



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 437 OF 2009**

**CENTAURUS COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**SEUMU LIMITED.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff entered into an agreement of sale dated 4<sup>th</sup> March 2008 with the Defendant in which the Defendant agreed to sell to the Plaintiff the piece of land known as L.R. No. 24394 (“the Suit Property”) at the agreed consideration of Kshs. 12 Million. The Plaintiff paid the Defendant a deposit of Kshs. 1.2 Million on execution of the agreement and was to pay the balance upon completion, which was to be 90 days of the date of the sale agreement or such earlier or later date as the parties would agree in writing.
2. The Plaintiff alleged that on receiving the deposit, the Defendant breached the contract and did not take steps to carry out its obligations under the agreement for sale. The Plaintiff set out the particulars of breach which include the assertion that the Defendant failed to provide a letter of no objection from the Kenya Airports Authority and that the Defendant terminated the contract and allegedly entered into a subsequent agreement with a third entity over the same property. The Plaintiff contended that it had acquired a statutory charge and interest over the Suit Property pursuant to the deposit it paid to the Defendant.
3. In the plaint dated 2/9/2009, the Plaintiff seeks to be allowed to pay the balance of the purchase price of Kshs.10.8 Million and an order of specific performance against the Defendant to compel it to transfer the Suit Property to the Plaintiff. It also seeks special damages to be quantified in lieu of specific performance and an order of injunction to restrain the Defendant from interfering in any manner with the Plaintiff’s rights in the Suit Property as well as costs and interest.
4. The Defendant only filed a Notice of appointment of advocates dated 3/9/2009 but did not file a defence. At the time of filing suit, the Plaintiff filed an application for injunction seeking to restrain the Defendant from interfering with its rights over the Suit Property. The application was opposed by the Defendant through its director’s replying affidavit dated 14/9/2009. The application was dismissed by the court.
5. The Defendant in this matter filed a notice of preliminary objection dated 14/9/2009, which was heard and dismissed by the court. The Plaintiff then filed the application dated 30/9/2010 seeking to amend the plaint. That application was allowed and the Plaintiff joined Shaima Developers Limited to the suit as the 2<sup>nd</sup> Defendant. The Plaintiff filed the application dated 15/5/12 for extension of validity of summons against the 2<sup>nd</sup> Defendant. The application was allowed and the Plaintiff was also granted leave to serve the 2<sup>nd</sup> Defendant by way of substituted service.
6. The suit came up for hearing on 21<sup>st</sup> March 2017 but the Defendant did not appear. The Plaintiff proceeded ex-parte and called its director who testified. Counsel for the Plaintiff withdrew the entire case against the 2<sup>nd</sup> Defendant, abandoned the Amended Plaint dated 5/11/2010 and urged the court to rely on the original plaint dated 2<sup>nd</sup> September 2009.
7. The court delivered an *ex parte* judgment on the matter on 18/5/2017. Dissatisfied with the *ex parte* judgement, the Plaintiff applied to set aside the judgement. The court set aside the *ex parte* judgement on 27/11/2018 after considering the Defendant’s application dated 10/5/2018 and noting that the hearing notice had not been served on the Defendant when the case was heard.
8. The court has considered the plaint and submissions filed. The court has also looked at the sale agreement dated 4/3/2008. The dispute arose between the parties arose when the Plaintiff alleged that one completion document, a letter of no objection from the Kenya Airports Authority was not availed to the Plaintiff to enable it pay the balance of the purchase price. The completion documents are listed in clause 2 of the sale agreement dated 4/3/2008. A letter of no objection was not expressly listed in clause 2 of the sale agreement. Be that as it may, the Plaintiff was not barred from further conducting due diligence on the property.
9. The Plaintiff wrote to Kenya Airports Authority on 12/3/2008 seeking a letter of no objection pertaining to ownership and development of

the suit land. Kenya Airports Authority responded on 14/4/2008 indicating that it was not in a position to give a no objection to the Plaintiff's development. In the court's view, the response from Kenya Airports Authority was only concerned about developments, but did not touch on the issue of ownership of the suit property. The Plaintiff produced a search certificate that shows that at the time the parties entered into the sale agreement date 4<sup>th</sup> March 2008, the Defendant was the registered owner of the suit land.

10. The vendor's advocates' letter 5/5/2008 which forwarded copies of the completion documents and the transfer documents to the purchaser's advocates confirms that this was done on time. However, the purchaser's advocates insisted on a letter of no objection, through their letter dated 6/5/2008. The letter from the Defendant's advocates dated 20/8/2008 addressed to the Plaintiff's advocates stated that the vendor was willing to complete and gave 21 days' completion notice, from 20/8/2008. The purchaser's advocates rejected the vendor's completion notice vide their letter dated 29/8/2008.

11. The vendor's advocates' letter of 9/9/2008 pointed out to the purchaser's advocate that the letter of no objection was outside its purview. The letter asked the purchaser's advocates to complete without the letter of no objection, and if the purchaser was not willing to complete the transaction without the letter then the contract was to be rescinded without apportioning blame to either party. The letter went unanswered until 10/8/2009, almost a year later, when the purchaser's advocates wrote on 10/8/2009 informing the purchaser that they were ready with the balance of the purchase price. The vendor's advocates responded on 24/8/2008 that the transaction was rescinded the moment the Plaintiff failed to adhere to the notice.

12. From the correspondence exchanged between the purchaser's advocates and the vendor's advocates, who are the Plaintiff and Defendant respectively, and which letters were produced as exhibits by the Plaintiff, the court finds that the Defendant was ready and willing to complete the transaction. It is the Plaintiff who insisted on a letter of no objection, which letter pertained to its development of the suit land, but not ownership. The seller admitted it could not obtain the letter and rescinded the agreement after the notice it had given lapsed.

13. The Plaintiff prayed for special damages. The Plaintiff paid the Kshs. 1.2 Million, being 10% of the purchase price to the Defendant. This is the money it seeks. Clause 10.3 of the sale agreement dated provided that in the event of default on the part of the purchaser, the purchaser would forfeit the deposit absolutely and the vendor would retain the 10% deposit in respect of the purchase price being the agreed liquidated damages for the purchaser's breach of the agreement.

14. The Plaintiff's conduct disentitles it from getting the remedy of specific performance. It is not the place of courts to rewrite contracts for parties, as it was held in **Feba Radio (Kenya) Limited t/a Feba Radio v Ikuyu Enterprises Limited [2017] eKLR**, but the court has the power and jurisdiction to infer or interpret the intention of the parties to the agreement.

15. Having failed to prove its case on a balance of probabilities, the Plaintiff's claim is dismissed. Each party will bear its own costs.

Dated and delivered at Nairobi this 20<sup>th</sup> day of March 2019.

**K. BOR**

**JUDGE**

**In the presence of: -**

Mr. Osoro Omwoyo holding brief for Ms. L. Koki for the Plaintiff

Mr. V. Owuor- Court Assistant

No appearance for the Defendant