



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

E.L.C CASE NO. 407 OF 2017 (O.S)

KAFIA MOHAMED MOHAMUD.....APPLICANT

VERSUS

ABDULLAHI YUSSUF HASSAN.....RESPONDENT

JUDGMENT

1. The Applicant entered into an agreement with the Respondent dated 23/1/2016 for the sale of apartment number D4, first floor block D on L.R. No. 1/380 Nairobi (“the Suit Property”) at the agreed purchase price of Kshs. 23,200,000/=. The purchaser, who is the Applicant, was to pay a deposit of USD 120,000 to the vendor on execution of the sale agreement. In the Originating Summons filed in court on 19/6/2017, the Applicant seeks an order to direct the Respondent to hand over vacant possession of the Suit Property to her within 7 days of the date the order is made. She further seeks compensation from the Respondent for the period she has not enjoyed possession of the Suit Property which she now claims based on the monthly rent of Kshs. 110,000/= from 1/5/2016 until vacant possession is handed over to her. She also sought the costs of this suit.

2. The Originating Summons is supported by the Applicant’s affidavit sworn on 15/6/2017 in which she depones that Clause 6 of the sale agreement stipulated that she would get vacant possession on 30/4/2016 after paying the initial deposit, which she paid on 27/1/2016. She made further payments to the Respondent of Kshs. 1 million and 3 million on 22/3/2016 and 6/5/2016 respectively and claims to have paid a further sum of Kshs. 1.2 million in cash. She avers that the Respondent failed to hand over vacant possession of the Suit Property in breach of the sale agreement and that she has been paying rent of Kshs. 110,000/= per month for the rented house that she is living in. She annexed a copy of the sale agreement together with documents showing the remittances made towards the purchase price.

3. The Respondent opposed the suit vide his replying affidavit filed in court on 18/4/2018. He admitted entering into a sale agreement over the Suit Property with the Applicant. He averred that pursuant to Clause 3 (1b) of the sale agreement, the balance of the purchase price of USD 107,843 would be paid before the completion date which was 30/4/2016. He stated that the Applicant failed to pay the full purchase price on the agreed date for completion and that he was kind enough at the time to allow the Applicant to make payment after the completion date.

4. He averred that the Applicant made two more payments on 6/5/2016 but since then has failed to pay the balance of purchase price which had delayed the finalisation of the transaction. He blamed the Applicant for the delay and stated that the Suit Property was wasting away since he vacated the property on 19/12/2016 for the Applicant to take possession upon completion of payment. He stated that he has been living in a rented apartment where he pays Kshs. 90,000/= every month as rent. He asked the court to dismiss the suit.

5. The Applicant swore a further affidavit in which she stated that the Respondent represented to her that she could settle the balance of the purchase price and complete the transaction even after the completion date had passed which position is confirmed by the fact that she paid Kshs. 4.6 million on 6/5/2016. She stated that the Respondent frustrated her efforts in obtaining a bank loan to clear the balance of the purchase price and that he failed to provide the completion documents. She also stated that he refused to allow access to the Suit Property for purposes of valuation of the property for assessment of stamp duty.

6. Parties filed submissions which the court has considered. The Applicant submitted that under Clause 6.1 of the sale agreement, the Respondent was required to hand over vacant possession of the Suit Property on 30/4/2016 after receiving the initial deposit. She submitted that having paid the initial deposit and further payments of Kshs. 5.2 million she is entitled to an order of specific performance and vacant possession of the Suit Property. She maintained that the agreement is still in force since the Respondent has not issued a complete notice to her. She relied on the decision of **Andrew Karimi King’ori v Joseph Waweru Njoroge [2018] eKLR** where the court cited the case of **Gurder Singh Birdi and Marinder Singh Ghatora v Abubakar Mathubuti, Civil Appeal No. 165 of 1996** in which the Court of Appeal stated that a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform and which he ought to have performed at the date of filing suit for the court to grant the equitable relief of specific performance.

7. She also relied on Clause 6.1 of the sale agreement and urged that handing over of possession was dependent on her payment of the initial deposit and not the full purchase price. She claimed that she had a reasonable and legitimate expectation that possession of the Suit Property would be given to her on 30/4/2016 having paid the initial deposit. She submitted that if there was any ambiguity in the interpretation of

Clause 6.1 of the sale agreement on the issue of possession, then it should be interpreted against the Respondent since it is his advocate who drew the sale agreement.

8. She further submitted that the Respondent was aware that she had applied for a loan facility from Gulf African Bank of Kshs. 6.6 million to enable her clear the balance of the purchase price and that the bank had made her an offer vide its letter of 13/9/2016. She urged that the Respondent is estopped from resiling from his word after making her believe that the sale would be concluded when he extended the period for the Applicant to complete the transaction and payment. The Applicant urged that she has always acted in good faith and has already paid 2/3 of the purchase price and was willing to pay the balance of Kshs. 5.4 million which she indicated that she was prepared to deposit in court.

9. The Respondent maintained in its submissions that the completion date was 30/4/2016 and that it is not the place of the court to rewrite the sale agreement. Respondent urged that 30/4/2016 was the date by which the Applicant ought to have paid the full purchase price before taking vacant possession of the apartment. He accused the Applicant of material non-disclosure. Further, the Respondent urged that the Applicant had not issued a completion notice under Condition 4 (7) of the Law Society of Kenya Conditions of Sale to which the sale agreement was subject due to the fact that she was not ready to complete the transaction. The Respondent argued that the Applicant entered into the sale agreement willingly having understood the terms of the agreement and that she had an opportunity to instruct her own lawyer. The Respondent faulted the Applicant for suggesting that she wished to deposit the balance of the purchase price being Kshs. 5.4 million in court and wondered why she does not want to pay the money directly to the Respondent in accordance with the agreement.

10. The issue for determination is whether the court should grant the Plaintiff orders of specific performance and the amount she seeks on account of rent. The agreement for sale stipulated in Clause 1.1 (a) that the completion date meant 30/4/2016. Clause 3 provided for the payment of the purchase price through a deposit of USD 120,000/= on execution of the agreement and the balance of USD 107,843 on or before completion. Clause 4 provided that completion would take place on the completion date and the purchaser was to pay the balance of the purchase price to the vendor's advocates and the vendor's advocates were to release the completion documents to the purchaser's advocates. The completion documents included the original lease for the Suit Property, the transfer of lease executed by the vendor, a duly completed and signed valuation form and consent to transfer and the original rent certificate.

11. Clause 6 which was the subject of the dispute stipulated as follows:-

“the property is sold with vacant possession on completion. However, the vendor shall handed over the vacant possession of the property to the purchaser on 30/4/2016 from which date the purchaser having received an initial deposit from the purchaser”

12. The Respondent submitted that he vacated the Suit Property on 19/12/2016 so that the vendor could take possession upon payment of the balance of the purchase price. He deponed that he has been paying rent of Kshs. 90,000/= for the house he moved into. It would seem that the Applicant was aware of this, it is not clear why she did not pay the balance of the purchase price in December 2016 and take possession; she instead filed this suit in July 2017. The Applicant has failed to prove that she is entitled to the rent she seeks from the Respondent.

13. The court is of the view that the sale agreement must be read as a whole. Clause 6.1 or clause 6 is not drafted in an elaborate legalistic manner. The clause makes reference to possession being handed over on 30/4/2016 which was the completion date for the sale. If this clause of the agreement were interpreted to mean that the purchaser was to have been given vacant possession on 30/4/2016 irrespective of whether or not it had paid the full purchase price in full, then when would the Applicant have been expected to pay the outstanding purchase price?

14. Clauses 1.1 (a), 3.1(b.i) and 4.2 presupposed that the sale would be completed on 30/4/2016 and that by that date the Applicant would have paid the purchase price in full. It is admitted that the purchaser paid part of the purchase price after 30/4/2016. The Applicant indicated in her submissions that she was willing to deposit the balance of Kshs. 5.4 Million in court yet under the agreement she was to have paid the purchase price through the vendor's advocates.

15. From the correspondence exchanged on the Applicant's application for a banking facility in September 2016, it is clear that the Applicant was not ready, able and willing to pay the full purchase price by 30/4/2016 and to complete the sale which would have entitled her to possession of the Suit Property. At the time she filed this suit, the Plaintiff was not ready, able and willing to pay the balance of the purchase price.

16. The court declines to grant the orders sought in the Originating Summons. Each party will bear its own costs.

Dated and delivered at Nairobi this 28th day of May 2019

K. BOR

JUDGE

In the presence of: -

Mr. Shiramba Etemesi holding brief for Mr. Mohamud for the Applicant

Mr. Daniel Ongayo holding brief for Mr. E. Mitheri for the Defendants

Mr. V. Owuor- Court Assistant