



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 396 OF 2013

**THUO COMMERCIAL AGENCIES LIMITED.....PLAINTIFF
VERSUS**

NICHOLAS MUYA KAMAU..... DEFENDANT

JUDGMENT

The plaintiff brought this suit against the defendant on 22nd March, 2013 seeking the following reliefs:

- a) A declaration that the sale agreement between the plaintiff and the defendant in respect of L.R No. 13201/37 (hereinafter referred to as “the suit property”) is rescinded.
- b) Vacant possession of the suit property.
- c) An account of all rental income received by the defendant from the date of taking over possession of the suit property until delivery of possession to the plaintiff.
- d) An order for payment by the defendant to the plaintiff of all the rental income in respect of the suit property received by the defendant upon taking of accounts.
- e) Costs.
- f) Interest on (d) and (e) above.

In its plaint dated 19th March, 2013, the plaintiff averred that it entered into an undated agreement for sale with the defendant under which it agreed to sell and the defendant agreed to buy the suit property at a consideration of Kshs. 4,800,000/-. The plaintiff averred that it was an express term of the said agreement for sale that the defendant would pay a deposit of Kshs. 2,000,000/- on or before the execution of the said agreement and the balance of the purchase price on completion. The plaintiff averred that the defendant took over possession of the suit property immediately after the execution of the agreement and was deriving income from a commercial building erected thereon. The plaintiff averred that in breach of the said agreement, the defendant paid a total of Kshs. 1,900,000/- on 7th June, 2011 and 9th June, 2011 leaving a balance of Kshs. 100,000/- on account of the deposit. The plaintiff averred that the defendant issued a cheque dated 3rd June, 2011 for Kshs. 100,000/- to the plaintiff which was dishonored and returned unpaid. The plaintiff averred that on 14th November, 2011, the plaintiff paid a further sum of Kshs. 800,000/-.

The plaintiff averred that despite several demands, the defendant failed to pay the balance of the purchase price and to complete the agreement. The plaintiff averred that on 3rd December, 2012, it served upon the defendant a 21 days completion notice demanding the payment of the balance of the purchase price in the sum of Kshs. 2,100,000/-. The plaintiff averred that time was made of the essence in respect of the defendant’s obligations under the said agreement for sale. The plaintiff averred that the balance of the purchase price remained unpaid despite the said completion notice. The plaintiff averred that it was left with no alternative but to rescind the contract between it and the defendant.

The defendant filed a statement of defence on 7th May, 2013 which was amended on 9th June, 2016 to include a counterclaim. The defendant admitted having entered into an agreement for sale with the plaintiff. The defendant denied however that he had refused to pay the balance of the purchase price to the plaintiff. The defendant contended that the balance of the purchase price was payable after the registration of transfer and issuance of a title in respect of the suit property in his favour. The defendant contended that he paid to the plaintiff a deposit of Kshs. 2,000,000/- and a further sum of Kshs, 960,000/-. The defendant averred that he was always ready and willing to pay the balance of the purchase price upon registration of the transfer and issuance of a title in respect of the suit property in his favour.

In his counterclaim, the defendant reiterated the contents of his defence and averred that he had always been ready and willing to complete the agreement for sale with the plaintiff. The defendant averred that it was a term of the said agreement for sale that the balance of the

purchase price would be paid when the title in respect of the suit property was released to him. The defendant averred that despite several demands, the plaintiff had failed to facilitate the transfer of the suit property to his name. The defendant denied that the agreement for sale between him and the plaintiff had been rescinded. The defendant sought the following reliefs against the plaintiff by way of counter-claim:

- a) An order that the plaintiff transfers the suit property and accepts the balance of the purchase price from the defendant.
- b) Costs of the suit and the counterclaim together with interest thereon.

The suit was heard on 16th October, 2017 when the plaintiff and the defendant called one witness each and closed their respective cases. David Ndua Thuo (PW1) gave evidence on behalf of the plaintiff. He adopted his witness statement filed in court on 22nd March, 2013 as part of his evidence in chief and produced the plaintiff's bundle of documents dated 19th March 2013 and supplementary bundle of documents dated 24th March, 2014 as plaintiff's Exh. 1 and Exh. 2 respectively. In his witness statement, PW1 stated that the plaintiff was the owner of the suit property which had a commercial building erected thereon with tenants in occupation. He stated that in the year 2010, the plaintiff entered into an agreement for the sale of the suit property to the defendant at a consideration of Kshs. 4,800,000/-. He stated that it was an express term of the said agreement that the defendant would pay a deposit of Kshs 2,000,000/- on or before the execution of the agreement and that the balance of the purchase price was payable on completion.

PW1 stated that the defendant took possession of the suit property upon execution of the agreement in the year 2010 and made the first payment towards the deposit in June, 2011. He stated that the defendant made payments of Kshs. 500,000/- and Kshs. 1,400,000/- on 7th June, 2011 and 9th June, 2011 respectively. He stated that a cheque for Kshs 100,000/- issued to the plaintiff by the defendant on 3rd June, 2011 was returned unpaid. PW1 stated that the last payment made by the defendant was of Kshs. 800,000/- which was received on 14th November, 2011.

PW1 contended that despite several requests made to the defendant to pay the balance of the purchase price in exchange for the completion documents, the defendant failed, refused and or neglected to do so. He stated that through its advocates, the plaintiff which was ready and willing to complete the agreement sent a letter dated 3rd December, 2012 to the defendant demanding the payment of the balance of the purchase price. He stated that the defendant failed to make the payments as demanded and on 8th February, 2013, the plaintiff rescinded the contract and sought vacant possession of the suit property and an account of the rental income received by the defendant from the property. He averred that the defendant refused to deliver possession of the suit property and was still in occupation.

In cross-examination, PW1 stated that the plaintiff was to be paid Kshs. 2,000,000/- as a deposit and the balance of the purchase price was to be paid after completion and registration of the transfer of the property in favour of the defendant. He stated that the plaintiff was not willing to transfer the suit property to the defendant before receipt of the balance of the purchase price in full. He averred that apart from the deposit, the defendant did not make any further payments. He stated that the plaintiff had not been paid Kshs. 2,960,000/- as alleged by the defendant. He denied that as at 16th March 2012, the defendant had paid more than he was supposed to pay as deposit under the agreement. He averred further that the plaintiff had not processed all the completion documents because it had not been paid the balance of the purchase price. PW1 contended that the defendant was in breach of the agreement for sale and must renegotiate the price of the property which had gone up if he was still interested in purchasing the same. In re-examination, PW1 stated that a cheque for KShs. 100,000/- issued by the defendant towards the payment of the deposit was dishonoured. He reiterated that the plaintiff was always ready and willing to complete the transaction.

The defendant, Nicholas Muya Kamau (DW1) adopted his witness statement filed in court on 9th March, 2017 as part of his evidence in chief. He produced documents attached to his list of documents filed in court on 8th March, 2017 and supplementary list of documents filed on 24th April, 2017 as defendant's Exh. 1 and Exh. 2 respectively. In his witness statement, DW1 averred that he entered into an agreement with the plaintiff for the purchase of the suit property together with the buildings and other developments thereon at a consideration of Kshs 4,800,000/-. He stated that he paid a deposit of Kshs 2,000,000/- and a further sum of Kshs. 960,000/- to the plaintiff after which he took possession of the suit property.

DW1 averred that at the time he entered into the said agreement with the plaintiff, the buildings on the suit property were in a dilapidated and inhabitable condition and that he spent about Kshs. 7,000,000/- in renovating and rehabilitating the property. DW1 averred that it was an express term of the agreement for sale under clauses 3.2, 4.1 and 5.1 that the balance of the purchase was to be paid after the transfer and issuance of the title in respect of the suit property in his favour. He denied that he was in breach of the agreement for sale as alleged by the plaintiff. He stated that the plaintiff had failed to release to him the title documents despite several requests. He averred that to his knowledge, the sale agreement was never rescinded and was in force.

DW1 averred that he was ready and willing to perform and complete his obligations under the said agreement by paying the balance of the purchase price in the sum of Kshs 1,840,000/- upon the plaintiff transferring and/or facilitating the transfer of the suit property into his name in accordance with clause 4.1 of the agreement. He urged the court to dismiss the plaintiff's suit with costs and enter judgment in his favour as prayed in the counterclaim.

In cross-examination, DW1 stated that he did not pay the deposit of Kshs. 2,000,000/- at once. He averred that he paid Kshs 800,000/- and 1,400,000/- on the same date. He stated that the cheque for Kshs. 100,000/- that was dishonored was not intended to be part of the deposit. He contended that he stopped the payment of the cheque. DW1 stated that he paid to the plaintiff Kshs. 2,960,000/- which included Kshs 200,000/- paid to an agent at the plaintiff's instance and Kshs 60,000/- paid for electricity bill on behalf of the plaintiff.

In his further testimony, DW1 told the court that he spent about Kshs. 7,000,000/- to renovate and rehabilitate the suit property. DW1 stated that the photographs and the valuation report that he produced in evidence showed that the value of the suit property had increased. DW1 admitted that his advocates had erred in their letter dated 23rd April, 2012 in which they claimed that he had paid to the plaintiff a total sum of Kshs. 3,400,000/-.

In re-examination, DW1 stated that a deposit in the sum of Kshs. 2,200,000/- was paid to the plaintiff on the same day. He reiterated that he paid the agreed deposit in full and made a further payment of Kshs. 500,000/- on 29th May 2011. He contended that he paid to the plaintiff a total sum of Kshs 2,700,000/- which was more than the deposit he was supposed to pay. DW1 reiterated that he was to pay the balance of the purchase price in exchange with the title for the suit property in his name. He stated that it was the plaintiff who had frustrated the agreement between them.

After the close of evidence, the parties made closing submissions in writing. The plaintiff filed its submissions on 22nd January, 2018 while the defendant filed his submissions on 24th September, 2018. The plaintiff submitted that the payment of Kshs. 1,900,000/- by the defendant by way of installments on diverse dates was proof that the defendant did not pay the sum of Kshs. 2,000,000/- that was required as a deposit under clause 3.1 of the agreement for sale. The plaintiff submitted that the Law Society Conditions of Sale (1989 Edition) (hereinafter referred to as "LSK Conditions for Sale") were applicable to the agreement between the parties and that failure to pay the full deposit at the time of executing the agreement for sale constituted a breach of the agreement which entitled the plaintiff to exercise the rights available to it under clause 3.3 of the agreement for sale and condition 3 of the LSK conditions of Sale.

The plaintiff cited Chitty on Contracts, General Principles (28th Edition, vol 1) para 25-001 and 25-038 and submitted that the defendant's breach of the agreement for sale entitled it to treat itself as discharged from further liability under the contract. The plaintiff submitted that following the defendant's breach of contract as aforesaid, it served the defendant with notices rescinding the sale agreement. In support of its submission on rescission of contract, the plaintiff cited Halsbury's Laws of England (4th Edition Vol. 42) paragraph 242 and Karanja Mbugua & another v Marybin Holding Co. Ltd [2014]eKLR. The plaintiff submitted that if a contract for sale contains a condition entitling the vendor to rescind the contract on the happening of certain events and those events happen, the vendor may proceed with rescission. The plaintiff also referred the court to the case of Sisto Wambugu v Kamau Njuguna[1983]eKLR in which it was held that the vendor's right to rescind an agreement for sale for nonpayment on the appointed time is only exercisable where time is of essence or where the innocent party has issued a notice to the defaulting party making time of essence. The plaintiff referred to condition 6.3 of LSK Conditions of Sale and the case of Kasturi Ltd. v Nyeri wholesalers Ltd. [2014] eKLR and submitted that upon rescission, the defendant had no basis for continuing to occupy the suit property. The plaintiff submitted further that where rescission follows a repudiatory breach by the purchaser, the vendor may recover damages including rent where the purchaser had been in possession.

On the defendant's counter-claim for specific performance, the plaintiff cited Snell's Equity, 31st edition (Thomson Sweet & Maxwell) 2005 at 352 and submitted that specific performance is a discretionary remedy granted only where damages cannot afford a complete remedy. The plaintiff contended that the defendant had not shown that the property was unique and that damages was not an adequate remedy. The plaintiff submitted that the expenses incurred by the defendant in renovating the suit property could be quantified and paid out in damages. The plaintiff argued further that there was no valid agreement upon which specific performance could be ordered since the agreement between the parties stood rescinded. The plaintiff argued further that it was the defendant's responsibility under clause 6(2)(a) of the LSK Conditions of Sale to keep the property in good repair and condition at all times and that the sum of Kshs. 7,000,000/- allegedly spent towards the renovation of the suit property was not proved.

In his submission in reply, the defendant reiterated that under clause 3.2 of the agreement for sale, he was required to pay the balance of the purchase price after the transfer and registration of the suit property in his name. The defendant submitted that as at 10th November, 2011, he had paid a total of Kshs. 2,700,000/- to the plaintiff which was over and above the mandatory deposit required under clause 3.1 of the agreement for sale. The defendant submitted that the plaintiff purported to rescind the contract through a letter dated 8th February, 2018 long after he had paid the deposit and requested for the completion documents which were never availed by the plaintiff in contravention of clause 3.2 of the agreement. In support of his submission, the plaintiff referred the court to the case of William Kazungu Karisa v Cosmas Angore Chanzer[2006]eKLR in which it was held that parties must perform their respective obligations under a contract in accordance with the terms thereof.

The defendant submitted that the plaintiff purported to rescind the agreement for sale without giving the defendant any completion notice. The defendant submitted that the purported rescission was null and void and of no effect in law. The defendant submitted further that the plaintiff had not fulfilled its obligations under clause 3.2 of the sale agreement and as such it had no right to rescind the agreement without observing clause 5.1 of the agreement. The defendant cited Halsbury's Laws of England (4th Edition) Vol. 42 paragraph 242 in support of his submission that in the absence of a condition entitling a vendor to rescind a contract for sale of land on the happening of certain events, the vendor may only rescind if the purchaser's conduct is such as to amount to a repudiation and the parties can be restored to their former position. The defendant submitted that in this case, the frustration of the agreement for sale was occasioned by the plaintiff who failed to avail the completion documents.

With regard to his counter-claim, the defendant submitted that having paid the deposit in full as required under the sale agreement, the plaintiff ought to be ordered to transfer the property in his favour against payment of the balance of the purchase price. The defendant submitted that he stood to suffer prejudice if the plaintiff failed to fulfill its obligations under the contract as he had made major improvements on the suit property which he bought in a dilapidated state.

The defendant cited the cases of Sagoo v Dourado[1983] KLR 365 and Cassam v Sachania (1982-1988)1KAR 41 and submitted that there was no express clause in the agreement making time of essence and that the plaintiff was not entitled to rescind the agreement when the deposit had been paid and what was remaining was for it to facilitate completion by availing the necessary completion documents. The defendant submitted further that having fulfilled his part of the contract, time could not be of essence.

The defendant submitted that the plaintiff had failed to prove its case on a balance of probabilities as required. The defendant submitted that there were no circumstances that would make it inequitable to order the plaintiff to complete the contract and that on the contrary, denying the defendant the order sought would give unfair advantage to the plaintiff which had sought to avoid its contractual obligations through false claims. The defendant submitted that he was ready and willing to fulfill his obligations under the agreement for sale between him and

the plaintiff.

I have considered the pleadings, the evidence tendered by the parties in support of their respective claims and the submissions of counsel. The parties did not agree on the issues for determination by the court. From the pleadings, the following in my view are the issues that arise for determination in this suit:

1. Whether it was the plaintiff or the defendant who breached the agreement for sale in respect of the suit property.
2. Whether the plaintiff was entitled to rescind the said agreement for sale.
3. Whether the plaintiff is entitled to the reliefs sought in the plaint.
4. Whether the defendant is entitled to the reliefs sought in the counter-claim.
5. Who is liable for the costs of the suit?

Whether it was the plaintiff or the defendant who breached the agreement for sale in respect of the suit property:

The terms of the agreement for sale that was entered into between the plaintiff and the defendant in respect of the suit property are not in dispute. The agreement provided as follows in material part:

“Deposit

3.1 The purchaser shall on or before the execution of this Agreement render part payment towards the purchase price. That is to say the sum of Kenya Shillings Two Million Only (Ksh.2,000,000/=) to the vendor by way of deposit,....”

3.2 The balance thereon shall be paid after the completion and obtaining the Registration of the Transfer.

3.3 The Deposit shall become refundable forthwith in the event of this contract of sale becoming frustrated. Should the frustration be occasioned by the Purchaser, the said Deposit shall be subject to deduction therefrom, of all sums that may have been expended by the vendor in pursuit of performance of this contract”.

4. Costs

4.1 For the avoidance of doubt, the balance of the Consideration being the sum of Kenya Shillings Two Million Eight Hundred Thousand (Kshs. 2,800,000/=) only shall be paid at completion AT THE SAME TIME AS THE title in favour of the Purchaser is released to the Purchaser.”

5. Completion

5.1 The completion date to be 90 days from the date of this Agreement or the successful Registration of a Transfer in favour of the Purchaser.

8. Law Society’s Conditions of Sale

8.1 The Law Society’s Conditions of Sale 1989 Edition shall apply to this Agreement in so far as the same are not varied by or inconsistent with the terms hereof.

As I have mentioned herein earlier. The agreement for sale between the plaintiff and the defendant was undated. No evidence was led by the parties as to the approximate date when it may have been made in the year 2011. The plaintiff’s contention that the agreement was signed in 2010 is inconsistent with the year given on the face of the agreement which is 2011. It was common ground that the defendant paid to the plaintiff Kshs. 2,700,000/- as follows:

7 th June, 2011-----	Kshs. 500,000/-
9 th June, 2011-----	Kshs. 1,400,000/-
14 th November, 2011-----	<u>Kshs. 800,000/-</u>
Total	<u>Kshs. 2,700,000/-</u>

According to the agreement for sale, the defendant was supposed to pay a deposit of Kshs. 2,000,000/- on or before the date of the execution of the agreement for sale. Since the date when the agreement for sale was entered into by the parties is unknown, it is difficult to determine whether the defendant paid the deposit in accordance with the terms of the agreement for sale or not. The defendant having paid Kshs. 2,700,000/- which was over and above the deposit amount agreed upon, the plaintiff’s contention that the defendant breached the agreement

for sale by failing to pay the deposit of Kshs. 2,000,000/- in accordance with the terms of the said agreement has no basis. Contrary to the submissions by the plaintiff, the burden was upon it to prove that the deposit was not paid in accordance with the terms of the agreement for sale. Even if it is assumed that the defendant did not pay the deposit in accordance with the terms of the agreement, the evidence before the court shows that the plaintiff received the said sum of Kshs. 2,700,000/- from the defendant without any protest and expressed its willingness to complete the agreement on receipt of the balance of the purchase price. The plaintiff must be taken to have waived its rights under the agreement to receive the deposit on or before the date of the execution of the agreement or acquiesced to the defendant's breach of the clause in the contract on the payment of the deposit. It is not open to the plaintiff in the circumstances to seek to enforce its rights under that clause.

I wish to add that under clause 3 of the Law Society Conditions of Sale, the plaintiff had a right to repudiate the agreement for sale for non-payment of the deposit or the dishonor of the cheque for Kshs. 100,000/- that was allegedly paid on account of the deposit. The plaintiff did not exercise this right. The plaintiff's acceptance of further payments from the defendant after the dishonour of the said cheque was a waiver of its right of repudiation under the said clause 3 of the Law Society Conditions of Sale. The plaintiff's advocates' letter dated 16th March, 2012 (see page 15 of PExh.1) through which it purported to exercise its right of repudiation after receipt of a total of Kshs. 2,700,000/- from the defendant was inconsequential.

The plaintiff's case as pleaded in the plaint is that the defendant had breached the agreement for sale by failing to pay the balance of the purchase price in the sum of Kshs. 2,100,000/- and that it was on account of this breach that it rescinded the contract. See paragraphs 12, 13, 14 and 15 of the plaint. I have reproduced at the beginning of this judgment the salient terms of the agreement for sale between the plaintiff and the defendant. There is no doubt upon reading clause 3.2 and 4.1 of the agreement for sale that the balance of the purchase price was payable once the suit property had been transferred to the defendant. The plaintiff's demand for the payment of the balance of the purchase price before the suit property was transferred to the defendant was therefore contrary to the terms of the agreement for sale. The same applies to the plaintiff's failure to release the completion documents to the defendant's advocates until it was paid the balance of the purchase price.

Due to the foregoing, it is my finding that it is the plaintiff who breached the agreement for sale between it and the defendant by refusing to release the completion documents to the defendant after having been paid Kshs. 2,700,000/- which was over and above the deposit amount that was provided for under the agreement for sale.

Whether the plaintiff was entitled to rescind the agreement for sale:

Arising from my finding on the first issue, the defendant was not in breach of the agreement for sale between him and the plaintiff when the plaintiff purported to serve him with the completion notices on 7th November, 2012 and 3rd December, 2012. The sum of Kshs. 2,100,000/- that was demanded from the defendant in the two notices was not due and payable as the suit property had not been transferred to the defendant. The purported rescission of the agreement for sale following the defendant's refusal to comply with the said notices was therefore unlawful.

Whether the plaintiff is entitled to the reliefs sought in the plaint:

The plaintiff has failed to prove its claim against the defendant on a balance of probabilities. The plaintiff is therefore not entitled to any of the reliefs sought in the plaint.

Whether the defendant is entitled to the reliefs sought in the counter-claim:

The defendant has proved on a balance of probabilities that it is entitled to an order for specific performance of the agreement for sale that he entered into with the plaintiff. The defendant has demonstrated that he performed his part of the agreement and that he is ready, able and willing to complete the agreement. No evidence was placed before the court showing that the plaintiff may have any difficulty in transferring the suit property to the defendant. It is my finding that the defendant is entitled to the reliefs sought in the counter-claim.

Who is liable to pay the costs of the suit?

Costs follow the event unless for special reason the court orders otherwise. I am not persuaded that any special reason exists in this case that should warrant a departure from this settled rule on costs. The defendant shall have the costs of the suit and the counter-claim.

Conclusion:

In conclusion, I hereby make the following orders:

1. The plaintiff's suit is dismissed.
2. Judgment is entered for the defendant against the plaintiff on the counter-claim.
3. The plaintiff shall furnish the defendant with the completion documents which shall include a duly executed and registrable instrument of transfer of L.R No.13201/37 in favour of the defendant within thirty (30) days from the date hereof.
4. The defendant shall pay to the plaintiff a sum of Kshs. 2,100,000/- on the date of registration of the transfer in his favour.
5. The defendant shall have the costs of the suit and the counter-claim.

Delivered and Dated at Nairobi this 21st day of March 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Ms. Ongore h/b for Mr. Ochieng for the Plaintiff

N/A for the Defendant

C.Nyokabi-Court Assistant