REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 165 OF 2013

ROSE WAMBUI WAHITO……..…..……...……. PLAINTIFF

VERSUS

JOHN IAN MAINGEY…….…..…..……DEFENDANT

JUDGMENT OF THE COURT

The Plaintiff's prays for an order of injunction restraining the Defendant from dealing in any manner whatsoever with the parcel of land known as L.R. No. 1338/4/R, as well as an order of specific performance compelling the Defendant to complete a sale agreement he entered into with her dated 22nd June 2006. She also seeks general damages for breach of contract and the costs of this suit, with interest thereon.

The Plaintiff's case is stated in her plaint dated 24th May 2012 and filed on the same date and in evidence she adduced in court orally and by way of a witness statement dated 24th May 2012 filed in court on the same date, and which was admitted by the court as her evidence. She states that on or about 22nd June 2006 she entered into an agreement with the Defendant who is the owner of the parcel of land known as L.R. No. 1338/4/R to purchase 3 acres of the said land for Kshs 2,700,000/=. Further, that she paid a deposit of Kshs 500,000/= upon execution of the agreement and was to pay the balance of the purchase price within 3 months after confirmation by the Defendant that the title deed was ready.

The Plaintiff also claimed that there were express terms in the said agreement that the Defendant would carry out the subdivision of the said parcel of land and obtain the relevant consent and clearance certificates to facilitate of the transfer of the parcel of land; that the parcel of land would be sold without any encumbrances and that the Defendant had met all the outgoing payments relating to the aforesaid parcel of land which included rent and rates at the time of execution of the sale agreement. However that the Defendant has failed, refused or neglected to complete the aforesaid sale agreement and transfer of the parcel of land to the Plaintiff, despite her being ready and willing to complete the sale agreement.

The Defendant entered appearance on 15th June 2012 and filed a Defence dated 5th July 2012 on the same date. The Defendant denied the Plaintiff's averments and stated that the Plaintiff was in breach of the sale agreement. The Defendant averred that the sale agreement could not be completed owing to the Plaintiff's laxity to pay the balance of the purchase price. It is alleged by the Defendant that the consideration for the sale agreement was a past consideration which is not sufficient in law to support the claim. Further, that the Plaintiff recovered the monies paid up in the year 2008 and therefore cannot claim

it under the alleged agreement.

The hearing of the suit proceeded on 4th February 2013 when the Plaintiff (PW1) gave oral evidence. Her testimony was that she is a business woman residing in Congo and that the Defendant was a family friend known to her for about 20 years. She produced the sale agreement entered into with the Defendant dated 22nd June, 2006 as the Plaintiff Exhibit 1. The rest of her bundle of documents dated 24th May 2012 and filed in court on the same date were produced as the Plaintiff's Exhibit 1A. PW1 averred that she is ready and willing to complete the sale agreement and to pay the Defendant the balance of Kshs 2,200,000/=. PW1 concluded by stating that owing to the breach, she had suffered loss and damage, lack of profit and use or enjoyment of the suit parcel for which the Defendant was responsible.

During cross examination by the Defendant's Counsel, the Plaintiff stated that she received a letter dated 19th September 2006 form Chokaa & Company Advocates which was demanding the balance of the purchase price in 3 months. According to the Plaintiff, the demand was contrary to the agreement and further, that she responded to the same by making two telephone calls and did not put her response in writing. PW1 testified that there was no reason why the vendor would have delayed the transaction since his family had financial problems. In re- examination, the Plaintiff stated that she brought the suit in good time and proceeded to close her case. Upon the court's inquiry on why the balance has not been paid, the Plaintiff stated that the Defendant never went back to her and that he had a family case in court.

The Defendant (DW1) testified and gave oral evidence in addition to his witness statement dated 5th July 2012 which was admitted by the court in evidence. He admitted to having entered into a sale agreement with the Plaintiff who was a friend to his late sister, Lucy Akuku Maingey. DW1 stated that her late sister informed him that she was selling 3 acres to the Plaintiff and that she asked him to also sell his 3 acres as well. DW1 informed the court that she got his 3 acres through a court order issued by Lady Justice Rawal on 22nd July 2002 whose copy was attached to his list of document dated 5th July 2012. According to the Defendant, the cost of sub-division of the said property was to be borne by his late father's estate and further, that sub-division was carried out in 2006.

DW1 attributed the delay in carrying out subdivision to a problem between the two executors and further, that he had to write to the court and the church to intervene. The Defendant stated that the church finally settled the issue and the deed plan was issued in 2006. DW1 contended that the Plaintiff was informed of the issuance of the deed plans whereof she requested for the title. According to the Defendant, save for his telephone conversation with the Plaintiff and a letter written by his lawyer in July 2006 to the Plaintiff, the parties did not communicate until the suit was lodged.

DWI informed the court that he has sub-divided the property and has gazetted it for change of user. It was the testimony of DW1 that he has sold some of the sub-divided plots and further, that he relies on the plots to educate his children and live on. According to DW1, 1 acre is about Kshs 7 million and he urged the court to dismiss the suit stating that it was not his fault that the deed plan was delayed but the executors' fault. DW1 contended that he could pay back the deposit to the Plaintiff.

Upon cross-examination by the Plaintiff's Counsel, DW1 stated that he signed the agreement between him and the Plaintiff and admitted to having never written a letter rescinding the contract. This witness stated that he was not bound by the contract since 90 days were over and that on 19th September 2006, his advocate wrote to the Plaintiff requesting her to collect her deposit.

DW1 confirmed that the contract did not stipulate the term of payment and acknowledged having received a payment of Kshs 500,000/=. According to this witness, the balance was to be paid after the title documents were ready and further, that the Plaintiff knew the land was to be sub-divided. DW1 alleged to have spoken to the Plaintiff on phone and stated that the Plaintiff was to give him money for sub-division, although the same is not in the agreement.

DW1 absolved the Plaintiff from any delay in the sub-division and instead attributed the same to the executors of the will. He contended that since 7 years had lapsed since the contract was entered into, the

contract was not binding and therefore that the Plaintiff was at liberty to collect her money. DW1 reiterated that his letter asking the Plaintiff for money voided the agreement after 90 days had lapsed. While stating that he did not enrich himself with the Plaintiff's Kshs 500,000/-, DW1 admitted that he had not made any attempt to repay the Plaintiff her money. When referred to the witness statement filed in court, DW1 denied signing the said witness statement and denied that it was his statement.

DW 1 stated in re-examination that the agreement was never completed because there were many obstacles. He averred that he was willing to refund the deposit if required to do so. He produced his List and Bundle of Documents dated and filed on 5th July 2012 as Defence Exhibit 1, and his Further List and Bundle of Document dated and filed on 21st May 2013 as Defence Exhibit 2 .

The parties were directed to file submissions ,and the Plaintiff's advocate in submissions dated 11th June 2013 reiterated the evidence adduced at the hearing and submitted that Defendant having denied making, signing or filing any witness statement while under oath invalidated his testimony and his defence. Counsel relied on the provisions of Order 7 Rule 5(c) of the Civil Procedure Rules which provides that a defence shall be accompanied by a witness statement by the witness and submitted that lack of one rendered the defence invalid and *void ab initio*. Counsel urged the court to strike the defence off the record as well as the testimony of the Defendant and to treat the suit as undefended and proceed to grant the orders sought in the Plaint.

On the issue of general damages, it was submitted for the Plaintiff that the land value has appreciated to Kshs 7 million per acre, by the Defendant's own admission, and the Plaintiff's counsel urged the court to consider the value and grant general damages at Kshs.10 million. Lastly, the counsel submitted that the Defendant's proposal to refund the deposit paid was not provided anywhere in the contract between the parties, and was therefore not tenable.

The Defendant's counsel in submissions dated 11th June 2013 submitted that the Plaintiff had not shown a *prima facie* case with any chances of success as laid down in the case of **Gielia -vs- Cassman Brown (1953) EA.** Counsel submitted that through a letter dated 19th September, 2006 the Defendant's advocates informed the Plaintiff that the deed plans were ready and instructed the Plaintiff to pay the balance of Kshs.2,200,000/= to finalize the sale as per the agreement. Counsel submitted that the letter signified the parties intention to complete the transaction and that the said letter was not responded to by the Plaintiff.

While submitting that the Plaintiff had failed to illustrate what loss she would suffer if the suit property was not transferred to her, the Defendant stated that he would suffer loss having informed the Plaintiff on 19th September, 2006 that the deed plans were ready. Counsel for the Defendant contended that value of the suit property has appreciated, and were the Defendant to be ordered to transfer the 3 acres to the Plaintiff at the amount of Kshs.2,700,000/=, he would suffer irreparable loss and damage being a retiree with no other source of income.

It was further submitted for the Defendant that the remedy of specific performance was not available for the Plaintiff owing to her indolence having waited for over 5 years to challenge her rights in the sale agreement. Counsel submitted that the remedy of specific performance is discretionary, and the Plaintiff had approached the court with unclean hands having failed to respond to the letter of 19th September 2006. Lastly, it was submitted that specific performance is not available where the Plaintiff seeks the remedy of general damages and further, that the Plaintiff had failed to demonstrate that general damages would be an inadequate remedy.

Issues for determination.

I have carefully considered the pleadings and evidence by the parties herein. The issues for determination are as follows:

1. Whether the rejection of a witness statement by a witness during the hearing of a suit invalidates the testimony and case of that witness.

2. Whether the sale agreement between the Plaintiff and Defendant was rescinded and/or repudiated.
3. Whether the Plaintiff is entitled to remedies sought.
4. Which party is to bear the costs of the suit.

a. **Whether the rejection of a witness statement by a witness during the hearing of a suit invalidates the testimony and case of that witness.**

The DW1 when giving evidence on 4th February 201 3 stated that he had made a statement dated 5th July 2013, which statement was admitted by the court as his evidence-in-chief subject to cross-examination. Throughout the evidence in chief and cross-examination DW1 was referred to the said statement and answered questions arising therefrom, but at the close of cross-examination on 23rd May 2013 the witness denied signing the said witness statement and disowned it as his statement. The Plaintiff's counsel has argued that the effect of this renunciation of the witness statement under the provisions of Order 7 Rule 5(c) of the Civil Procedure Rules renders the Defendant's defence invalid and *void ab initio*.

Order 7 Rule 5 of the Civil Procedure Rules provides as follows:

"The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

(a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;

(b) a list of witnesses to be called at the trial;

(c) written statements signed by the witnesses except expert witnesses; and

(d) copies of documents to be relied on at the trial.

Provided that statements under sub-rule (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11."

Order 3 Rule 2 also require that similar documents accompany a plaint or other document instituting a suit in court. The main purpose of exchange of witness statements prior to trial is to give advance notice of the other party's case so that parties can prepare adequately and expedite the hearing of the suit. After DW1 stated that the witness statement is his and allowed the said statement to be admitted as his evidence-in-chief without any objection, he led the Plaintiff to organise her case in light of the said statement. The withdrawal of the said statement at the last minute will therefore obviously prejudice the Plaintiff's case.

While it is important that a witness statement needs to be made and verified to be true by a witness, in the circumstances of this case the Court will draw adverse inferences from the DW1's actions probating and reprobating on its witness statement, as it implies that the witness is not being truthful. The court will therefore exercise its discretion in favour of the Plaintiff and apply the appropriate sanction against the Defendant herein arising from the conduct of DW1. In any event the said evidence has no probative value as it has been expressly denied by the Defendant's only witness. I accordingly hereby exclude all the evidence that was given by DW1 on the basis of the witness statement dated and signed on 5th July 2012 and filed on the same date. I would also like to take this opportunity to warn witnesses that circumstances as have arisen in this suit may expose them to proceedings for contempt of court.

I will now proceed to determine the remaining issues on the basis of the evidence tendered in court by the Plaintiff.

b. **Whether the sale agreement between the Plaintiff and Defendant was rescinded and/or repudiated.**

I have perused the sale agreement entered into between the Plaintiff and Defendant dated 22nd June 2013

and produced as the Plaintiff Exhibit 1. The said agreement did not contain any term on rescission, repudiation and/or termination of the contract. The sale agreement was made subject to the Law Society sale agreement format of 1996 which I presume are the Law Society Conditions of Sale of 1996 Edition. He Plaintiff did not bring evidence of the said Law Society agreement format nor of the conditions therein as to rescission or termination.

I have also perused the letter addressed to the Plaintiff dated 19th September 2006 from Chokaa & Company Advocates which was demanding the balance of the purchase price in 3 months which was in the bundle of documents produced as the Plaintiff's Exhibit 2 The letter stated a follows:

"… REF: JOHN MAINGEY

AGREEMENT FOR SALE LR 1338/4/R

Further to our letter dated 1st September 2006, please find enclosed herein a copy of the deed plans awaiting collection of title deeds.

Please kindly but urgently let us have the outstanding balance of Ksh 2.2. million to finalize the sale as per the agreement.

Kindly expedite…."

The term of the agreement on payment of the balance of the purchase price stated that "***it has been agreed that the purchaser shall pay the balance within 3 month after confirmation from the vendor that the title document is ready".***The question to be answered is whether by forwarding the deed plans the vendor had thereby fulfilled his obligations as to provisions of the title documents. The Land Registration Act at section 26 provides as follows with regard to a certificate of title:

> **"(1) The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**
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> **(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**
>
> **(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."**

The repealed Registration of Titles Act also had similar provisions under this regard under section 22 and 23 as did section 32 of the repealed Registered Land Act .The common thread in all these sections is that a document of title to land is issued by the Registrar of Land in a prescribed form. The preparation and approval of deed plans are but part of the process in the issue of a title and cannot be taken to be the title to land. It is thus my finding that the Vendor had not completed his part of the agreement to be entitled to payment of the purchase price, and that failure to pay such balance on the part of the Plaintiff as demanded did not amount to a breach of the sale agreement.

On the other hand, the Plaintiff did not brought any evidence as to the time of completion of the agreement on the part of the Defendant. In addition, the Plaintiff produced correspondence between the Defendant and the Town Clerk, Mavoko Municipal Council and between the said Town clerk and the Director of Surveys dated 31st July 2006 and 9th August 2006 respectively in her Exhibit 2. The said correspondence was on cancellation of the sub-division of the suit property. The Plaintiff had averred in her Plaint that this cancellation was indicative of a breach of the agreement by the Defendant.

However, a perusal of the said correspondence clearly indicates that the said cancellation arose from a dispute between the Defendant and his family members on the acreage of the said sub-divisions. In any event the deed plans were later issued according to the letter dated 19th September 2006 from the Defendant's Advocate. This court cannot therefore make a finding that there was a valid rescission or repudiation of the sale agreement on the part of either the Plaintiff or the Defendant.

(**c) Whether the Plaintiff is entitled to remedies sought**.

The Plaintiff has sought a permanent injunction against the Defendant restraining him from dealing with the suit property, specific performance compelling the Defendant to complete the sale agreement dated 22nd June 2006 and general damages for breach of contract.

On the remedy for a permanent injunction the Plaintiff has shown a *prima facie* case in terms of the agreement entered into with the Defendant for the purchase of the suit property. The question to be answered is whether the Plaintiff will suffer irreparable damage if the injunction is not granted, and whether she can be adequately compensated by the award of damages. Adequacy of damages is also a condition that applies to the remedy of specific performance, and to a large extent the remedy sought of a permanent injunction herein is as an aid to the orders of specific performance sought. The issue of the availability of the two remedies will therefore be considered together.

While it is normally the position in law that the purchaser of land cannot, on the vendors' breach obtain a satisfactory substitute and specific performance will normally be available to such a purchaser, in this particular case there are two distinguishing factors that may not make an order of specific performance appropriate. The first is that the Plaintiff has been guilty of delay in bringing this suit. The facts giving rise to this cause of action arose in 2006, yet the Plaintiff did not file suit until 24th May 2012, almost six years later. Specific performance and injunctions being equitable remedies are subject to the doctrine of laches, and the Plaintiff brought no evidence of any actions she undertook to seek relief in the said six years, or of the family disputes involving the Defendant that she claimed prevented her from taking action.

Secondly and more significantly, a key requirement for specific performance to issue is that the terms of the contract sought to be enforced must be certain and precise so as to be capable of exact performance. This is stated in **Halsbury's Law of England Volume 44 (1), 4th Edition (Re-issue)** at paragraph 840 as follows:

" Where it is sought to enforce specific performance of a contract, the court must be satisfied (1) that there is a concluded contract which would be binding at law if all proper formalities had been observed and in particular that the parties have agreed, expressly or impliedly, on all the essential terms of the contract, and (2) that the terms are sufficiently certain and precise that the court can order and supervise the exact performance of the contract."

One of the grounds therefore for refusing specific performance therefore is where there is uncertainty as to the subject matter of the contract entered into by parties. This may arise as in his case where the subject matter was not finally determined at the date of the sale agreement, but was left to be determined thereafter. The sale agreement dated 22nd June 2006 between the Plaintiff and Defendant described the property to be bought as follows:

"The property to be bought is 3 acres of the vendor's 18 acre share of all that parcel of land known as L.R. No 1338/4/R ."

The Plaintiff did not bring any evidence how the 3 acres were to be ascertained or identified for purposes of enforcement of the contract, and the remedy of specific performance would therefore not be appropriate.

The remedy of the permanent injunction sought is also not appropriate for this reason, as the property on

which it would operate is not identifiable.

On the remedy of general damages for breach of contract, it has been explained in the foregoing that the Plaintiff has not proved beyond a balance of probability that the Defendant has been in breach of the sale agreement, and that there has thus been an effective repudiation of the sale agreement on his part. This remedy is therefore not available to the Plaintiff

The only remedy available to the Plaintiffs in the circumstances is the refund of the money paid to the Defendant as purchase price. This court therefore enters judgment for the Plaintiff to the extent that it is hereby ordered that the Defendant refunds to the Plaintiff Kshs 500,000/= together with interest thereon at court rates with effect from 22nd June 2006, within ninety (90) days of service by the Plaintiffs on the Defendant of this judgment. Execution shall issue in default, and interest shall accrue until payment in full.

Each party shall bear their costs of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ____1st____ day of ____October_____, 2013.

P. NYAMWEYA

JUDGE