



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO 588 OF 2017

NANCY WANJA WARUHIU(*Suing as the legal representative*

of the Estate of NJOROGI KAGUATHI(Deceased).....**PLAINTIFF**

VERSUS

THE TRUSTEES OF ORTHODOX CHURCH KARURI.....**DEFENDANT**

JUDGMENT

By Plaintiff dated **31st May 2017**, the Plaintiff sought Judgment against the Defendant for the following orders:-

- a) A permanent injunction (pending the hearing and determination of this suit a temporary injunction) restraining the Defendant either by itself, servants or agents from trespassing, interfering, alienating, disposing, construction and or dealing in any other way whatsoever with property known as Kiambaa/Karuri/ T.137.***
- b) A declaration that the Plaintiff is the rightful and legal owner of all that parcel of land known as Kiambaa/ Karuri/ T.137.***
- c) A declaration that the Defendant is in breach of sale agreement dated 12th December, 2012 for sale of all that parcel of land known as Kiambaa/Karuri/T.137, as illegal and hence null and void ab initio.***
- d) A declaration that the sale of a portion measuring 33.3 by 100” from all that parcel of land known as Kiambaa/ Karuri/T.137, as illegal and hence null and void ab initio.***
- e) General Damages for breach of agreement.***
- f) Costs and Interests of this suit.***

The Plaintiff averred that she is the bonafide/beneficial/legal owner of the suit property. That on **14th December 2012**, she entered into a sale agreement with the Defendant for sale of a portion of land measuring **33.3 by 100”**, to be excised from the suit property for consideration of **Kshs. 1,150,000/=**. That the Defendant paid **Kshs.300,000/=** only upon execution of the sale agreement and a further **Kshs. 200,000/=** only on **13th February 2013**.

That in breach and violation of the said sale agreement, the Defendant refused and or neglected to pay the balance of the purchase price, despite several oral demands from the Plaintiff. The Plaintiff further contended that the Defendant lodged a **restriction**, against her interest over the suit property, without any colour of right. It was her contention that in its endeavour to illegally amend the terms of the sale agreement, the Defendant wrote to the Plaintiff on **9th April, 2014**, alleging that the Plaintiff was in breach of terms of the sale agreement with malice aforethought and without any justification whatsoever.

Further that the Defendant falsely claimed that the Plaintiff was paid a sum of **Kshs. 500,000/=** only at the time of execution and a further sum of **Kshs. 200,000/=** as a second instalment to make a total of **Kshs. 700,000/=**. That the Defendant further claimed that failure to complete the sale was due to the fact that the Plaintiff had not subdivided the suit property to alienate the subject portion, despite the fact that the sale agreement did not stipulate the issue of subdivision and or excision of the subject plot as condition precedent to completion of payment of the balance of the purchase price.

That the plaintiff through her Advocates sought to have the matter amicably settled between the parties to no avail, as the Defendant set down unreasonable conditions. It was the Plaintiff's contention that the Defendant's actions amounted to revocation of the sale agreement dated **12th December 2012**, and that the Plaintiff equally revoked the agreement due to frustrations from the Defendant.

The suit is contested and the Defendant filed a Defence dated **11th September 2017**, and denied all the allegations in the Plaintiff. It averred that pursuant to the agreement entered between the parties, the Plaintiff was required to pursue the **Succession Cause** to its logical conclusion to enable her transact on the suit property. The Defendant contended that upon receipt of the deposit amount, the Plaintiff became dodgy with it and showed reluctance to proceed with the transaction as agreed, necessitating the Defendant to withhold any further payments toward the purchase price. That consent was obtained from the **Land Control Board** pursuant to the agreement, but the Plaintiff has been reluctant to complete the transaction.

It was the Defendant's contention that it is willing and ready to pay off the balance of the purchase price to the Plaintiff on condition that she provides the completion documents to enable the registration of the sold portion to their name. That the Defendant feared the Plaintiff would offer the purchased property to another buyer and thus they placed a caution on the suit property as a **precaution** measure as they awaited the Plaintiff to avail the completion documents. The Defendant further contended that they made legitimate efforts to have the transaction completed, despite the fact that the stipulated period of the contract had expired. However, it was aware that the delay was only attributed to the Plaintiff who became reluctant to complete the transaction once she received the initial deposit of the purchase price. That the final payments on the transaction of this nature can only take place once the completion documents have been availed to the purchasers. That the Defendant would not have been naïve to pay all the amounts without having received all the documents

Further that the efforts to have an amicable solution to the issues were done on a without prejudice basis and cannot be used against the Defendant to unilaterally revoke the agreement.

The Plaintiff filed a reply to Defence dated **12th October 2017**, and reiterated the contents of the Plaintiff. It was the Plaintiff's contention that at the time of negotiations and the agreement for sale, she had pursued the **Succession cause** to its logical conclusion, letters of Administration were duly confirmed, and a certificate issued on **24th October 2012**. That the Defendant's averment that it was ready to clear the balance is absurd and that the value of the suit property has significantly increased over the 5 years and that the transaction stands repudiated/revoked.

The matter proceeded by way of **viva voce** evidence wherein the Plaintiff testified for herself and the Defendant called one witness.

PLAINTIFF'S CASE

PW1 Nancy Wanja Waruhiu adopted her witness statement dated **31st May 2016** as her evidence. She further produced the list of documents as Exhibits in Court. She produced the Confirmation of Grant as Exhibit 1, Sale agreement dated **14th December 2012**, as Exhibit 2. Correspondences between the Advocates as Exhibit 3.

She further testified that she went to the bank and found that the Defendant had deposited **Kshs. 300,000/=** and **Kshs.200,000/=** being a total of **Kshs. 500,000/=**. However, the purchase price was **Kshs. 1,150,000/=**, and the purchase price was to be deposited in two instalments. She produced the deposit receipts as Exhibit 4 and testified that the Defendants have placed a caution on the suit property and have refused to remove it. It was her testimony that the Defendants breached the sale agreement.

She acknowledged knowing what the sale agreement was about and that it did not indicate the date the money was to be paid and neither was there a completion date given. She had two acknowledgments; the first was for **Kshs. 300,000/=** and the second was for **Kshs. 200,000/=**. The balance was **Kshs.650,000/=**. That her obligations in the agreement were not spelt out and she was to transfer the suit property before receiving the final balance. That the land was her grandfather's and it was to be shared amongst the three of them. However, the title was not in her name.

That she went to the **Land Registrar, Kiambu** and paid some money and that the said **Land Registrar** told her that she needed to be paid the full purchase price before the transfer. That the land has not been subdivided but there has been a consent dated **2nd May 2013**, to subdivide the said land.

Further that the sale agreement did not have a default clause and the Defendant has not called her for the balance of the purchase price. However, they tried to reach out to her after filing of the suit. She testified that she did not wish to proceed with the transaction and she was ready to refund the purchase price if the Court orders. That she tried to refund the purchase price, but the Defendant declined to accept it. That instead of paying the money, the Defendant placed a caution on the suit property.

DEFENCE CASE

DW1 Florence Wanjiku Rubia the treasurer of the Defendant stated that she gave out money over the purchase price of the suit property. She adopted her witness statement as her evidence in Court. She also produced the Defendant's list of documents as Exhibits 1 to 3. She denied that the Defendant breached the agreement. It was her testimony that the Defendant paid for the consent and that the vendor had not done anything to transfer the suit property. That the Defendant cannot pay the balance before the transfer is signed.

Further that she has been the treasurer since **2005** and the Defendant purchases plots for building of Churches and they normally pay by depositing the money in the account and not through Mpesa. That though the Defendant tried to resolve the matter with the Plaintiff, she did not transfer the land to them. That when they purchased the land, they knew there was no title and that the Plaintiff only had a **Confirmed grant**, and she was to share the land with her brothers. That the Plaintiff had not refunded the deposit of the Purchase Price and they had obtained the **Land Control Board's Consent**. She acknowledged that the Plaintiff can refund the deposit of the purchase price together with interest. However she denied that the Defendant contributed to the Plaintiff's failure to transfer the land to them.

That the Defendant has paid **Kshs. 500,000/=** and that there was a balance of **Kshs.650,000/=** and the defendant was ready to pay. However, the Plaintiff has not performed her part of the bargain and has stayed with their money for over 5 years. She further testified that

the caution was placed by the church. That the money paid via Mpesa was also counted as part of the purchase price. Further that no one has complained that the Plaintiff was not the owner of the suit property and that the church's interest is to have the land and not the money.

The Court directed the parties to file written submissions and the same were filed. The Court has carefully read and considered the said written submissions together with the pleadings, the evidence adduced and the testimony of the parties and the Court renders itself as follows:-

It is not in doubt that the parties entered into a written agreement dated **14th December 2012**, for the sale of 1/3 portion of the Plaintiff's share in the Estate of the Late **Njoroge Kaguatha**. It further not in doubt that there are two agreements signed by the parties; one is the agreement dated **14th December 2012**, in which the Plaintiff acknowledges having received **Kshs. 300,000/=** which is part of the purchase price which was **Kshs. 1,150,000/=**. There is a further agreement dated **13th February 2013**, in which the Plaintiff further acknowledged that she had received **Kshs. 200,000/=** and the parties further agreed that the balance of the purchase price which was **Kshs. 650,000/=** was payable by **August 2013**.

While the Plaintiff contends that the Agreement provided that the balance of the purchase price was to be **August 2013**, the Defendant failed to meet its end of the bargain and therefore are in breach of the Contract. It is the Defendant's submissions that the balance of the purchase price was payable by **August 2013**, subject to the Plaintiff availing the completion documents. It was further submitted that the Defendant was in possession of the suit property and used the land for some time but the Plaintiff turned against them and filed the instant claim.

The issues for determination are;

- 1. Whether the Parties entered into a valid sale agreement**
- 2. Whether there was breach of the terms of the sale agreement by any party**
- 3. Whether the Plaintiff is entitled to the orders sought**
- 4. Who should bear the costs of the suit.**

1. Whether the Parties entered into a valid sale agreement

The Court has looked at the sale agreements between the parties It is not in doubt that the same are in writing and signed by the parties. The sale agreement thus meets the requirements of **Section 3(3) of Contract Act** which states as follows:-

3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—

(a) the contract upon which the suit is founded—

(i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

Further the agreements for sale contain the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreements confirms that the same are valid sale agreements which are enforceable by the parties. See the case of **Nelson Kivuvani...Vs...Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, where the Court held that:-

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

2. Whether there was breach of the terms of the sale agreement by any party

While it is the Plaintiff's contention that the Defendant is in breach of the contract as it failed to pay the requisite balance of the purchase price on time, it is the Defendants submission that it cannot be said that the Plaintiff was to receive all the purchase price without having put into place the process of subdivision and registration of the title to her name for onward transfer to the Defendant and that the consent obtained on **5th February 2013**, was meant to facilitate the same .

It is the Defendants further submission that in every land transaction, there are express and implied obligations for each party for a successful transaction. It is thus the Defendant's contention that there was an implied term that the Plaintiff would subdivide the land, and transfer to her

name before onward transmission. It is however the Plaintiff's contention that this was not a term of the sale agreement and the Defendant cannot bring in new terms.

It is not in doubt that this Court cannot imply any term in the said contract unless it was intended. See the case of Lulume...Vs...Coffee Marketing Board (1970)EA 155, where the Court held that:-

“No term should be implied in a contract unless it was intended”.

In the case of Bid Insurance Brokers Limited...Vs...British United Provident Fund [2016] eKLR the Court held that;

“According to Chitty on Contracts Vol. I (General Principles), 2009 Edition paragraph 13-001, page 773,

“...express terms are those which are actually recorded in a written contract or openly expressed at the time the contract is made.”

Again Chitty on Contracts (supra), comes handy.

“The implication of a term is a matter for the court and whether or not a term is implied is usually said to depend upon the intention of the parties as collected from the words of the agreement and the surrounding circumstances.”

17. The “intention of the parties” like the spirit of the Constitution or Statute, must be found within the words of the Constitution or Statute. Chitty on Contracts, paragraph 13004 says –

“In many cases, however, one or the other of the parties will seek to imply a term from the wording of a particular contract and the facts and circumstances surrounding it. The court will be prepared to imply a term if there arises from the language of the contract itself, and the circumstances under which it is entered into, an inference that the parties must have intended the stipulation in question. An implication of this nature, may be made in two situations –

First where it is necessary to give business efficacy to the contract, and secondly, where the term implied represents the obvious, but unexpressed, intention of the parties.(emphasis mine) These two criteria often overlap and in many cases, have been applied cumulatively, although it is submitted that they are, in fact, alternative grounds. Both however depend on the presumed intention of the parties.”

From the above, is the Court satisfied that there was an implied term of the Contract that the Plaintiff would deliver the completion documents and that the Plaintiff would carry out the subdivision of the suit property?

The Court has carefully gone through the sale agreements by the parties. It is not in doubt that it was an express term of the agreement that the balance of the purchase price would be paid by **13th August 2013**. The Court is not satisfied that it was an implied term of agreement that the Plaintiff would subdivide the suit property, transfer it in her name and then transfer it to the Defendant. This is so because the agreement is titled **“Sale of 1/3 share of Plot Agreement Plot Kiambaa/Karuri/ T.137.”** In the agreement, the Plaintiff goes on to state that she had sold her share of the property. Therefore, the Court's finds that there was no implication that the Plaintiff would first subdivide the land then sell as she was selling her share.

Further the Defendant has submitted that there was an implication that the Plaintiff first needed to provide the completion documents before the Defendant could pay the balance of purchase price. While it is obvious that the Plaintiff needed to provide the Defendant with the completion documents, it is not obvious in the Court's considered view that the completion documents needed to be provided first before the payment of the purchase price. There was an express term of agreement that the balance of the purchase price was to be paid by a certain time. The Defendant failed to fulfil its obligations even after several reminders by the Plaintiff and the Court finds that the Defendant were in breach of the agreement as parties are bound by their terms of agreement. See the case of National Bank of Kenya Ltd ...Vs...Pipeplastic Samkolit (K) Ltd & Another, Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503, where the Court held that:-

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

3. Whether the Plaintiff is entitled to the orders sought

The Plaintiff has sought for various orders against the Defendant:- amongst them is a Permanent Injunction and a declaration that she is the rightful owner of the suit property. That the Defendant is in breach of the sale agreement dated **12th December 2012**. This Court has already held that the Defendant is in breach of the Contract making the contract void. Therefore, it follows that the Suit property then reverts to the Plaintiff and the prayers for permanent injunction and declaration that she is the rightful owner are thus merited.

The Plaintiff also sought for the declaration that the sale of the suit property is illegal and hence null and void. The Court finds no merit in the said prayer as the Plaintiff has failed to show the illegality of the Contract. The Plaintiff has further sought for General Damages for breach of Contract. It is not in doubt that the parties are bound by their terms of contract. From the sale agreement provided by the Plaintiff, there is no provisions for damages for breach of Contract. Further the Court notes that while it was not an implied term of the Contract that the Plaintiff would subdivide the suit property, the Plaintiff led the Defendant to think that she was willing to subdivide the suit property and therefore the Court finds and holds that she is not entitled to General damages for breach of Contract.

4. Who should bear the costs of the suit

Section 27 of the Civil Procedure Act gives the Court discretion to grant costs. However, it is trite that costs usually follow the events unless there are special circumstances. In this instant looking at the circumstances of the case, the Court finds that each party should bear its own costs.

Having now carefully read and considered the pleadings by the parties, the evidence adduced and the written submissions, the Court finds and holds that the Plaintiff has proved her case on the required standard of balance of probabilities. Consequently, the court finds the Plaint dated **31st May 2017**, is merited in terms of **prayers a, b and c**.

Further, the Court orders the Plaintiff to refund to the Defendant the purchase price of **Kshs. 500,000/=** forthwith. Failure to do so, the Defendant should recover the said amount as a Civil debt. Each party to bear its own costs.

It is so ordered.

Dated, signed and Delivered at Thika this 19th day of November 2020

L. GACHERU

JUDGE

19/11/2020

Court Assistant - Lucy

ORDER

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15th March 2020**, this **Judgment** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

With Consent of and virtual appearance via video conference – Microsoft Teams Platform

No appearance for the Plaintiff

Mr. Gikaria for the Defendant

L. GACHERU

JUDGE

19/11/2020