



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 8 OF 2013

GETRUDE NAFULA TSUMA.....PLAINTIFF

VERSUS

JEMIMAH WANJIKU.....DEFENDANT

JUDGMENT

Background

1. The plaintiff filed the plaint in this matter on **24/1/2013**. In that plaint she seeks an order of eviction against the defendant from the land known as **LR NO 6670 IR 3112 (hereinafter referred to as "the suit land"**. The defendant filed a defence on **14/3/2013** and thereafter the plaintiff filed a reply to the defence on **2/3/2013** and another similar document on **30/5/2013**. Later the defendant filed her amended defence and counterclaim on **15/2/2019** with leave of court and subsequently the plaintiff filed an amended reply to defence and defence to counterclaim on **6/3/2019**.

2. The plaintiff testified on **26/9/2019** and gave further evidence on **17/10/2019**. On the latter date her case was closed. The defendant and **DW2** testified on **14/11/2019**. **DW3** testified on **19/11/2019** and at the close of his evidence the defence closed its case.

The claim

3. The plaint states that the plaintiff is the proprietor of the suit land upon which the defendant allegedly trespassed on **18/12/2012** or thereabouts and by that act the defendant allegedly denied the plaintiff quiet possession of a portion thereof and subsequently failed to vacate despite demands to do so.

The defence.

4. In her defence the defendant admits being in possession of a plot which is part of the suit land, and avers that she is a bona fide purchaser for value without notice thereof, having purchased the same from one **Isaac Ndayala Agola** for valuable consideration on **7/2/2009**; she maintains that she has developed the said plot. The defendant further avers that the plaintiff had sold the said Isaac the plot vide an agreement for sale dated **24/8/1992** which fact *inter alia* the plaintiff has allegedly concealed from court. Her further defence is that the plaintiff's claim is statutorily time barred by the provisions of **section 7 of the Limitations of Actions Act, Cap 22**. She also pleads that a constructive trust has arisen in her favour; in her counterclaim she prays that a declaration should issue that the plaintiff is holding the plot in trust for her and an order to compel the plaintiff to sign the necessary documents to effect subdivision of the suit land and transfer of the plot she occupies to her and in default the Deputy Registrar do so.

The plaintiff's reply to defence.

5. In the amended reply to defence the plaintiff averred that the defendant has been putting up structures at night; that **Isaac** did not have any title to pass on to the defendant and that no constructive trust has arisen. She also alleged that the counterclaim does not conform to the law and should be struck out or dismissed for that very reason.

The plaintiff's evidence.

6. The plaintiff's evidence as contained in her oral testimony and the statement she filed on **6/3/2019** is that the suit land is hers; that she purchased the suit land in **1965**; that transfer of the land to her was effected in **1973**; that the original title has been submitted to the Lands Office for subdivision; that the defendant bought a plot from her but instead of developing that particular plot, she developed an adjacent plot also situate on the suit land; that the plaintiff had received a deposit in respect of the second plot from another purchaser one **Belice Muhenga**

Agola, who was intent on purchasing the plot on behalf of her children *Lillian Sayo Agola* and *Isaac Ndayalla Agola* (all also collectively referred to herein as “*the Agolas*” or “*the Agola family*” that the agreement with *Belice Muhenga Agola* was not completed and the plaintiff had refunded to the purchaser the deposit paid. Upon cross examination the plaintiff admitted that the suit land was demarcated into commercial plots; that she has known the defendant since 2004 when she, among other people, came to purchase land from the plaintiff; that she purchased a plot of 50 by 100 feet and took possession; that the plaintiff does not dispute the defendant’s claim over that first plot; that in 1992, one *Belice Muhenga* came and asked her to reserve a plot for her daughter, *Lilian Agola* who was still a student; that at her mother’s instance, the agreement was however made out in *Lilian*’s name; that the plaintiff signed the agreement and Ksh 25,000/= was paid leaving a balance of Ksh 15,000/= outstanding. Later in November of the same year the plaintiff was paid Ksh 10,000 and on 17/9/2000 she received a further Ksh 5000/=. She also admitted that the purchasers were to assume possession of the plot upon execution of the agreement. However upon further cross-examination she insisted that the *Agolas* demarcated land for themselves and it is not her who showed them the plot the defendant claims to have purchased from them. She admitted that on 9/9/2006 she had instructed Mr Peter Kiarie, Advocate to pay Ksh 20,000/= into the Kenya Institute of Professional Counselling and that pursuant to those specific instructions Mr Kiarie made a cheque to the institution and also a refund voucher for Ksh 20,000/= in her favour; she also admitted that the defendant is in possession of the plot; however, in re-examination she denied having any intention to sell the portion the defendant is occupying. She averred that it was *Lilian Sayo Agola* who had asked that the money be refunded by way of a cheque for Ksh 20,000/= which was allegedly paid into *Lilian*’s account with the Institute. However her mother is said to have refused to collect the balance despite reminders.

The defendant’s evidence.

7. The defendant’s evidence is that she has bought two plots located on the suit land; that on 24/8/1992 she purchased the first plot directly from the plaintiff; that plot has no dispute to date; that later on 9/3/2007 she entered into a sale agreement with the plaintiff for the sale of a second plot and the plaintiff sold her the second plot; however, as soon as she began to develop the second plot, some members of the Agola family informed her that it belonged to their mother; that upon hearing this the defendant called the plaintiff who produced an agreement bearing the names of Agola’s children; upon visiting Advocate Kiarie’s office it was verified that the agreement was genuine; that the issue was escalated to the CID and the plaintiff was arrested and asked to refund the defendant the purchase price; that however the plaintiff was unable to refund the defendant the consideration paid and instead she agreed to give the defendant an alternative plot; that by then the defendant had deposited construction materials on the disputed plot; that the Agolas agreed to allow her to remain with that plot and took up the alternative plot offered the defendant by the plaintiff; that as soon as the plaintiff had allocated the Agolas that alternative plot the Agolas sold the suit plot to the defendant for ksh 280,000/ and she took up possession but the plaintiff prohibited her from developing it; however she continued construction and was thereafter served with a court order; that she decided to purchase the plot after seeing evidence that the consideration paid by Ms Agola had been returned to the plaintiff by Mr Kiarie. Upon cross-examination by Mr Ingosi she identified **DEXh 4** as the agreement she had relied on.

8. DW2 Isaac Adika Agola testified on the same date as **DW1**. His evidence is that in 1992 his family bought a portion of land out of the suit land from the plaintiff at the consideration of Ksh 40,000/= and the plaintiff has never refunded his family any money paid as consideration; that his family took possession as provided in the sale agreement; that in the year 2007 the family learnt that the defendant had taken possession of the property and they showed her their agreement with the plaintiff; that the defendant informed them she had purchased it from the plaintiff; that the parties then went to Mr Kiarie’s law office to have the matter resolved and subsequently the matter was reported to the police and the plaintiff arrested and detained; that the plaintiff then agreed to give an alternative plot to the defendant since she could not refund the defendant her money; that the Agolas then agreed that the plaintiff do remain on the disputed plot as she had placed construction materials thereon as they took possession of the alternative plot. That subsequently they sold the defendant the plot on 7/2/2009 and she has remained in possession since.

9. DW3 Peter Kiarie Ndarwa testified on 19/11/2019. His evidence is that he is an advocate of the High Court of Kenya and that he has known the plaintiff for many years; that he made the agreement produced as **DEXh 4**; that the consideration of Ksh 40,000/= was paid; that later the plaintiff wished to refund the Agola family the Ksh 20, 000/= but the refund was not accepted by the Agola Family; that the plaintiff later caused the said Ksh 20,000/= to be paid to the Kenya Institute of Professional Counselling. He did not know the purpose of the payment but he issued the cheque nevertheless and also prepared a refund voucher in favour of the plaintiff.

10. The defence then closed its case.

11. The parties filed their respective submissions in the suit and I have perused both sets of submissions, the evidence and the pleadings and have concluded that the following are the issues for determination arising in this suit:

- a. Did the plaintiff and the Agola Family enter into a binding sale agreement over the plot and if so, was it ever rescinded?
- b. Did the plaintiff attempt to resell the same plot to the defendant?
- c. Did the Agola family have capacity to sell the plot to the defendant and is the sale agreement dated 9/2/2009 valid?
- d. Has constructive trust arisen on the part of the plaintiff in favour of the defendant?
- e. What orders should issue?

12. The issues are discussed as hereunder.

a. Did the plaintiff and the Agola Family enter into a binding sale agreement over the plot and was it ever rescinded?

13. The plaintiff admitted the agreement between her and the Agola family dated 24/8/1992. This is a straightforward agreement and since the plaintiff has admitted it, it is a valid and binding agreement.

14. The same is signed by the plaintiff. There is also one signature made on behalf of the purchasers named therein. It is in respect of sale to Lillian Sayo Agola and Isaac Ndayala Agola of a plot measuring 50 by 100 feet. The plot was to be carved out of LR 6670. Ksh 25000/= was the deposit and the agreement stipulated that the balance of Ksh 15,000/= would be paid before or on 31/12/1992 through Kiarie & Co Advocates. The purchasers were to take possession upon execution of the agreement.

15. However the plaintiff in her evidence averred that her intention to sell the Agolas effervesced and later on the agreement was rescinded and part of the purchase price refunded to the Agola family. From the evidence on the record it appears that the decision to rescind the agreement was made unilaterally by the plaintiff.

16. Rescission of a contract may be by reason of breach on the part of one of the parties which entitles his counterpart who is not in breach to terminate the contract, or by agreement of the parties. The plaintiff states in her evidence that the agreement was rescinded because Isaac did not execute the agreement and the purchasers failed to pay the balance of the purchase price and that Lillian Sayo Agola called for a refund of the purchase price when she realised that the other family members intended to sell the plot to a third party which course of action she was against.

17. Is there evidence of breach by the Agolas as alleged?

18. On the face of the agreement there is an acknowledgement of receipt by the plaintiff from the Agolas of Ksh 25,000/=. There is also on the face of that agreement a further handwritten acknowledgement of receipt of Ksh 10,000/= by the plaintiff. The plaintiff while acknowledging receipt of a deposit by the Agola family stated as follows in her evidence in chief:

“She (the defendant) caused me to be arrested by police. She claimed that I had sold the land to another woman. I had not sold the plot to that other woman. That woman had given me a deposit. She wanted the land on behalf of her child.”

19. The plaintiff needed clear evidence of breach and rescission and total refund in this suit. Upon cross-examination by Mr Samba she admitted that the whole of the consideration for the suit plot had been paid by the Agolas.

20. The plaintiff has not brought forward clear evidence of a refund of the entire consideration: the plaintiff states that she refunded Ksh 20,000/= by way of payment of college fees for Lillian Sayo Agola in 2006; perchance this refund happened, I would find it irregular because the plaintiff was aware that Lillian’s mother was the proper party to the transaction on behalf of her children, and was herself entitled to the refund. In her cross-examination by Mr Samba the plaintiff stated as follows:

”Belice Muhenga Agola is known to me. It is not her children who came. She came and asked me to reserve a plot for her daughter Lillian.”

21. It appears that Mrs Agola voluntarily decided to purchase land for her children using her own resources, and the children produced nothing towards the consideration that could have entitled them to ask for any refund. It should be regarded as automatically the case that since it was not shown by the plaintiff that her children had sent her with the funds to purchase the land, they were not entitled to a refund even upon request. Therefore, Mrs. Agola was not in the circumstances an agent of her children whose authority they could revoke at will and cancel the contract.

22. The fact remains that the plaintiff brought forth no proof of refund; Mr Kiarie’s evidence is that though Kshs 20, 000/= was deposited with him on account of Lillian Sayo Agola as part refund of the consideration paid in the agreement of 24/8/1992, Lillian never accepted the refund; further, nothing on the face of the alleged refund documents can link the same to the alleged rescission of the contract by the plaintiff. On a plain examination of the same, it appears that the plaintiff merely was recalling the monies she had given to Mr Kiarie for safekeeping. The plaintiff never produced the request for a refund or any authority from Mrs Belice Muhenga Agola to refund the money to any other person including Lillian Sayo Agola, and the particular manner in which the refund would be made. In particular, she does not demonstrate that she was requested by anyone to refund the money by way of payment to the Kenya Institute of Professional Counselling. In my view there is no evidence brought forward by the plaintiff that the Ksh 20,000/= that was paid to the Institute was paid on account of Ms Lillian Sayo Agola, or that Lillian or Mrs Agola had requested that it be so paid.

23. Further if the total amount paid as deposit and further part payment of consideration as per the face of the agreement was Ksh 35,000/=, and the plaintiff’s own admission in cross examination by Mr Samba was that she had received ksh 5000/= more in respect of the sale on 17/9/2000 that marked the full payment of the purchase price; it then begs the question as to why the plaintiff was only intent on refunding Ksh 20,000/= rather than the full amount to the Agolas. There is no evidence that Mrs Agola refused to receive the refund of the consideration. Proof of a full refund, and that to Mrs Agola herself, would have evinced a clear intention to rescind on the part of the plaintiff though questions of validity of such a unilateral rescission would still arise.

24. It appears that the Lillian Sayo Agola were not involved in the alleged rescission. In her written statement the plaintiff stated the reasons for rescission as follows:

“The agreement was rescinded because Isaac Ndayalla Agola did not execute the agreement, the purchasers failed to pay the balance of the purchase price as agreed and Lillian Sayo Agola called for refund after her mother and brother had shown an intention of selling the plot to a third party which she was against.”

25. That Isaac Ndayalla Agola did not execute the agreement is a ground for rescission is not logical or proper given that the plaintiff herself admits that she tried to refund part of the purchase price to Lillian Sayo Agola who was also not a signatory to the agreement. It should be outrightly rejected. That Lillian Sayo Agola called for refund should not be a ground for rescission in the light of this court’s findings above that there is no evidence that she or Mrs Belice Agola called for it or that any of them was in fact refunded.

26. Concerning the alleged failure to pay the balance of the purchase price as per the agreement, it is noteworthy that though **clause 3** of the agreement stated that the balance of **Ksh 15,000/=** was to be paid on or before **31/12/1992**, in her evidence the plaintiff acknowledged receipt of **Kshs 10,000/=** on **11/11/92** and a further **Kshs 5000/=** on a later date. It is the law that where time is of essence in a contract that must be stipulated therein and where such a clause is not incorporated in the written agreement, any party wishing to rely on delay for rescission must issue an appropriate notice. In the case of **Aida Nunes vs J.M.N Njonjo & C. Kigwe (1962) EA page 89**, the court observed as follows:

“When time has not been made the essence of a contract, it is clear that at least in contracts for the sale of land and the grant of leases, one of the parties cannot avoid the contract on the ground of unreasonable delay by the other until notice has been served making time of the essence... in the circumstances the respondents could have avoided the agreement only if they made time the essence of the contract by fixing a reasonable time within which the sublease must be granted coupled with a notice that, if not then granted the agreement would be avoided and this they failed to do.”

27. There is no evidence that the Agolas were served with notice of rescission by reason of breach on their part. In the case of **Bir Singh v Parmar (1972) EA page 212**, the Court held that:

“This appeal concerns an agreement for the sale of land, a condition of which was that a deposit was payable. The agreement did not specify that the time was of the essence in connection with the payment of the deposit, and the judge refused to imply a stipulation making time of the essence. He preferred to apply the general rule as stated in 8 HALSBURY’S LAWS, 3rd Edn.Pg.164-165, and held that in the absence of an express stipulation or clear implication that time in relation to the payment of the deposit was of the essence of the contract, failure to pay the deposit did not entitle the vendor unilaterally to avoid the contract. The position would of course have been different if the vendor had given notice making time for payment of the deposit of the essence of the contract and specifying a reasonable period for payment, but this he did not do. He preferred to treat the contract as not binding on him but I agree with the judge that in these circumstances the contract continued in force.

28. Having regard to the foregoing, I find that the unilateral acts of the plaintiff did not amount to and can not amount to effective rescission of the agreement dated **24/8/1992**.

b. Did the plaintiff attempt to resell the same plot to the defendant?

29. The evidence of **DW1** is corroborated by the evidence of **DW2** to show that the plaintiff offered the plot she had sold to the Agolas to the defendant. It is the evidence of **DW2** that when they learnt that the defendant had occupied the plot they went and informed the defendant of their sale agreement with the plaintiff. Thereafter the matter was escalated to the police who arrested the plaintiff. The plaintiff was then asked to refund the defendant the purchase price but she was unable and subsequently agreed to give the defendant an alternative plot.

30. The evidence of the plaintiff and the defendant concurs in one material respect: she was arrested by the police over the sale of the land to the defendant while she had already sold it to the Agolas.

c. Did the Agola family have capacity to sell the plot to the defendant and is the sale agreement dated 9/2/2009 valid?

31. The evidence on the record is to the effect that because the defendant had already brought construction materials on the suit plot, the Agolas agreed that they would sell the suit plot to her while they took up the alternative plot to be given by the plaintiff to the defendant, hence the agreement dated **7/2/2009** between the defendant and the Agolas. The agreement was attested to by an advocate and is signed by **Isaac Ndayalla Agola** as vendor and the defendant as purchaser.

32. This court has already ruled that there was no effective rescission of the agreement dated **24/8/1992** between the plaintiff and Mrs Agola on behalf of her children and that there is no evidence of refund of the purchase price paid in respect of that agreement. In this court’s view, the Agolas had an interest in the land which they were entitled to sell to the defendant, and in the absence of any complaint by Mrs Belice Agola, the sale transaction bound both parties.

d. Has constructive trust arisen on the part of the plaintiff in favour of the defendant?

33. The plaintiff admitted to having received the full purchase price from the Agolas. Her agreement with them was that they would take up possession of the plot upon execution of the agreement. There is no doubt that they took up possession of the plot. There is also no doubt that they sold the plot to the defendant. However the title to the main parcel out of which the plot was carved is still in the name of the plaintiff, though she has admitted to having the land demarcated with the intention of producing subtitles, some of which are for transfer to purchasers. As I have found that the Agolas were entitled to the plot before they sold it to the defendant, and that they were so entitled to sell it follows that there arises a constructive trust on the part of the plaintiff in favour of the defendant.

e. What orders should issue?

34. The upshot of the above is that I find that the plaintiff has failed to prove her claim on a balance of probabilities against the defendant and the defendant has proved her counterclaim against the plaintiff on a balance of probabilities.

35. I therefore enter judgment for the defendant against the plaintiff in respect of both the main suit and the counterclaim and I issue the following final orders:

a. An order that the plaintiff’s claim in the main suit is hereby dismissed with costs;

b. An order that the defendant's counterclaim is allowed;

c. An order that the plaintiff is holding the title to the plot measuring 50 by 100 feet within LR 6670 which is occupied by the defendant in trust for the defendant;

d. An order that the trust is hereby determined and the plaintiff is hereby ordered to sign all the necessary documents to effect the subdivision of LR 6670 and transfer of the portion occupied by the defendant measuring 50 by 100 feet to the defendant in default of which the Deputy Registrar of this court shall execute all such documents needed to effect the subdivision and/or transfer;

e. An order that the plaintiff shall bear the costs of the counterclaim.

It is so ordered.

Dated, signed and delivered at Nairobi via Teleconference on this 20th day of May, 2020.

MWANGI NJOROGE

JUDGE, ELC, KITALE

Judgment read via Teleconference in the presence of

Mr Samba for the defendant.

N/A for the plaintiff.

Hon Mercyline Lubia, DR.

MWANGI NJOROGE

JUDGE ELC, KITALE