



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO 7 OF 2014

CYKA ESTATES LIMITED.....PLAINTIFF

=VERSUS=

BOSCO MUNYWOKI KIMULU.....DEFENDANT

JUDGMENT

1. The plaintiff instituted this suit through a plaint dated 20/12/2013. Its claim is that it entered into a land purchase agreement with the defendant, dated 8/4/2011. Under the sale agreement, the defendant held himself as the beneficial owner of Land Parcel Number **Dagoretti/Waithaka/1136**. The land was at all material times registered in the names **Kigonde Kiragu, Julius Mbogo and Cyrus Kiragu**. The plaintiff contends that the defendant warranted that he had purchased the suit property from the registered proprietors hence he had the right to sell it to the plaintiff. The agreed purchase price was Kshs 2,800,000. The plaintiff paid a deposit of Kshs 500,000. It is the plaintiff's case that upon receipt of the deposit, the defendant went into hiding and failed to honour his obligations under the said contract. Consequently, the plaintiff seeks the following verbatim orders against the defendant:

- a) Refund of principal amount/deposit of Kshs 500,000.*
- b) Interest on (a) above from 4th April 2011 at 24% per annum.*
- c) General damages for breach of contract.*
- d) Costs of this suit.*
- e) Interest on (a), (b), (c) and (d) above until payment in full.*
- f) Any other relief that this honourable court may deem just and fair*

2. The defendant filed a statement of defence dated 18/2/2014. He made general denials of the averments made by the plaintiff in the plaint, including the allegation that the defendant entered into a sale agreement with the plaintiff. In the alternative, he pleaded that the material contract was frustrated by the plaintiff because the advocate who acted for the two parties declined and/or refused to give a written undertaking on the balance of the purchase price. He added that the completion date for the alleged contract was 30 days, and in the absence of an extension, the contract stood automatically cancelled. He urged the court to dismiss the plaintiff's claim.

3. Parties did not agree on issues. The plaintiff called one witness, Mr Dennis Mithamo Kariuki (PW1). The defendant did not lead any evidence.

4. Dennis Mithamo Kariuki testified as PW1. He stated that he was a director of the plaintiff company. He adopted his written statement dated 20/12/2013 as his sworn in evidence-in-chief. His evidence was that the plaintiff company identified the suit property through a broker. A search at the Lands Registry indicated that the suit property was registered in the joint names of **Kigonde Kiragu, Julius Mbogo and Cyrus Kiragu**. The broker informed him that the defendant had bought the suit property from the registered proprietors and was looking for a buyer. The company got in contact with the defendant and they were shown the following documents: (i) copy of title No DAGORETTI/WAITHAKA/1136; (ii) copy of sale agreement dated 9/8/2010 between the registered proprietors and the defendant; (iii) copy of special Power of Attorney dated 15/3/2011(donated to Cyrus Kiragu by Kigonde Kiragu and Julius Mbogo to transact on their behalf); (iv) copies of receipts relating to registration of the Power of Attorney; (v) copies of ID and PIN numbers of Cyrus Gikunju Kiragu; (vi) copies of cheques and acknowledgments of payments made to the registered proprietors and or their nominees towards off-setting the purchase price of Ksh 2,000,000; (vii) copies of the defendant's ID and PIN certificates. Consequently, the plaintiff entered into a sale agreement with the defendant on 8/4/2011. The suit property was to be sold to the plaintiff at Ksh 2,800,000. One of the terms of the agreement was that the plaintiff was to pay a deposit of Ksh 500,000 which was to be remitted directly to the registered proprietors to clear the balance of the purchase price owed to the registered proprietors by the defendant. The defendant was to cause the suit property to be transferred to the plaintiff. However, the defendant did not discharge his obligations under the contract. Further, the defendant refused to

refund the deposit of Kshs 500,000, thereby necessitating the institution of this suit.

5. The plaintiff filed its written submissions on 2/7/2019 through the firm of Wachira Maina & Company Advocates. He framed two issues for determination by this court. The first issue was whether the defendant received the sum of Ksh 500,000 and whether he should refund the same. The second issue was whether the defendant was in breach of the contract.

6. On the first issue, counsel submitted that the defendant frustrated the contract and therefore, he should refund the money paid to him by the plaintiff. Reliance was placed on the case of **Joseph Kangethe Irungu v Peter Ng'ang'a Muchoki [2018]eKLR** where Kemei J held that where the vendor frustrates the contract, he should pay the deposit paid by the purchaser together with any other expenses the purchaser has spent. On the second issue, counsel submitted that the defendant deliberately breached the terms of the sale agreement and therefore, judgment should be issued in the plaintiff's favour.

7. The defendant filed written submissions on 28/10/2019 through the firm of Julius Nyakiangana & Company Advocates. Counsel submitted that the plaintiff was not entitled to a refund of Ksh 500,000 because first, there was no land available for sale to the plaintiff because the land was not registered in the defendant's name. It was further submitted that the claim for refund of Ksh 500,000 with interest at 24 % was baseless and should be dismissed by the court. Counsel submitted that courts cannot rewrite contracts for parties. Reliance was placed in the decision of **Joseph Kangethe Irungu v Peter Ng'ang'a Muchoki [2018] eKLR**. Counsel further submitted that the plaintiff was not entitled to general damages for breach of contract.

8. I have considered the parties' pleadings, the evidence of PW1, the parties' submissions, the relevant law, and the applicable jurisprudence. Three issues fall for determination in this suit. The first issue is whether the parties herein entered into the land sale agreement dated 8/4/2011. The second issue is whether the plaintiff paid the defendant Kshs 500,000 as part payment of the agreed purchase price. The third issue is whether, in the circumstances, the plaintiff is entitled to the prayers sought in the plaint. I will make brief pronouncements on the four issues sequentially in the same order.

9. The first issue is whether the parties herein entered into the alleged land sale agreement. The plaintiff exhibited a land sale agreement dated 8/4/2011 in which the defendant herein is designated as the vendor. The vendor's identity card number is captured as 2033360. The agreement is executed by the defendant on the execution clause and on every page. The defendant made general denials but said nothing specific about the signature on the agreement for sale. The defendant did not lead any evidence to controvert the plaintiff's evidence that the defendant signed the agreement. In the circumstances, I am satisfied that the parties herein entered into the said agreement dated 8/4/2011.

10. The second issue is whether the plaintiff paid the defendant the sum of Kshs 500,000 as party payment of purchase price. The defendant acknowledged in **Clause 1** of the sale agreement that he had received Kshs 500,000. The defendant's acknowledgment of receipt of Kshs 500,000 from the plaintiff is unequivocal. There is no other logical interpretation to give to Clause 1 other than the defendant's express acknowledgment that he had received Kshs 500,000 from the defendant. My finding on the second issue therefore is that, indeed, the plaintiff paid and the defendant received Kshs 500,000.

11. The third issue is whether, in the circumstances, the plaintiff is entitled to the prayers sought in the plaint. The first prayer is a plea for refund of the sum of Kshs 500,000. The completion period was 30 days. The plaintiff led evidence to prove that the defendant failed to complete the contract. The plaintiff's evidence was not rebutted. Special Condition C contained the following framework in the event of failure by the defendant to complete the contract:

“(C)In the event that the vendor is unable to complete this agreement or in any way breaches this agreement, the purchaser may rescind this agreement and the vendor shall refund the entire deposit and any other amount paid in excess of the deposit with interest thereon as provided in special condition (a) above”

12. It was the mutual agreement of the parties that in the event that the defendant failed to complete the transaction, the deposit paid to the defendant was to be refunded to the plaintiff by the defendant. It is therefore my finding that the defendant having failed to discharge his obligations under the contract, the plaintiff is entitled to a refund of the sum of Kshs 500,000 paid to the defendant as deposit.

13. Prayer (b) is a plea for interest at 24% per annum from 4 April 2011. Special Condition (c) read together with Special Condition (a) provided for interest at 10% above the rate of the Barclays Bank of Kenya. The plaintiff did not, however, lead any evidence to establish the Barclays Bank of Kenya interest rates at all material times. In the absence of that crucial evidence, the court will not pluck a figure from the air and apply it. Secondly, the agreement did not specify whether the additional 10% was to be reckoned per annum or per month. In the circumstances, the plea for interest at 24% per annum fails.

14. Prayer (c) is a plea for general damages. Again the plaintiff did not lead any evidence to support this plea. Purely because there was breach on part of the defendant, I will award the plaintiff nominal damages assessed Kshs 100,000.

15. Prayer (d) relates to costs. In light of the above findings, it is clear that the plaintiff's suit has largely succeeded. The plaintiff will therefore have costs of the suit.

16. Prayer (e) is a plea for interest on (a) (b) (c) and (d). Prayer (a) is a special damages plea. I will therefore award interest at court rate on prayer (a) from the date of filing suit. The nominal damages will attract interest at court rate from the date of judgment while costs will attract interest at court rate from the date of taxation.

17. In light of the above findings and assessment, I hereby enter judgment in favour of the plaintiff against the defendant in the following terms:

a) Refund of Deposit paid in the sum of Kshs 500,000

b) Interest on (a) above at court rate from the date of filing suit till payment in full.

c) Nominal Damages in the sum of Kshs 100,000

d) Interest on (c) above at court rate from the date of Judgment

e) Costs and interest on costs at court rate from the date of taxation.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF FEBRUARY 2020.

B M EBOSO

JUDGE