that he had paid for the property. The plaintiff averred that on 31st January, 2012, the defendant refunded a sum of Kshs. 50,000/- leaving a balance of Kshs. 150,000/- which she promised to pay with interest at the rate of 12%. The plaintiff averred that after receipt of the said amount, she re-transferred the suit property to the defendant in the process of which he paid additional transfer fees.

The plaintiff averred that the defendant refused to refund the balance of the purchase price in the sum of Kshs. 150,000/- as promised together with interest and additional expenses incurred in transferring the property back to the defendant. The plaintiff sought judgement against the defendant for;

- a. A sum of Kshs. 164,800/- together with interest thereon as pleaded in paragraph 9 of the plaint.
- b. Costs of the suit and interest thereon.
- c. Any other relief that the court may deem fit and just to grant.

The defendant filed a defence dated 8th March, 2013 on 12th March, 2013 in which she admitted entering into an agreement for sale of the suit property with the plaintiff. The defendant averred that after selling the suit property to the plaintiff, the defendant went with the plaintiff to Githunguri Constituency Ranching Co. Limited's office at which the suit property was transferred to the plaintiff. The defendant averred that after the transfer of the suit property to the plaintiff, the plaintiff intimated to her that she did not like the suit property and demanded a refund of the purchase price. The defendant denied that the suit property belonged to someone else. The defendant averred that the suit property was owned by her and that she had a good title to the same. The defendant urged the court to dismiss the plaintiff's suit with cost.

At trial, the plaintiff testified that she purchased the suit property from the defendant at Kshs. 200,000/- through an agreement for sale dated 25th January, 2011. The plaintiff stated that she paid the purchase price in full and was issued with a certificate of ownership by Githunguri Constituency Ranching Co. Limited. The plaintiff stated that she paid Kshs. 4000/- to an advocate for the preparation of the agreement for sale between her and the plaintiff and a sum of Kshs. 4800/- to Githunguri Constituency Ranching Co. Limited as transfer fees. The plaintiff stated that when she went to the suit property, she found out that there was another person laying a claim to the property. The plaintiff stated that when she reported the adverse claim to the defendant, the defendant advised her to look for a surveyor to determine the dispute. The plaintiff stated that she did not follow the defendant's advice but instead lodged a complaint against the defendant with the advocate who

prepared the agreement for sale for them. The plaintiff stated that the said advocate volunteered to arbitrate the dispute but this initiative failed when the defendant did not turn up at the said advocate's office for arbitration.

The plaintiff stated that she later entered into an agreement with the defendant in which the defendant agreed to refund the purchase price of Kshs. 200,000/-. The plaintiff stated that the defendant paid Kshs. 50,000/- as a refund of the purchase price for the suit property and agreed to pay the balance in the sum of Kshs. 150,000/- together with interest. The plaintiff stated that the defendant failed to pay the said sum of Kshs. 150,000/- even after a demand was made upon her to do so. The plaintiff stated that in response to the plaintiff's demand, the defendant claimed that she had not refunded the balance of the purchase price because the plaintiff had not surrendered certificate of ownership of the suit property to her.

The plaintiff stated that to clear the way for the defendant to refund the balance of the purchase price, the plaintiff transferred the suit property back to the defendant on 14th September, 2012. The plaintiff stated that for this transfer, she paid a transfer fees of Kshs. 10,000/- to Githunguri Constituency Ranching Co. Limited but the receipt in acknowledgment of the payment was issued in the name of the defendant. The plaintiff stated that she notified the defendant of this additional payment made on her behalf.

The plaintiff stated that the defendant paid to her Kshs. 150,000/- on 1st July, 2015 after the filing of this suit. The plaintiff stated that her claim against the defendant for Kshs. 164,800/- comprised of, Kshs. 150,000/- being a refund of the balance of the purchase price, Kshs. 4,800/- being the transfer fees that she paid when purchasing the suit property and Kshs. 10,000/- being the transfer fees she paid while re-transferring the property to the defendant. The plaintiff told the court that the agreement for sale that she entered into with the defendant on 25th January, 2011 provided for an interest of 30%. She urged the court to award her interest on the amount claimed together with interest at the same rate. The plaintiff produced the documents in her bundle of document dated 30th January, 2013 as Plaintiff's exhibits 1 to 13.

In cross-examination by the defendant's advocate, the plaintiff stated that after the suit property was transferred to her and she was issued with a certificate of ownership, she found out that the suit property was being claimed by another person. The plaintiff stated that she did not go back to Githunguri Constituency Ranching Co. Limited but went to the defendant who told her to look for a surveyor to show her the plot she had bought. The plaintiff stated that she did not look for a surveyor but reported the matter to the police for investigation. The plaintiff stated that she went to the office of Githunguri Constituency Ranching Co. Limited with the police and they were told that there was a problem with the plot that had been sold to her. The plaintiff stated that she was told that it was up to the defendant to show her the plot. She testified that after the disagreement she had with the defendant over the suit property, she decided to get back the purchase price. She told the court that she reported the matter to the police because the defendant refused to be of assistance to her.

The plaintiff stated that she was paid Kshs. 50,000/- at the police station after which they went to the office of the advocate who had drawn for them the agreement for sale where the defendant agreed to pay her the balance of the purchase price after selling the suit property. The plaintiff admitted that all along the suit property was in her name even at the time her advocate wrote a letter to the defendant demanding the sum of Kshs. 150,000/-. The plaintiff admitted also that she was the one who rescinded the agreement for sale. The plaintiff told the court that she had been paid Kshs. 150,000/- of the amount claimed and that the balance of her claim against the defendant was Kshs. 14,800/-. The plaintiff admitted that the interest that she was claiming at the rate of 30% was not pleaded.

In her testimony, the defendant admitted that she sold the suit property to the plaintiff at a price of Kshs. 200,000/- and that they entered into a written agreement for sale. The defendant stated that she showed the plaintiff the beacons marking the boundaries of the suit property after which they went to the office of Githunguri Constituency Ranching Co. Limited which had the records for the property. She stated that Githunguri Constituency Ranching Co. Limited confirmed that she was the owner of the suit property after which the property was transferred to the plaintiff before she paid the purchase price of Kshs. 200,000/-.

The defendant stated further that the plaintiff came back to her after about 2 months claiming that someone was developing the suit property. She stated that she asked the plaintiff to get a surveyor to determine the dispute but the plaintiff did not heed the advice. The defendant stated that when she went to the suit property, she established that the parcel of land that she sold to the plaintiff had not been developed. The defendant stated that it was a neighbouring plot that was being developed. She told the court that the plaintiff did not return to her but instead reported the matter to the police. She stated that she was summoned at the police station where she learnt that the plaintiff wanted a refund of the purchase price that she had paid for the suit property.

The defendant stated that she had no problem with the plaintiff's demand. She stated that she asked the plaintiff to transfer the suit property back to her so that she could sell the same to raise money for the refund that was being demanded by the plaintiff. The defendant stated that she paid to the plaintiff Kshs. 50,000/- at the Police Station after which they were referred to an advocate. The defendant told the court that it was the plaintiff who breached the agreement for sale between them. She stated that the plaintiff took some time before re-transferring the suit property to her and that she resold the suit property to another person at Kshs. 380,000/-. She stated that if the suit property had a problem, she would not have sold it. She stated that she had already refunded the full purchase price of Kshs. 200,000/- to the plaintiff and that she was not aware of the additional sum of Kshs. 14,800/- being claimed by the plaintiff. She stated that since it was the plaintiff who decided to rescind the agreement for sale, she was not liable for the expenses that the plaintiff incurred in the transaction. The defendant urged the court to dismiss the plaintiff's suit with cost.

In cross-examination by the plaintiff's advocate, the defendant stated that the plaintiff came back to her after about 2 to 3 months claiming that the suit property had a problem. The defendant stated that the plaintiff did not wait for the matter to be investigated before reporting the matter to the police. The defendant stated that after the plaintiff told her that the suit property had a problem, she disappeared and only heard again from her when she went to the police. The defendant stated that she took a surveyor to the suit property who established that the property had no issues. The defendant told the court that at the Police Station, she told the police that the suit property had no issues but the plaintiff insisted that she wanted a refund of the purchase price. She stated that at the Police Station, she told the plaintiff to return the certificate of ownership in respect of the suit property before she could refund the balance of the purchase price.

The defendant stated that the plaintiff re-transferred the suit property to her in 2012 after which she refunded to the plaintiff the balance of the purchase price in the sum of Kshs. 150,000/- through her advocates on record. The defendant reiterated that she was not liable for the

payment of the expenses claimed by the plaintiff because it was the plaintiff who breached the agreement for sale.

After the close of evidence, the parties were directed to make closing submissions in writing. The plaintiff filed her submissions on 14th November, 2018 while the defendant did not file submissions. I have considered the pleadings and the evidence tendered by the parties. I have also considered the submissions by the plaintiff's advocates. In my view the only issue that arises for determination in this suit is whether the defendant is liable to pay to the plaintiff a sum of Kshs. 164,800/-. In her evidence, the plaintiff told the court that this amount comprised of the balance of a refund of the purchase price in the sum of Kshs. 150,000/-, a sum of Kshs. 4,800/- being transfer fees paid to Githunguri Constituency Ranching Co. Limited for the transfer of the suit property to the plaintiff and Kshs. 10,000/- paid to Githunguri Constituency Ranching Co. Limited for the transfer of the suit property back to the defendant.

There is no dispute that the defendant paid to the plaintiff a sum of Kshs. 150,000/- after the filing of this suit. That payment reduced the plaintiff's claim to Kshs. 14,800/- plus interest. From the evidence on record, after the defendant accepted the plaintiff's rescission of the agreement for sale dated 25th January, 2011 and agreed to refund a sum of Kshs. 200,000/- that was paid by the plaintiff as the purchase price, the parties entered into another agreement dated 31st January, 2012 in which the defendant paid to the plaintiff a sum of Kshs. 50,000/- and undertook to pay the balance in the sum of Kshs. 150,000/- immediately the defendant resold the suit property with interest of Kshs. 12%. In the latter agreement, the defendant was only liable to pay Kshs. 150,000/- together with interest of 12% *of the said amount* and nothing more. I am in agreement with the defendant that the plaintiff's claim for the expenses incurred in the transfer of the property to his name and retransfer of the property to the defendant has no basis.

The defendant having paid to the plaintiff a sum of Kshs. 150,000/- that leaves only the interest on the said amount at the rate of 12% in accordance with the agreement dated 31st January, 2012. The parties did not indicate in the agreement dated 31st January, 2012 whether the interest of 12% was to be per month or per annum. In her submissions, the plaintiff had submitted that the interest of 12% was to accrue per annum from 25th January, 2011 when the purchase price was paid to the defendant until 1st July, 2015 when the defendant paid the balance of the purchase price in the sum of Kshs. 150,000/-. The agreement entered into by the parties does not have such provision. The agreement talks of "an interest of 12% of the said amount". In my understanding, this means 12% of Kshs. 150,000/-. This may explain why there was no indication whether the interest was per month or per annum. The parties seem to have agreed on a fee or a penalty of 12% of the amount then outstanding. This conclusion is drawn from the wording of clause 9 of the agreement of sale dated 25th January, 2011. Due to the foregoing, it is my finding that the defendant is liable to the plaintiff in the sum of Kshs. 18,000/- being 12% of Kshs. 150,000/-.

In the final analysis and for the foregoing reasons, I enter judgment for the plaintiff against the defendant in the sum of Kshs. 18,000/- plus interest at court rates from the date hereof until payment in full. The plaintiff shall also have the costs of the suit which shall be assessed based in the lower court scale.

Delivered and Dated at Nairobi this 27th Day of February 2020

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

N/A for the Plaintiff

N/A for the Defendant

Ms. C. Nyokabi-Court Assistant