



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 97 OF 2011

JUSTINE OYAGI OMOKE.....1ST PLAINTIFF

EDNA KWAMBOKA RIECHI.....2ND PLAINTIFF

VERSUS

ELIZABETH MUENI NGOTHO.....1ST DEFENDANT

NJIHIA MUOKA RASHID CO. LIMITED.....2ND DEFENDANT

JUDGMENT

1. In the Amended Plaint dated 15th April, 2011, the Plaintiffs averred that on 6th October 2011, they entered into an Agreement with the 1st Defendant for the purchase of a parcel of land known as Mavoko Town Block 2/4261 (*Beacon No. 553*) (*the suit property*) for a sum of Kshs. 630,000.
2. The Plaintiffs averred that it was a term of the sale that after paying the deposit of Kshs. 300,000, the 1st Defendant would provide the Plaintiffs with the original title, Land Control Board consent forms, a copy of his national identity card or passport and photographs signed and dated at the back; that they paid the required deposit in accordance with the Agreement and that the 1st Defendant, in an attempt to frustrate the sale, has refused, ignored, and/or neglected to forward the said documents and instead has purported to cancel the sale and to refund the deposit of the purchase price.
3. The Plaintiffs' claim against the Defendants is for an order of injunction to restrain the Defendants from disposing the suit property to other parties and an order of specific performance compelling the Defendants to comply with the provisions of the Sale Agreement dated 6th October, 2010.
4. In their joint Defence, the Defendants averred that the 1st Defendant did enter into a Sale Agreement with the Plaintiff on 6th October, 2010; that the Defendants duly complied with the terms of the Sale Agreement and that it is the Plaintiff who failed to complete the Sale Agreement within the stipulated time, which was ninety (90) days.
5. The Defendants finally averred that the Plaintiffs having been refunded the deposit of the purchase price, the suit property changed hands and that an order of permanent injunction and specific performance cannot lie.
6. The 1st Plaintiff, PW1, informed the court that on 6th October, 2010, together with his wife, the 2nd Plaintiff, they bought the suit property from the 1st Defendant, through the 2nd Defendant, for Kshs. 630,000; that they made a deposit of Kshs. 300,000 as per the Agreement and that the balance of the purchase price was to be paid after the Defendants furnish them with the all the completion documents.
7. Despite declining to forward to them the completion documents, PW1 stated that on 12th April, 2011, the 2nd Defendant, on instructions from the 1st Defendant, purported to cancel the Sale Agreement and that the 1st Defendant is in the process of selling the land to a third party.
8. In cross examination, PW1 stated that the 2nd Defendant was the agent of the 1st Defendant; that he never met the 1st Defendant; that the 2nd Defendant was selling plots on behalf of the 1st Defendant; that the 2nd Defendant was also acting on their behalf and that he never paid the balance of the purchase price because the Defendants never gave him the completion documents as agreed.
9. PW1 stated that he received a letter from the Defendants purporting to cancel the Sale Agreement; that he rejected the cheque that he was given by the Defendants in respect to the deposit of the purchase price that he had paid and that he did not breach the Agreement of Sale as alleged by the Defendants.

10. DW1 informed the court that he is the Managing Director of the 2nd Defendant; that they are in the business of valuation and estate agents; that the 2nd Defendant was acting as an agent for both the Plaintiffs and the 1st Defendant in respect to the sale of the suit property; that the cheque in respect to the purchase price was paid through the 2nd Defendant and that the 2nd Defendant was not a party to the Sale Agreement.

11. According to the evidence of DW1, the Plaintiffs did not pay the balance of the purchase price within the requisite time; that the 1st Defendant rescinded the Agreement for Sale and that the 1st Defendant refunded the paid deposit to the Plaintiffs.

12. DW1 informed the court that if any completion documents were to be forwarded to the Plaintiffs, then it is the 1st Defendant who should have forwarded the same and not the 2nd Defendant and that the 2nd Defendant has no capacity to transfer the suit property to the Plaintiffs

13. In cross examination, DW1 stated that he cannot recall if all the completion documents were passed to the Plaintiffs; that the cheque in respect to the deposit that was given to the Plaintiffs, being the refund, was done before a formal completion notice was done and that the rescission of the Agreement was done verbally.

Submissions:

14. The Plaintiffs' advocate submitted that the Agreement, in Clause 7a, provides that at the signing of the Agreement, the 1st Defendant would provide the Purchaser with the copy of the original title, Land Control Board consent forms signed by both Vendor and Purchaser, copy of Identity card or Passport, and three (3) passport size photographs-signed and dated at the back and that the foregoing documents were never provided.

15. The Plaintiffs' advocate submitted that the Plaintiffs signed the Agreement at the offices of the 2nd Defendant; that the 1st Defendant was not there when the Agreement was being signed and the Agreement had to be forwarded for her signature and that the letter dated 7th October, 2010 clearly confirms this position. Counsel submitted that the failure to provide the Purchaser with the documents meant that he could not proceed to the next level of paying the balance and executing the transfer as provided in paragraph 7b of the Agreement.

16. The Plaintiffs' advocate submitted that the 1st Defendant never issued the Plaintiffs with any letter notifying them of the breach and asking them to remedy the same; that the 2nd Defendant failed in ensuring the 1st Defendant performed her obligation under the contract; that the Plaintiffs were not in breach of the Agreement and that a party in a contract who delays in fulfilling her obligation in a contract should not be allowed to shift the blame to the innocent party.

17. On specific performance, counsel relied on the cases of *Charles Kiraithe Kiarie & 2 others vs. Administrators of the Estate of John Wallace Mathare [2013] eKLR*, and *George Njenga Kagai vs. Samuel Kabi Njoroge & Another [2019] eKLR*.

18. On his part, the 2nd Defendant's advocate submitted that the 2nd Defendant was not under any obligation to forward to the Plaintiffs the completion documents; that the 2nd Defendant was not a party to the transaction and that the 2nd Defendant was not privy to the Agreement between the Plaintiffs and the 1st Defendant. Counsel relied on the case of *Savings & Loan (K) Limited vs. Kanyenje Karangaita Gakomba & Another (2015) eKLR* where the court held as follows:

“In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.”

19. Counsel submitted that in any event, the Plaintiffs were to pay the balance of the purchase price within ninety (90) days; that the Sale Agreement was rescinded after 180 days, and that the Plaintiffs have not paid the full purchase price to date.

Analysis and findings:

20. The Plaintiffs' claim is that on 6th October, 2010, they jointly bought the suit property from the 1st Defendant, through the 2nd Defendant, for Kshs 630,000; that they made a deposit of Kshs. 300,000 as per the Sale Agreement and that the balance of the purchase price was to be paid after the Defendants furnish them with all the completion documents.

21. According to the Plaintiffs, despite declining to forward to them the completion documents, on 12th April, 2011, the 2nd Defendant, on instructions from the 1st Defendant, purported to cancel the Sale Agreement and is in the process of selling the land to a third party. The Plaintiffs have prayed for an order of injunction and for an order of specific performance to issue.

22. The law relating to an order of specific performance was restated by the Court of Appeal in the case of *Gurdev Singh Birdi & Another vs. Abubakar Madhbuti (1997) eKLR* as follows:

“It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed, as is set out in paragraph 487v of volume 44 of Halsbury's Laws of England, Fourth Edition, a Plaintiff seeking equitable remedy of specific performance of a contract:

‘must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action...Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance but dismisses the claim.’”

23. The Plaintiff can only succeed in a claim for specific performance if he has complied with all the terms of the Sale Agreement. The Agreement between the Plaintiffs and the 1st Defendant was signed by both parties. According to the Agreement, the Plaintiffs and the 1st Defendant signed the Agreement on 6th October, 2010. The Plaintiffs’ and the 1st Defendant’s signatures were duly witnessed in accordance with the provision of Section 3 (3) of the Law of Contract Act.

24. The Agreement provides that the purchase price was Kshs. 630,000, with the deposit of Kshs. 300,000 payable at the signing of the Agreement. As at the time of signing the Agreement, the 1st Defendant, who is the registered proprietor of the suit property, was required to provide to the Plaintiffs the original title; duly signed Land Control Board consent forms; a copy of the Identity card or passport and three (3) passport size photographs.

25. The Agreement further provided as follows:

“Balance/Final payment: The balance of the purchase price amounting to Kshs. 330,000 is payable on signing of the transfer on or before expiry of 90 days from the date of the sale agreement by a banker’s cheque addressed to Ms. Elizabeth Mueni Ngotho.”

26. The terms of the Agreement are clear that the 1st Defendant was to hand to the Plaintiffs the completion documents at the time of signing of the Agreement, and the balance of the purchase price was to be paid upon the signing of the transfer by the 1st Defendant.

27. The 1st Defendant has not denied that she signed the Sale Agreement and was paid the requisite deposit. However, there is no evidence by the Defence to show that they gave to the Plaintiffs, or their agent, the completion documents. Indeed, the said documents were to be handed to the Plaintiffs on the date of signing the Agreement, which has not happened to date.

28. Although the 1st Defendant was supposed to also sign the transfer document before the payment of the balance of the purchase price, the 1st Defendant did not sign the said transfer. Consequently, and considering the clear terms of the Agreement, it is the 1st Defendant who is in breach of the Agreement, and not the Plaintiffs.

29. That being the case, and considering that the Plaintiffs have been waiting to be furnished with the completion documents before they could pay the balance of the purchase price, the Defendants cannot purport to rescind the Agreement of Sale between the Plaintiffs and the 1st Defendant. Any such rescission is null and void.

30. For the reasons that I have given above, I find that the Plaintiffs have proved their case on a balance of probability. The Plaintiffs’ claim is allowed as follows:

a) An order of permanent injunction be and is hereby issued restraining the Defendants, their agents, servants and or representatives from selling, transferring, constructing and/or in any manner interfering with parcel of land known as Mavoko Town Block 2/4261 (Beacon No. 553).

b) An order of specific performance be and is hereby issued compelling the 1st Defendant to comply with the terms of the Sale Agreement dated 6th October, 2010.

c) The 1st Defendant to pay the costs of the suit.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 18TH DAY OF SEPTEMBER, 2020

O.A. ANGOTE

JUDGE