



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 223 OF 2016

AUSTIN OMONYO BARASA.....PLAINTIFF

VERSUS

JAMES IRUNGU MWANGIDEFENDANT

JUDGMENT

1. In the Plaintiff dated 27th April, 2017, the Plaintiff has averred that by an Agreement dated 18th December, 2014 between himself and the Defendant, the Defendant agreed to sell to him a parcel of land known as L.R. No. 12715/1601 in Mavoko Municipality for Kshs. 1,750,000.
2. According to the Plaintiff, he was required to pay to the Defendant Kshs. 1,000,000 on execution of the Sale Agreement; that the balance of the purchase price of Kshs. 750,000 was to be paid upon the successful lodging of the Transfer documents and that the Defendant was required to furnish him with the completion documents.
3. The Plaintiff averred that although the Agreement provided that the parties would be represented by one firm of Advocates, the Defendant brought his own advocate to the offices of Tim Okwaro Associates Advocates to represent him; that it was agreed that the Defendant would furnish the completion documents through his advocate, Martin Keffa Simiyu, and that the Defendant furnished the completion documents except the duly executed Transfer.
4. The Plaintiff finally averred that the purported rescission of the Agreement by the Defendant on 8th September, 2015 was illegal, unlawful, invalid, null and void and that the Defendant has wrongfully failed to complete the said sale.
5. In his prayers, the Plaintiff has sought for an order of specific performance commanding the Defendant to complete the sale; damages for breach of contract and for costs of the suit.
6. In his Defence and Counter-claim, the Defendant averred that as per the Sale Agreement of 18th December, 2014, Timothy Vitalis Makokha Okwaro, being the sole proprietor of the law firm of Tim Okwaro Associates Advocates, was the joint advocate for both himself and the Purchaser.
7. The Defendant averred that upon execution of the Agreement, he released the original title together with the requisite consents to Timothy Vitalis Makokha Okwaro advocate who was representing both of them; that the said advocate was required to prepare the Transfer documents which he failed to do and that he instructed an advocate who issued a termination notice dated 5th August, 2015 to the Purchaser and Okwaro advocate.
8. In the Counter-claim, the Defendant is claiming from the Plaintiff 10% of the purchase price; general damages for breach of contract and a mandatory injunction ordering Timothy Okwaro Advocate and the Plaintiff to forthwith release to him the original title for L.R. number 12715/11601 and costs of the suit.
9. In his testimony, the Plaintiff, PW1, informed the court that he bought the suit property from the Defendant vide an Agreement dated 18th December, 2014; that upon execution of the Agreement, he paid to the Defendant Kshs. 1,000,000 and that the balance of Kshs. 750,000 was to be paid upon successful lodging of the Transfer documents.
10. It was the evidence of PW1 that the completion documents that the Defendant was required to furnish him were the original Grant; the duly executed Transfer; Clearance Certificate; copies of the PIN Certificate and the National Identity Card; three coloured passport size photographs and any other relevant documents as may be in the Defendant's possession regarding the land.
11. It was the evidence of PW1 that although the Agreement provided that both parties will be represented by one advocate, that is Tim Okwaro, the Defendant was accompanied by an advocate known as Martin Keffa Simiyu to represent him in the transaction.

12. According to PW1, the Defendant's advocate, Martin Keffa Simiyu, read and approved the Sale Agreement and attested the Defendant's signature and that the Defendant has refused to furnish his advocate with a Transfer duly executed by him to enable lodging of the completion documents for registration.
13. PW1 informed the court that the Defendant furnished the completion documents to his (*Plaintiff's*) lawyer through his (*Defendant's*) advocate except the signed Transfer document. It was the evidence of PW1 that he has always been ready and willing to pay the balance of the purchase price of Kshs. 750,000, which payment was to be made after the lodging of the Transfer for registration.
14. The Defendant, DW1, stated that he is the registered proprietor of L.R. No. 12715/11601 (*the suit property*). According to DW1, he agreed to sale the suit property to the Plaintiff vide an Agreement of Sale dated 18th December, 2014 and that they had a joint advocate, Timothy Vitalis Makokha Okwaro.
15. It was the evidence of DW1 that after signing the Agreement of Sale, he surrendered the original Title Deed and "*other relevant documents*" to their joint advocate who was supposed to prepare the transfer document; that after releasing the title, the Plaintiff failed to pay the balance of the purchase price and that their joint advocate also declined to prepare a Transfer document for execution.
16. It was the evidence of DW1 that after realizing that their joint advocate had taken sides, he instructed another firm of advocates to issue a termination notice dated 5th August, 2015 and that by the time the Plaintiff purported to pay him the balance of the purchase price on 19th October, 2015, the Agreement had already been terminated and that the Sale Agreement stands rescinded.
17. In cross-examination, DW1 stated that Mr. Simiyu advocate witnessed the signing of the Sale Agreement as a friend; that he gave to Mr. Simiyu the completion documents to transmit them to the Purchaser's advocate and that because he is not a lawyer, he could not draft the Transfer instrument. According to DW1, it was the responsibility of Okwaro advocate to draft the Transfer document for execution.
18. In his submissions, the Plaintiff's advocate submitted that the Defendant has admitted that he appeared at the offices of Tim Okwaro Associates Advocates with an Advocate called Martin Simiyu Keffa, who read the Agreement, approved it on behalf of the Defendant and attested the Defendant's signature.
19. According to the Plaintiff's advocate, it is the same advocate, Martin Simiyu Keffa, who delivered to Tim Okwaro Associates Advocates, the Transfer documents; that by conduct, it should be found that the Defendant was represented in the matter by Mr. Simiyu advocate and that it was Mr. Simiyu who should have delivered a duly executed Transfer document to Tim Okwaro Associates.
20. On his part, the Defendant's advocate submitted that as per Clause 8 of the Sale Agreement, Timothy Vitalis Makokha Okwaro (*Tim Okwaro Advocate*) was the joint advocate for both the Vendor and the Purchaser in the transaction; that the Plaintiff breached the duty to pay in accordance with the Sale Agreement and that at the same time, their joint advocate declined to prepare the requisite Transfer documents.
21. According to counsel, the Sale Agreement was rescinded vide a termination notice dated 5th August, 2015 and that the Sale Agreement stood terminated as at 19th October, 2015 when the Plaintiff purported to forward to the Defendant a cheque for Kshs. 500,000.
22. Counsel submitted that since rescission is affected by the act of the party entitled to rescind, the assistance of the court is required to also obtain restitution of the Title to the property.
23. It is not in dispute that the Defendant entered into an Agreement of Sale of L.R. No. 12715/11601 (*the suit property*) with the Plaintiff. According to the Agreement of Sale of 18th December, 2014, the Defendant agreed to sale to the Plaintiff the suit property at a consideration of Kshs. 1,750,000.
24. The Agreement of Sale provided that the Plaintiff will pay a deposit of Kshs. 1,000,000 on the date of execution of the Sale Agreement, with the balance of the purchase price of Kshs. 750,000 being paid by the Plaintiff "*upon successful lodging of the Transfer documents.*"
25. The Agreement further provided that the completion date shall be 90 days from the date of the Agreement, or earlier. In addition, the Defendant was required to release to their "*joint advocate*" the completion documents "*upon receipt by the Vendor of an undertaking and substance acceptable to him from their joint advocates.*" The Completion documents that the Defendant was supposed to release to their "*joint advocate*" included the original Grant, duly executed Transfer, Clearance Certificates, copies of his PIN Certificate and Identity Card.
26. The Plaintiff informed the court that upon the signing of the Agreement of 18th December, 2014, the Defendant, through an advocate called Mr. Simiyu, released to his advocate all the completion documents, except the duly executed Transfer. It is the Plaintiff's case that it was the Defendant's advocate who was supposed to draft and engross the Transfer document, have it executed by the Defendant, and release it to his advocate for lodging.
27. On the other hand, the Defendant has argued that he waited for their joint advocate to draft and engross the Transfer document for signing to no avail; that when the 90 days lapsed, he issued to the Plaintiff a termination notice, and that the Sale Agreement stands rescinded.
28. The first issue I should determine is who was under the obligation to draft and engross the Transfer instrument for execution by both parties.
29. The Agreement of 18th December, 2014 was drafted by Tim Okwaro Associates Advocates. Clause 8 of the Agreement provided as follows:

“That the parties herein agree that their joint Advocates, Tim Okwaro Associates, Advocates P.O. Box 10964-00100, Nairobi whose instructions are limited to preparing, witnessing, arbitrating on the agreement.”

30. It is trite that an Agreement of Sale usually provides the names of the advocates acting for the parties in the transaction. In this instance, Tim Okwaro Associates Advocates agreed to act as the joint advocates for both parties. However, the Agreement limited the functions of the said Advocates to “*preparing, witnessing and arbitrating on the Agreement,*” and nothing more.

31. Although the Agreement required the Defendant to release completion documents, including the duly executed Transfer by himself, the Agreement did not obligate the firm of Tim Okwaro Associates to draft the Transfer instrument for execution.

32. It would appear that from the very beginning, the firm of Tim Okwaro Associates was unwilling to act for the parties herein in respect to any other matter other than preparing and witnessing the signing of the Sale Agreement. That explains the rather strange wording of Clause 8 of the Sale Agreement.

33. Were it not for the limitation imposed on the obligations of the law firm of Tim Okwaro and Associates Advocates in Clause 8, an advocate acting for both the Vendor and the Purchaser is the one who is required to not only draft the Sale Agreement, but also the Transfer instrument.

34. The reading of Clause 8 of the Sale Agreement dated 18th December, 2014 shows that the firm of Tim Okwaro and Associates Advocates was not obligated to draft the Transfer for signing by the Defendant. Indeed, under special condition number 1, the Defendant was required to submit to their “*joint advocate*” a duly executed Transfer in favour of the Plaintiff, which he never did, and which he has never done to date.

35. The Defendant did not inform the court why he did not instruct Martin Keffa Simiyu Advocate, who released to the firm of Tim Okwaro and Associates advocate the other completion documents, to release a duly executed Transfer document. The Defendant did not also produce even a single letter in which he requested the firm of Tim Okwaro and Associates Advocates to prepare the Transfer document, or evidence to show that he paid the said firm legal fees for the purpose of drafting the Transfer document for execution.

36. Considering that the Sale Agreement of 18th December, 2014 limited the obligations of the “*joint advocate*” “*to preparing, witnessing and arbitrating on the Agreement,*” the Transfer document should have been drafted and engrossed by the Defendant’s appointed advocate and forwarded to the Plaintiff for lodging for registration. Having not done so, it is my finding that the period of 90 days lapsed due to the Defendant’s breach of the terms of the Agreement. The Defendant was under an obligation to not only release a portion of the completion documents, but all the documents including the duly executed Transfer.

37. Even if the Defendant was to argue that he never received an undertaking from their “*joint advocate*”, then he should not have released any completion document at all, until such an undertaking was given. However, having released almost all the completion documents, he had no valid reason not to release the duly signed Transfer document duly drafted, engrossed and executed by himself.

38. Clause 5 of the Sale Agreement provides that a party not in breach shall be entitled to serve a notice in writing upon the other party to complete the sale, and thereafter rescind the Agreement. As I have stated above, it is the Defendant who was in breach of the Sale Agreement by failing to release the duly executed Transfer document to the Plaintiff or their “*joint advocate*”. That being the case, he could not issue a termination notice as he purported to do vide the letter dated 5th August, 2015 and the rescission letter dated 8th September, 2015.

39. In fact, from the Defendant’s letter of 26th September, 2016, it would appear that the Defendant’s intention was to sell the suit property at a price higher than what was agreed upon on 18th December, 2014. That explains why he declined to forward to the Plaintiff a duly executed Transfer document, even after receiving from the Plaintiff more than the 10% that he was entitled to under the Sale Agreement.

40. In the circumstances, and for the reasons I have given above, I find and hold that the Plaintiff has proved his case on a balance of probabilities. The Defendant’s Counter-claim is dismissed with costs. The Plaintiff’s Plaint is allowed as follows:

a. An order of specific performance be and is hereby issued commanding the Defendant to complete the Sale Agreement of 18th December, 2014.

b. The Defendant to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 21ST DAY OF FEBRUARY, 2020.

O.A. ANGOTE

JUDGE