



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO 4611 OF 1987

JADIEL GITHINJI.....PLAINTIFF

VERSU

MARGARET NJOKI NJUGUNA & ANOTHERDEFENDANT

JUDGMENT

This is an originating summons taken out by the plaintiff against the defendants seeking three orders viz:

1. That plaintiff be declared the *bona fide* owner of plot No 8570/277 at Kamiti Farmers Company Farm.
2. That the first defendant be ordered to effect specific performance and the transfer of title and ownership of the plot.
3. That in the alternative the defendant do pay damages for breach of contract plus interest thereon.

When the suit came for hearing plaintiff abandoned the first two prayers and pursued the claim for damages.

It emerges from the evidence that first defendant agreed to sell the suit plot which 1/2 acre to the plaintiff by an agreement dated 19.2.87 at a consideration of Shs 29, 000. However there had been a previous oral agreement and by virtue of that agreement plaintiff took possession of the land on 13.5.86 and by 19.2.87 when the agreement was reduced in to writing, plaintiff had already paid Shs 23, 215 in instalments.

Agreement of 19.2.87, plaintiff was to pay the balance of Shs 5,785 not later than August 1987. But plaintiff paid Shs 1000 to the first defendant on 6.9.87 which the first defendant accepted. On 6.6.87 plaintiff paid Shs 500 making the total payment of Shs 24,715/-.

On 17.10.87 first defendant caused a letter of that date to be sent to the plaintiff. It stated among other things that since the plaintiff had failed to pay the balance of the purchase price within 46 days given to him from August 1987 to 17.10.87, first defendant had now sold the plot to somebody else. It called on the plaintiff to collect the part of the purchase price that he had already paid.

The reality is that first defendant sold the plot to one Richard Wangi sometime in 1987 for Shs 40,000, who in turn sold the plot to one Jamlich Kamande who took possession in August 1988. Plaintiff says that he did breach the contract and claims that the first defendant did not demand the balance before he sold the plot to a 3rd party or inform him that one was selling the plot to a third party.

First defendant agrees in her evidence in cross-examination that she received Shs 1000 on 6.9.87. She

states that she received Shs1000 because she was still waiting for the plaintiff to pay. She further agrees that when she received the Shs1000 she did not tell the plaintiff not to pay any more or that she had revoked the contract. Again she concedes that she did not demand the balance from the plaintiff or give him a notice that if money was not paid she would sell to another person. Indeed her letter dated 17.10.87 was not demand or notice to the plaintiff. It merely informed plaintiff that in view of the plaintiff's default she had already sold the plot to somebody else.

Plaintiff was given possession on 13.5.86 and continued possession until he was dispossessed by another purchaser in August, 1988. Plaintiff was paying by instalments until 19.2.87 when an agreement was reached that he should pay the balance of the purchase price not later than August 1987. So, on 19.2.87 time was made of essence to the contract.

But defendant accepted an instalment of Shs 1000 on 6.9.87 after the expiry of the deadline and states that she accepted the money because she was waiting for the plaintiff to pay meaning that she no longer treated time of essence to the contract. By accepting the instalment and failing to demand the payment of the balance within a specified time she convinced the plaintiff that time was not of essence to the contract. In law, she was in the above circumstances required to serve another notice on the plaintiff again making time of essence to the contract. Admittedly she did not and therefore plaintiff was not in breach of the contract. Rather I find that it was the first defendant who was in breach of the contract and that she is liable to pay damages to the plaintiff.

Plaintiff claims the refund of purchase price, which is agreed at Shs 24,215/-. He also claims Shs10, 000 being the value of the crops and costs of the fencing and Shs 6000 which he paid as advocates fees to defend the suit filed against him by the second purchaser. First defendant in her affidavit sworn on 27. 11.90 admits the plaintiff was sued by the second purchaser in RMCC No 5723 of 1988. Plaintiff has not produced receipts to support those claims of consequential loss but it is not disputed that he was in possession of the land for about 2 years. He must have expended money. I would assess his expenditure on the land as Shs 5000 and advocates fees as Shs 3000- total Shs 8000/=

He further claims general damages for the loss of the 1/2- acre piece of land on the basis that the market price is now about 150,000. The normal measure of damages for loss of the land is the difference between the purchase price and the market price at the time of filing the suit or at the time of resale. This suit was filed on 9.11.89. The first defendant resold the plot at Shs 40,000 in October 1987- a month or so before the suit was filed. Consequently the damages that plaintiff is entitled is the difference between the purchase price of Shs 29,000 and the resale price of Shs 40,000- that is Shs 11,000.

Plaintiff is also entitled to refund of the purchase price and as the Shs 24,215 was not deposited in Court, there was no tender made in Court and the sum should carry interest.

The suit against the 2nd defendant was not pursued and indeed no claim against the 2nd defendant was proved. The result is that I enter judgment for the plaintiff against first defendant for Shs 43,215 (800 = 11,000 = 24,215) with interest and costs at the subordinate courts scale.

I dismiss the claim against the second defendant with no orders as to costs.

Dated and delivered at Nairobi this 9th day of July, 1992

E.M GITHINJI

JUDGE