



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 194 OF 2018

MARY NJERI WANDERI.....PLAINTIFF

VERSUS

JAMES NYAMWEYA MAMBOLEO T/A

NYAMWEYA MAMBOLEO & Co. ADVOCATES & 7 OTHERS.....DEFENDANTS

JUDGEMENT

(Plaintiff having entered into an agreement where she was purchaser of the suit property; the agreement containing terms on the time of payment and of the completion period; plaintiff not making payment within the stipulated period; vendor rescinding the sale and selling the suit property to a second purchaser and transferring the land to the second purchaser; plaintiff suing, contending that the second sale is fraudulent and that the title of the second purchaser should be cancelled; no fraud in the second sale; clear that the second sale was entered into after the plaintiff failed to abide by the terms of her sale agreement; vendor thus within his rights to cancel the sale agreement with the plaintiff and offering the property to another person; plaintiff's suit dismissed; second purchaser's counterclaim for the eviction of the plaintiff and for mesne profits succeeds)

1. This suit was commenced through a plaint which was filed on 14 June 2018 which plaint was amended on 7 November 2018. In the amended plaint, the plaintiff has averred that through a sale agreement dated 2 March 2017, between herself and the 3rd defendant, she agreed to purchase the property comprised in LR No. 451/47/LVIII (Grant No. I.R 10460/I) at a consideration of Kshs. 44,000,000/= (hereinafter referred to as “the suit property”). In the transaction, the 1st defendant, acted as her counsel, whereas the 2nd defendant, acted as counsel for the seller. She has averred that she would thus deposit money for the purchase of the suit property to the 1st defendant for onward transmission to the 2nd defendant as counsel for the vendor. She has complained in her plaint that the 1st defendant did not remit the money as expected of him which led her to withdrawing instructions from him and proceeding to act in person. She then engaged the 2nd defendant who informed her that the vendor had cancelled the sale agreement and that the suit property had been sold to the 4th and 5th defendants through a subsequent sale agreement entered into on 10 July 2017. She believes that there was collusion between the 1st and 2nd defendant and has faulted the 2nd defendant for continuing to receive her money without informing her that there was a subsequent sale agreement. She contends that when the second sale agreement was entered into, her sale agreement was still subsisting. She has averred that there was active participation by the 1st – 5th defendants to ensure that her interests in the suit property were defeated, and that the 2nd defendant acted fraudulently for the 3rd, 4th and 5th defendant, inter alia by failing to inform the plaintiff of the subsequent sale and retaining Kshs.2,200,000/= on her sale. She has also faulted the transfer of the suit property to the 4th and 5th defendants for being done out of the territory of Kenya. She has further averred that the 4th and 5th defendants acted fraudulently, inter alia for the reasons that they were aware that there existed another purchaser of the property when they entered into a sale agreement with the 3rd defendant, and that they knew that she was in possession. It is also contended that at the time of the sale agreement with the 3rd defendant, the 3rd defendant was not within jurisdiction. She has further claimed that the 6th defendant, acted fraudulently, inter alia for failing to register the transfer in the proper manner and in failing to register her sale agreement. In the suit, she wishes to be declared as the lawful owner and/or purchaser of the suit property, an order revoking the subsequent sale, cancellation of the title of the 4th and 5th defendants, and an order of specific performance of her sale agreement. In the alternative, she has sought a refund of Kshs.2,200,000/=, damages for breach of contract, punitive damages and loss she has incurred with interest at commercial rates.

2. The 1st defendant did not enter appearance and did not file any defence. Neither did he participate in these proceedings despite being duly served.

3. The 2nd and 3rd defendants filed a joint statement of defence. The 2nd defendant averred that she received instructions to act for the 3rd defendant in the sale of the suit property and drafted the sale agreement between the plaintiff and the 3rd defendant. She averred that the plaintiff failed to make a deposit of 10% (Kshs. 4,400,000/=) as required in the sale agreement, but instead deposited Kshs.3,500,000/=. It is

also averred that the plaintiff failed to pay the balance of the purchase price within the completion date, which was 90 days of the sale agreement. It is contended that what the plaintiff did was to make haphazard payments through her counsel, the 1st defendant, and that these would be deposited in the account of the 2nd defendant, without any notice, and the 2nd defendant would only come to know of such after making enquiries with her bank. It is pleaded that the plaintiff was issued with a 21 day completion notice which she failed to abide with and that she was later informed that the sale had been rescinded. It is averred that the plaintiff was only entitled to a refund of what she had paid less 5% as liquidated damages pursuant to the contract of sale and that this was done. It is pleaded that following the termination of the plaintiff's sale agreement, the 3rd defendant entered into a subsequent sale agreement with the 4th and 5th defendants at a consideration of Kshs.45,000,000/= following which the suit property was transferred to the 4th and 5th defendants. They have asked that the plaintiff's suit be dismissed.

4. The 4th and 5th defendants similarly filed a joint statement of defence and a counterclaim. They inter alia pleaded that they are innocent purchasers for value from the 3rd defendant. They averred that they could not possibly have known the existence of the alleged sale agreement that the plaintiff claims to have had and that when they conducted an official and ground search, the same revealed that the property was registered in the name of the 3rd defendant and was unoccupied. They averred that they purchased the suit property for Kshs. 45,000,000/= and that they paid on time and the property was transferred to them and they are now the registered proprietor. In the counterclaim they have asked inter alia for orders of eviction against the plaintiff, mesne profits, damages and payment of utility bills, land rates and land rent, and a permanent injunction against the plaintiff.

5. The State Law Office entered appearance for the 6th and 7th defendants but I have not seen any defence on their part.

6. The plaintiff relied on her witness statement in her evidence in chief and was cross-examined. She mentioned that she did not know that her advocate was not remitting funds as she deposited in his account, including failure to pay the whole deposit, despite her forwarding to him the same in full, that is Kshs. 4,400,000/=. She averred that her advocate also failed to act on her instructions, including to submit her necessary applications for renegotiations. She claimed to have paid a total of Kshs. 16,848,000/= but was only refunded Kshs.8,000,000/=. She acknowledged that she used to deposit money with the 1st defendant who would then forward the money to the 2nd defendant. She mentioned her inability to reach her lawyer, the 1st defendant, which led her to ask for her file, which she got on 4 December 2017. That is when she claims she got to know of the notice terminating her sale agreement. She did not refute that upon cancellation of her sale agreement, the vendor was at liberty to sell the property to somebody else. She however wondered why the 2nd defendant continued receiving money on her sale agreement if at all it had been cancelled on 9 June 2017. She mentioned that they received Kshs.1,800,000/= on 24 July 2017, and Kshs.5,000,000/= on 17 October 2017. She contended that she would not have continued making payment if she had known that the sale agreement had been cancelled. She did mention that the 4th and 5th defendant came to the suit property with their agent, one Mr. Mwai, and they informed her that the property was offered to them to purchase. Mr. Mwai later tried to forcefully evict her and she preferred criminal charges against him and the group that he had with him.

7. DW-1 was Angelina Abongo Okoko, who also relied on her witness statement and documents filed with the pleadings of the 2nd and 3rd defendants. She is sister to the 3rd defendant. She stated that the sale to the plaintiff was cancelled because the plaintiff did not fulfil her part of the bargain and that the plaintiff was refunded what she had paid less 5% damages. Having cancelled the agreement, the property was then sold to the 4th and 5th defendants and title transferred to them. The full purchase price is yet to be paid to them because the 4th and 5th defendants do not yet have possession. She did state that the 3rd defendant lives in USA and that she has been the contact between him and the 2nd defendant. She acknowledged not holding a power of attorney from the 3rd defendant and that her name does not appear in the sale agreements. She did mention that the 3rd defendant came to Kenya for purposes of transacting the agreements. She testified that the property was owned by her late grandfather and was transmitted to the 3rd defendant but she and her other sister have a stake in it. She asserted that she is the contact person with regard to all questions over the suit property.

8. DW-2 was Ndirangu Njenga, the 4th defendant, who also relied on his witness statement. He testified inter alia that they came to know that the suit property was being offered for sale and they did a search. They then made an offer and they agreed to buy the property at Kshs.45,000,000/=. They purchased the property through financing from Equity Bank and Family Bank, and the property is now registered in his name and that of the 5th defendant. They are however yet to take possession of the property and he lamented that they are paying a loan on it yet do not have benefit of the property.

9. DW-3 was Mr. David Arimi, a practising valuer. He gave the rental value of the property at Kshs.360,000/= per month.

10. With the above evidence, the parties closed their respective cases.

11. I invited counsel to file written submissions, which they did, and I have taken note of these before arriving at my decision. I also invited counsel to highlight their written submissions which counsel for the plaintiff and the 4th and 5th defendant did, and I have also taken note of these submissions.

12. The basis of the plaintiff's suit is the sale agreement dated 2 March 2017 that she had with the 3rd defendant and I feel that it is important at the outset to lay out the core terms of the said agreement. They are as follows :-

Clause 2 : The purchase price is Kshs.44,000,000/= of which the purchaser has paid Kshs.4,400,000/= being 10% of the purchase price to M/s Hayanga & Company Advocates to hold as stakeholders pending completion (receipt whereof is hereby acknowledged). The balance of the purchase price shall be paid in the manner set out in special condition 1 below.

Clause 5 : The advocates acting for the vendor are M/s Hayanga & Company Advocates...while the Advocates acting for the purchaser are M/s Nyamweya Mamboleo & Company Advocates...

Clause 6 : The completion date is Ninety (90) days from the date of this Agreement or such other date as the parties hereto may agree in writing.

Special condition 1 : On or before completion date the balance of the purchase price, that is, Kshs. 39,600,000/= shall be paid to the vendor's advocates to hold the same as stakeholders pending completion and in exchange of the completion documents as provided in Clause 2 before.

Special condition 8 : If completion is delayed beyond the completion date by act of default of the purchaser, the vendor shall give to the purchaser at least twenty-one (21) days notice in writing confirming the vendor (sic) readiness to complete the sale in all respects and specifying the default and requiring the purchaser to remedy the default before the expiration of such notice AND if the purchaser shall fail to comply with such notice, the vendor shall be entitled to cancel the sale herein and the purchaser shall forfeit five percent (5%) of the purchase price in favour of the vendor as liquidated damages and the vendor shall refund all the other sums paid herein towards the purchaser price within seven (7) days of rescission of the sale agreement. The purchaser may at the vendor's own absolute discretion accept to pay interest on the balance of the purchaser price at the rate herein specified from the completion date until the date of completion of this transaction or until a new completion date suggested by the purchaser and accepted by the vendor in writing.

13. Before I go too far, there was an argument raised about the non-payment of the 10% deposit as stipulated in the sale agreement but I do not think that there is any issue on this. It may be that the 10% had not been fully paid by the time the sale agreement was being executed, despite the sale agreement noting that it is fully paid, but there is no dispute that this was paid at some point in time, and I do not think that the sale agreement was terminated because of non-payment of this 10% deposit. That is why I see no issue on this point.

14. The obligation of the plaintiff under the sale agreement was to pay the purchase price as stipulated in the sale agreement. It was after payment was made that the property would be transferred to her as the purchaser. I have already set out the terms of payment, and apart from the deposit, the rest of the money, which was Kshs.39,600,000/= was to be paid within 90 days of the sale agreement which is 30 May 2017 (considering that March and May have 31 days, but even if the actual days were to be ignored, certainly by 2 June 2017). The plaintiff does not pretend to have paid the balance within this period of time and I have not seen any agreement between the parties where the completion period was extended. On 9 June 2017, the 2nd defendant wrote a letter to the plaintiff and to her counsel (1st defendant) issuing the 21 days completion notice. That letter shows that it was received by the 1st defendant on 14 June 2017, and if we take this date to be the effective date, then the plaintiff needed to ensure that full payment was made by 5 July 2017 at the latest.

15. What transpired thereafter is that on 30 June 2017, the 1st defendant wrote a letter to the 2nd defendant stating inter alia that the plaintiff had applied for a loan with her bank which was at an advanced stage but that the bank in exercise of due diligence had noted that the title of the property was in the process of change. The 1st defendant asked that any precipitate action be placed on hold. The 2nd defendant replied through a letter dated 7 July 2017, stating that the sale agreement stands terminated pursuant to the notice issued on 9 June 2017, and that the money paid will be refunded following special condition No.8. On 21 November 2017, ten banker's cheques totalling Kshs.9,600,000/= were forwarded to the 1st defendant, being what the 2nd defendant considered to be refund less 5% of the purchase price. On 4 December 2017, the plaintiff wrote to the 2nd defendant informing the 2nd defendant of the withdrawal of instructions from the 1st defendant and advised them to deal directly with her. The 2nd defendant then immediately wrote to her on the same day, informing her that the sale agreement was terminated and that the purchase price, less 5%, was refunded to her counsel. I have seen a letter dated 6 December 2017, where the plaintiff sought to have her erstwhile counsel refund her Kshs.16,500,000/= within seven days because the sale agreement was cancelled. It is not clear to me whether or not this money was ever deposited in her account.

16. What emerges from the foregoing is that the 3rd defendant cancelled the sale agreement that he had with the plaintiff due to non-payment of the balance of the purchase price within the stipulated period. It was argued by Mr. Opar, learned counsel for the plaintiff, that the 90 days completion date was not fixed and that parties could extend time in writing and further that the 1st defendant acting on behalf of the plaintiff sought for extension of time. I do not agree. The completion period was fixed at 90 days, but subject to the parties agreeing by mutual consent to extend time. I have no agreement or indeed any communication coming from the 3rd defendant or his counsel, that they were considering an extension of time, meaning that payment of the balance needed to be made within 90 days of the sale agreement.

17. There was also argument raised that it is DW-1 who instructed for the rescission of the agreement yet she had no capacity to do so. I see nothing on this, because the sale agreement was self executing, and if there was a notice to rescind issued, it must have issued on the basis of the sale agreement. It was further contended that the sale agreement could not have been rescinded because the 2nd defendant continued receiving money on the same, but I think this was adequately explained by the 2nd defendant pleading that they were never informed of any deposits made in their account. The plaintiff has not presented to me anything that would suggest that the 2nd defendant encouraged the plaintiff to continue depositing money into her account despite having knowledge of the cancellation of the sale agreement.

18. On my part, I am persuaded that the 3rd defendant was within his rights to cancel the sale agreement and I cannot fault him for opting out of the same. Given this position, the plaintiff cannot succeed in her prayer for specific performance. Neither can she succeed on the prayer for cancellation of the title of the 4th and 5th defendants, for there is nothing that barred the 3rd defendant from proceeding to sell the suit property to the 4th and 5th defendant, having properly cancelled the first sale agreement.

19. The only issue that arises is refund to the plaintiff. The 2nd and 3rd defendants contend that what was paid to them was a total sum of Kshs.11,800,000/=. The plaintiff has not produced anything to challenge this position and I have nothing before me which would suggest that the 2nd or 3rd defendants were paid anything above this sum. The agreement stipulated for refund of what has been paid less 5% of the purchase price which is Kshs.2,200,000/=. Thus what the 2nd and 3rd defendant needed to refund was Kshs.9,600,000/= which I have seen was duly forwarded on 21 November 2017. This was certainly outside the 7 day period noted in special condition 8 of the sale agreement. The 3rd defendant acting through the 2nd defendant was pretty strict on the terms of the sale agreement with regard to payment from the plaintiff and insisted on his pound of flesh. He however did not ensure refund within the 7 days, and I think given this position, the 2nd and

3rd defendants will be disentitled to the costs of this case, which I would otherwise have awarded to them. The case against the 2nd and 3rd defendants is thus dismissed but there will be no orders as to costs for or against them.

20. The plaintiff of course claims that she deposited with her advocate the sum of Kshs.16,500,000/=. As I mentioned, I do not know if this money was ever paid back to her and I note that the plaintiff did not make any claim for this amount of money within this suit. I think given that lacunae, it will be improper for me to make any order in respect of this money but the plaintiff is at liberty to directly sue her erstwhile advocate for any money that she feels that he may have withheld from her. I will therefore make no orders for or against the 1st defendant including any orders on costs.

21. There were allegations in the plaint of fraudulent collusion between the defendants but I see no evidence whatsoever of this. I also see no problem with the manner in which the 4th and 5th defendants purchased the suit property. They are now the registered proprietors and they deserve to be given full rights including the right of exclusive possession. I do note that the 4th and 5th defendants issued a notice on 9 May 2018, giving the plaintiff 3 months to vacate the suit property but the plaintiff refused to move out. I am persuaded to grant the 4th and 5th defendants mesne profits from 9 May 2018, to the date of this judgment.

22. The 4th and 5th defendants presented evidence, which is uncontested, that what they have lost in monthly income is Kshs.360,000/=. I will award them this amount of money of Kshs.360,000/= since 9 May 2018, until the plaintiff shall move out of the suit property. I will also issue orders in favour of the 4th and 5th defendants for the eviction of the plaintiff, and I do give the plaintiff 14 days to vacate the suit property, in default she be forcibly evicted. On expiry of this 14 days window, the plaintiff is also barred through a permanent injunction, from entering, being upon, using, or in any other way interfering with the possession of the suit land.

23. I have no evidence of any pending bills which the 4th and 5th defendants wanted orders on, but if there are any pending bills that they may find which have been incurred by the plaintiff, the plaintiff is ordered to ensure full payment of the same within 14 days of today, or within 14 days of being notified by the 4th and 5th defendants, and if the 4th and 5th defendants are forced to pay the same, the 4th and 5th defendants are entitled to a refund from the plaintiff. The 4th and 5th defendants will also have the costs of this suit and of their counterclaim against the plaintiff.

24. I did not see any impropriety against the 6th defendant and the case against the 6th and 7th defendants is dismissed with costs.

25. Judgment accordingly.

Dated, signed and delivered in open court at Nakuru this 30th day of September 2019.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of : -

Mr. Mukira holding brief for Mr. Opar for the plaintiff.

Mr. Murunga holding brief for Mr. Hayanga for the 2nd and 3rd defendants.

Mr. Kamau present for the 4th and 5th defendants.

No appearance for the AG- 6th defendant.

Ms. Chelangat for Kenya Revenue Authority.

Court Assistants. Nancy Bor/Alfred Cheron.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU