



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NUMBER 1075 OF 2016

JANE MUCHIKU KIMEMIA.....PLAINTIFF/APPLICANT

VERSUS

JOHN MWENJA NGUMBA.....DEFENDANT/RESPONDENT

JUDGEMENT

1. By a Plaintiff dated 3rd September 2016 and filed in Court on 5th September 2016, the Plaintiff sought the following reliefs:

- a) A permanent injunction restraining the Defendant either by himself, servants, agents and or attorneys from any way disposing, transferring, charging, pledging and or dealing or alienating the suit property being plot No. 17 a portion of subdivision of L.R NO. 74/12.*
- b) Mandatory injunction compelling the Defendant to lodge the conveyance with the Registrar of Lands in respect of Plot No.17 a portion of subdivision of L.R NO. 74/12.*
- c) A declaration that the Plaintiff is not in breach of the sale agreement and is therefore entitled to Plot No. 17 a portion of L.R NO. 74/12.*
- d) An order of specific performance to give effect to the sale agreement dated 28th July 2009.*
- e) Cancellation, Annulment and Invalidation, by the Honourable Court, of any certificate of sub-division and/or completion documents, Deed of Transfer or Assignment, Mortgage, Lien or power of Attorney, granted to any third party in and over Plot No. 17 being a portion of L.R NO. 74/12.*
- f) The costs of this suit and interest.*

ALTERNATIVELY

- g) An order do issue compelling the defendant to deliver up all the following documents to the Plaintiff:-*
- i. The original title documents relating to Plot No. 17*
 - ii. The conveyance in triplicate (undated) duly executed by the Defendant in favour of the Plaintiff*
 - iii. A duly completed form of valuation for stamp duty*
 - iv. A valid rates clearance certificate*
 - v. A valid land rent clearance certificate*
 - vi. Consents to transfer by the Commissioner of Lands*
 - vii. Copies of the Plaintiff's Personal Identification Number certificate*

- viii. *Certified copy of Grant of Letters of Administration*
- ix. *Certified copy of confirmation of grant of letters of administration*
- x. *Original deed plans for the sub-divisions relating to Plot No.17*
- xi. *Deed of Assent in favour of the named beneficiary*
- xii. *A certified copy of the sub-division certificate for LR No. 74/12 from the City Council of Nairobi*
- xiii. *A certified copy of proposed sub-division plan for the property*
- xiv. *NEMA license*
- xv. *The Deputy Registrar of this Honourable Court be authorized to sign such documents and deed as shall be necessary to perfect the Plaintiff's title over plot number 17 being a portion of LR No. 74/12.*
- xvi. *A refund of Kshs.186,040 plus interest*
- xvii. *Damages for breach of contract*
- xviii. *Costs of this suit and interest*
- xix. *Any other relief that this Honourable Court may deed fit to grant.*

2. The Defendant is the executor of the Estate of Andrew Kimani Ngumba who is the registered owner of LR NO. 74/12. On 28th July 2009, the Plaintiff entered into a sale agreement with the Defendant in respect of a sub-division of LR No. 74/12 identified as Plot No. 17 at a consideration of Kshs.4,400,000/= . It was a term of the agreement that the Plaintiff was to pay 50% of the purchase price i.e Kshs.2,200,000/= within 30 days from the date of execution of the agreement and the balance was to be paid within 180 days from the date of the agreement or within fourteen (14) days from the date of notification to the purchaser's Advocates of the successful registration of the conveyance in favour of the purchaser by the vendor's Advocate whichever is earlier.

3. The Plaintiff paid the deposit after 43 days of signing the agreement. The deposit included an overpayment of Kshs.600,000/= which was returned to the Plaintiff . The property was valued for stamp duty purposes which came to Kshs.176,000/= . The Plaintiff remitted a cheque for stamp duty. The Defendant's Advocates called for the Plaintiff's I D Card and Pin which were not sent as required.

4. The Defendant was being represented by the firm of Gichuki Kingara & Co. Advocates and the Plaintiff was being represented by Miller & Co. Advocates. Mr Mulani Advocate was handling the matter for the Defendant when he was working under Gichuki Kingara & Co. Advocates. Mr Mulani opened his law firm under MJD Associates and continued to act for the Defendant under his firm. A fresh professional undertaking to complete the balance of the purchase price was given by the firm of Miller and Co. Advocates to MJD Associates on 18th January 2016.

5. The Defendant's advocates undertook a fresh valuation of the property and called for the new amount for stamp duty but the Plaintiff did not remit the amount for stamp duty as required. The Defendant's advocate issued a 21 days' notice requiring the Plaintiff to rectify the default but the Plaintiff did not oblige. The Plaintiff sent the cheque for stamp duty outside the 21 days . The cheque was returned to the Plaintiff as the agreement had already been rescinded. It is after this that the Plaintiff filed this suit.

6. It is the Plaintiff's contention that it is the Defendant who breached the agreement and that is why she is seeking the reliefs in the Plaintiff. On the other hand, it is the Defendant's contention that it is the Plaintiff who breached the agreement. The Defendant states that the Plaintiff paid deposit outside the 30 days period required. When the property was assessed again, the stamp duty and penalties went up due to the delay in registration. The Plaintiff was asked to pay but she did not pay. When a 21 days' notice was issued asking her to make good the default, she did not and the agreement stood rescinded.

7. I have carefully gone through the Plaintiff's evidence as well as that of the Defendant. I have also gone through the submissions filed by the parties. The issues which emerge for determination are the following:-

- i. Who between the Plaintiff and the Defendant breached the agreement?*
- ii. Was the agreement properly rescinded by the Defendant?*
- iii. Is the plaintiff entitled to the remedies sought in the Plaintiff?*

Who between the Plaintiff and Defendant breached the agreement.

8. The sale agreement stated that the 50% deposit was to be paid within 30 days from the date of execution of the agreement. The plaintiff did not pay within the 30 days . Instead, the deposit was paid on 10th September 2009. This was 13 days outside the agreed time. The Defendant nevertheless accepted the deposit and returned what was over and above the agreed deposit. The Defendant called for a cheque for

stamp duty on 27th April 2010. The plaintiff was asked to pay within 7 days. The plaintiff did not remit the cheque until 14th July 2010, a period of almost three months later. The Defendant's Advocates had requested for Kshs.4000/= being valuation charges in their letter of 27th April 2010. This amount was not remitted. The amount was later revised to Kshs.10,000/- which was not paid until 17th February 2011, a period of almost ten months later.

9. When the Defendant changed Advocates from Gichuki King'ara & Co. Advocates to MJD Advocates, the new advocates called for the Plaintiff's ID and Pin vide letter of 18th November 2015. The advocates again called for the same documents through letter dated 21st January 2016. The Plaintiff's advocates wrote to the plaintiff on 9th February 2016 asking for the documents. The plaintiff sent the documents to her Advocates through e-mail on 15th February 2016 and apologized for the delay in remitting them. The Defendant's advocates acknowledged receipts of the documents on 29th March 2016 and called for a cheque of Kshs.308,040/= being stamp duty and penalties for late payments. The Plaintiff's Advocates wrote to the plaintiff asking for a cheque for the assessed stamp duty on 8th April 2016 and again on 5th May 2016. The plaintiff did not respond or send the cheque for the amount requested.

10. As the Plaintiff did not remit a cheque for stamp duty, the Defendant's Advocates issued a 21 day's notice on 13th June 2016 requiring the Plaintiff to remedy the default but there was no response. The plaintiff seems to think that as she had paid a cheque for stamp duty early on, she was not obliged to pay another amount. The Plaintiff had been explained that the early cheque had become stale and that the amount which was required was for the new stamp duty together with penalties for late registration. It is clear that it is the Plaintiff who breached the agreement.

11. The plaintiff tried to do what she was expected to do within 21 days by giving a cheque for stamp duty but it was too late. It is clear that the breach was on the part of the plaintiff.

Was the agreement properly rescinded by the Defendant?

12. The sale agreement provided for completion within 180 days of execution of the agreement or within 14 days of successful registration of transfer in favour of the Plaintiff. It is clear that the transaction was not completed within 180 days and registration was frustrated by the plaintiff who refused to pay stamp duty amount. This being the case and there being a delay of about seven (7) years, the Defendant issued a 21 days' notice. The notice was issued because the agreement was subject to the Law Society Conditions of sale. The Defendant issued the notice on 13th June 2016. This notice expired on 4th July 2016. The Plaintiff did not remedy the default. The agreement therefore stood rescinded after 4th July 2016.

13. It is clear from the agreement that time was not made of essence. The Defendant invoked the Law Society Conditions of sale and issued a 21 days' notice making time of essence. In **Housing Company of East Africa Limited Vs Board of Trustees National Social Security Fund & 2 Others (2018) eKLR**, it was held as follows:-

“ As correctly observed by the Judge, where a purchaser has dragged his feet and has been guilty of unnecessary delay as was the case here, the vendor was perfectly entitled to serve upon the purchaser a notice limiting time, at the expiry of which the vendor could treat the sale agreement as rescinded. This is also in consonance with this Court's decision in Njamunyu Vs Nyaga (1983) eKLR 282 in which the Court observed thus ...” before an agreement such as this can be rescinded the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given, failure to rectify will result in rescission of the contract”. Underlining ours.

14. The delay was on the part of the Plaintiff. The Defendant was perfectly in order to issue notice, the expiry of which rescinded the agreement. I therefore find that the agreement between the Plaintiff and the Defendant was properly rescinded.

Is the Plaintiff entitled to the remedies sought

15. Among the remedies the Plaintiff seeks is an order of specific performance of the agreement. I have already found that it is the Plaintiff who was in breach of the agreement. The agreement was lawfully rescinded. The issue of specific performance does not therefore arise. There is no basis for grant of either permanent or mandatory injunction of any nature against the Defendant.

16. The Plaintiff is seeking in the alternative refund of Kshs.186,040/= . This amount is made up of Kshs.176,040/= which was paid for stamp duty and Kshs.10,000/= which was given for valuation charges. The Plaintiff issued two banker's cheques. The first cheque of Kshs.176,040/= was in favour of Commissioner of Domestic Taxes. The second cheque of Kshs.10,000/= was made in favour of Gichuki Kingara & Co. Advocates. The Defendant testified that the cheque for Kshs.176,040/= expired as there was no stamp duty paid to the Commissioner of Domestic Taxes. The Plaintiff did not adduce any evidence in form of Bank statement to show that there was a debit of the amount in her account. There is therefore no basis for claiming the amount of Kshs.176,040/-. On the issue of the kshs.10,000/= it is clear that the cheque was in favour of Gichuki Kingara & Co. Advocates. There is no evidence that this cheque was not banked. The Plaintiff's advocate asked for a receipt for this payment but there was no response. I have no reason to doubt that the amount is with the Defendant's previous Advocate. I therefore find that the Plaintiff is entitled to refund of Kshs.10,000/= with interest at Court rates from 17th February 2011. The Plaintiff is also entitled to refund of the deposit paid less the 10% forfeited to Defendant. As the Plaintiff has substantially lost her case, I make no order as to costs of this suit.

Dated, Signed and delivered at Nairobi on this 14th day of May 2020.

E.O.OBAGA

JUDGE

In the absence of parties who had been duly notified of the date and time of delivery of Judgement.

Court Assistant: Hilda

E.O.OBAGA

JUDGE