



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 733 OF 2014

NELLIAS WAIRIMU MWANGI..... PLAINTIFF

VERSUS

SARAH NJAMBI KIARIE..... DEFENDANT

JUDGEMENT

1. The plaintiff has filed this suit against the defendant seeking:-

- (a) An interlocutory injunction to restrain the defendant from selling, charging, disposing of, evicting the plaintiff from, or in any manner dealing with land parcel Ndumberi/Riabai/1781.*
- (b) Specific performance of the contract of sale.*
- (c) In the alternative, the refund of the deposit and general damages for breach of contract.*
- (d) Costs of the suit.*
- (e) Such other or further relief the honourable court be pleased to grant.*

2. Upon being served with summons to enter appearance and copies of plaint the defendant entered appearance on 24th March 2016 through the firm of M/S Mbigi Njuguna & Co. Advocates. She also filed a statement of defence on the same date.

3. On the 28th June 2018, a hearing date was taken in the presence of advocates of both parties. On the 27th March 2018 neither the defendant nor her advocate were in court and the matter proceeded ex-parte.

4. It is the plaintiff's case that she entered into a sale agreement with the late Francis Mbugua Kiarie on 9th February 2000. It was in respect of Land Parcel Number Ndumberi/Riabai/1781. The purchase price was Kshs.1,000,000. She produced the sale agreement as exhibit P1. She paid Kshs.500,000 on execution of the agreement. The vendor acknowledged receipt. She produced the acknowledgement as exhibit P2 and a receipt for Kshs.100,000 as exhibit P3. She also produced the late Francis Mbugua Kiarie's will as exhibit P4. She did an official search at the land's registry and confirmed the said land is still registered in the name of Francis Mbugua Kiarie. It was produced as exhibit P5.

5. The plaintiff also produced several letters which her advocate wrote to the defendant seeking refund of the purchase price. She told the court that the reason was because the said Francis Mbugua Kiarie had passed on and his widow did not wish to proceed with the sale. The letters were produced as exhibit P6-P9, P13 respectively. She produced another acknowledgement of Kshs.200,000 as exhibit P10 and an acknowledgement of Kshs.500,000 as exhibit P11. She also applied for a caution to be registered against the land title Ndumberi/Riabai/1781. The caution was produced as exhibit P12. She produced another certificate of official search dated 19th August 2011 as exhibit P14 which confirms that the land was still registered in the name of Francis Mbugua Kiarie.

6. The plaintiff also produced letters showing the attempts to serve the defendant who resided in the United States of America as exhibit P16 – P20 respectively. There is another letter written by the plaintiff's advocate to the OCS Kiambu Police Station produced as exhibit P21. She also produced photographs of what is currently on the suit property as exhibits P 22 (a-d) respectively. She told the court that she is ready to pay the balance of Kshs.300,000/- and that the structures on the suit property ought to be demolished. She also prays that the land registrar be compelled to issue her with a title deed for the suit property.

7. I have considered the pleadings and the evidence on record. The issues for determination are:-

- (i) *Whether or not the plaintiff breached the agreement.*
- (ii) *Whether the deceased by a letter dated 25th August 2000 repudiated the agreement on account of the plaintiff's breach.*
- (iii) *Whether the plaintiffs suit is time barred under the provision of the Limitation of Actions Act Cap 22 Laws of Kenya.*
- (iv) *Has the plaintiff proved her case?*
- (v) *Who should bear costs?*

8. I have seen the sale agreement between the plaintiff and Francis Mbugua Kiarie. It is dated 9th February 2000. The balance of the purchase was to be paid by 30th May 2000. It is clear from exhibit P2 that by 20th December 2000 the plaintiff had not paid the full purchase price. There is a letter dated 25th August 2000 from Francis Mbugua Kiarie to the plaintiff rescinding the agreement. The same has been produced as exhibit P11. The reason given by the seller is that the plaintiff has failed to pay the full purchase price as agreed. There is no doubt that the plaintiff breached the agreement by failing to pay the full purchase price as agreed.

9. I also note that the sale agreement is dated 9th February 2000. The plaintiff filed this suit in 11th June 2014. The plaint is dated 12th May 2014. Section 4(1) of the Limitation of Actions Act Cap 22 Laws of Kenya provides that:-

“The following actions may not be brought after the end of six years from the date of which the cause of action accrued-

- (a) *Actions founded on contract,*
- (b) *.....”*

10. It is clear from the above provision that the plaintiffs claim is time barred. There is no evidence that she sought leave to file this suit out of time.

11. I have also gone thought the sale agreement dated 9th February 2000. The same is signed by the vendor and the purchaser, the plaintiff and Francis Mbugua Kiarie respectively. There were no witnesses. This contravenes Section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya which provides that contracts for disposition of land must be signed by the parties in the presence of witnesses. This sale agreement was not signed by any witnesses. The same is therefore null and void.

12. I have seen several letters written on the instruction of the plaintiff asking refund of the purchase price. It is clear from the said letters that she had since given up on her claim on the suit property.

13. It is also not clear if the consent from the Land Control Board was sought.

14. For the above reasons. I find that this court cannot order specific performance as the plaintiff was herself to blame for failing to make the requisite payment of the balance of the purchase price on the agreed period. She is therefore not entitled to any damages for breach of contract.

15. There is no doubt that she paid some amount to the said Francis Mbugua Kiarie. She is entitled to a refund of the monies.

16. Accordingly I enter judgment in favour of the plaintiff for a refund of Kshs.700,000/- plus costs of the suit and interest.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18TH day of JULY 2019.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant