



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAIROBI

ELC NO. 313 OF 2018

(FORMERLY HCC NO. 2808 OF 1990)

SARAH NJUHI MWENDA.....PLAINTIFF

EMMANUEL WANDERI MACHARIA.....2ND DEFENDANT

VERSUS

LUKA NJARARUHI KAMAU & OTHERS.....DEFENDANTS

JUDGMENT

1. The plaintiff vide the further amended plaint dated 21st December 2016 claimed to have purchased from the defendants L.R No.4953/4/71 situated within Thika for the consideration of Kshs595,000/= pursuant to an agreement dated 10th February 1983. The plaintiffs averred that although the full purchase price was paid on or about 8th January 1990, the defendant failed and/or refused to execute the transfer in favour of the plaintiff. The plaintiffs thus prayed for judgment against the defendants jointly and severally for : -

(a) An order declaring that the suit premises vests, with the plaintiff.

(b) An order directing the defendants to execute all papers, documents and chits premises to the plaintiff.

(c) Costs of the suit .

(d) Interest on (c) hereof.

2. The defendants filed a joint statement of defence on 15th August 1990 and although they admitted there was a sale agreement dated 10th February 1983 that had been signed only by some of the proprietors of the suit property, the defendants stated that any such purported sale agreement was rescinded by the proprietors. The defendants stated that the plaintiff never honoured the terms of the agreement and accordingly, the defendants were entitled to rescind the agreement as they did.

3. The defendants further pleaded a counterclaim whereby they claimed the plaintiff despite failing to complete the sale transaction continued in unlawful possession and was collecting monthly rent of Kshs4,500/=. The defendants sought judgment on the counter claim against the plaintiff for orders: -

(i) Rescission of the contract by the defendant.

(ii) Liquidated damages agreed at Ksh.59,000/=

(iii) Mesne profits at Kshs.4, 500/= from 11th May 1983 till vacant possession is delivered to the defendants.

(iv) An order for vacant possession to be delivered by the plaintiff to the defendants.

4. At the time the suit was heard before me on 22nd March 2019 the original plaintiff had died and had been substituted by Sarah Njuhi Mwenda and Emmanuel Wanderi Mwasia being the administrators of his estate pursuant to an ad litem grant of letters of administration issued to them on 14th September of 2015 in Nairobi High Court Succession Cause No.2271/2015. Sarah Njuhi Mwenda testified as PW1 on behalf of herself and her co-administrator. She was the sole witness for the plaintiff. The witness Pw1 relied on her evidence as per the

witness statement dated 21st December 2016 and on the filed plaintiff's bundle of documents. It was her evidence that all the original defendants had all passed away save for the 2nd defendant.

5. Pw1's evidence was to the effect that her late father had entered into an agreement of sale to purchase the suit property on 10th February 1983 exhibited as document 2 in the plaintiff's bundle of documents. She stated that the purchase price was Kshs.595,000/= and a 10% deposit of Kshs.59,500/= as per the agreement was paid to the parties advocates M/s S. P Punja advocates of Thika. The witness stated that the completion period as per the agreement was to be within 3 months from the date of execution of the agreement though the completion period could be extended by mutual agreement of the parties. The witness stated her father paid the balance of the purchase price through the advocates office although she affirmed the agreement was not completed within 90 days as provided in the agreement. She stated that her father was granted time extension and referred to correspondences exhibited at pages 27-30 of the trial bundle to support her assertion.

6. The witness stated that her father paid a cheque for Kshs.313, 620.90 as per the letter dated 8th January 1990 exhibited at page 35 of the trial bundle being the balance of the purchase price. The witness denied that the contract between her father and the defendants was ever rescinded stating that her father retained possession of the property until he died having taken possession of the same in 1983 when the contract was signed. After his death, she stated the estate has continued in possession to date and continues to pay rates to the authorities.

7. Under cross examination by Mr. Kamau counsel for the defendants the witness admitted extension of time for the completion of the agreement could only be by mutual agreement of the parties. She further agreed that she had not exhibited any document showing extension of time for the completion of the agreement had been mutually agreed. The witness further admitted she had no acknowledgment for the payment of the balance of the purchase price save for the correspondences.

8. Joseph Muturi Kurutu, the 2nd defendant, testified as DW1 on behalf of himself and the other defendants. He adopted his witness statement dated 14th May 2013 and filed in court on 24th June 2013 as his evidence and further placed reliance on the bundle of documents filed on behalf of the defendants. He stated in his evidence that he knew PW1's late father back-in the 1980's and he admitted that in 1983 the defendants entered into a sale agreement to sell their plot at Thika to him. He stated the sale agreement price was Kshs595, 000/= and that a 10% deposit was paid on signing of the agreement and the balance was to be paid within 90 days of the date of signing the agreement.

9. The witness stated that the purchaser did not pay the balance within the stipulated period which prompted them to write to the advocate on 11th January 1984 to make a demand for the balance of the purchase price from the purchaser. The witness stated they did not get a response from S. P Punja Advocate and on 20th June 1984 they wrote to the advocate notifying him they had cancelled the transaction.

10. The witness affirmed that the only amount they received from the purchase was Kshs.59,500/= which was the 10% deposit of the purchase price. He maintained that they were never paid the balance of the purchase price. He stated that after they rescinded the agreement, the purchase ceased to have any authority to occupy the suit premises and that they were by way of counter-claim seeking orders for vacant possession, damages and mense profits. The witness stated there never was any mutual agreement to extend the completion period for the agreement with the purchaser.

11. Under cross examination DW1 denied they got any money from S.P Punja advocate relating to be balance of the purchase price. The witness however admitted the balance of the purchase price was to be paid through S.P Punja advocate. He stated the advocate never informed them any money had been deposited with him in fulfillment of the terms of the agreement.

12. Following the closure of the trial the parties filed their final written submissions. The plaintiff filed his submission on 14th May 2019 while the defendants submissions were filed on 13th June 2019. I have considered the pleadings, the evidence and the submissions filed by the parties and the following issues arise for determination

i. Whether or not the completion dated for agreement between the parties dated 10th February 1983 was mutually extended by the parties?

ii. Whether or not the doctrine of estopped is applicable in the circumstances of this case?

iii. Whether the plaintiff paid the full purchase price, and if so whether such payments was paid within the contracted period?

iv. Whether there was rescission of the sale agreement by the defendants?

v. What reliefs and/or orders should the court grant?

13. The sale agreement dated 10th February 1983 was admitted by both parties and the contest was whether the terms of the agreement were fulfilled. The plaintiff admitted to not paying the balance of the purchase price within the stipulated period of 90 days provided under the agreement. The plaintiff however contended the completion period was mutually extended by the parties. In support, of this assertion, the plaintiff relied on the various correspondences with S.P Punja advocate who apparently represented both the plaintiff and the defendants in the sale transaction. He was the advocate who drew and attested the sale agreement dated 10th February 1983. Clauses 2 and 3 of the said agreement which are key to the eventual determination of this matter were in the following terms: -

2. The purchase price will be paid by the purchaser as follows:-

(a) Sh.59,000 being 10% of the purchase price to be deposited with S.P Punja Advocate Thika on or before the

execution of this Agreement.

(b) The balance of Shs.535,500/= on the transfer of the said property in his name.

3. The purchase will be completed at the offices of the said advocate within three months from the date of signing of this agreement and upon payment of the said balance of Shs.535,500/= (referred to as :- the date of completion”) and such date to be extended by mutual agreement of both the parties. Subject to the payment of the said balance of the purchase price and all other moneys due by the purchaser to the Vendors under the terms of this agreement the purchaser will be entitled to a transfer from the vendors all the right title and interest of the Vendors in the said immovable property.

14. The plaintiff submitted that the agreement entered into by the parties had no provision for rescission and /or termination and argued that the defendants could not therefore unilaterally impose a termination clause. In support of their submission the plaintiff placed reliance on the case of Housing *Finance Co. Of Kenya –vs- Gilvet Kibe Njuguna Nairobi HCCC No. 1601 of 199* (unreported) where the court stated:-

“ Parties only bind themselves by the terms contracted and executed and not anything else... If it appears to the court that one party varied terms of the contract with another without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the court will say no to the enforcement of such contract.

15. The plaintiff was of the view that by the defendants purporting to rescind the agreement vide the letter dated 20th June 1984, they were acting arbitrarily as the agreement had no provision for rescission and/or cancellation. The plaintiff referred the court to the case of *Njamunyu –vs- Nyaga (1993) KLR 282* where the court of appeal interalia held as follows:-

1. Where completion does not take place as intended by the parties, the option open to the concerned party is to give notice to the parties in default therefore making time of essence; where there no express agreement on notice making time of the essence the court will require precise compliance with stipulation as to time whenever the circumstances of the case allow.

2. Before an agreement such as this can be rescinded the party in default should be notified of the default and given reasonable time within which to rectify it, Once notice of default has been given failure to rectify will resort in rescission of the contract.

16. This decision in my view did not state that where the completion date had passed and there was no provision for rescission of the agreement, such agreement could not be rescinded. The agreement could be rescinded provided the defaulting party was given a reasonable notice within which to rectify the default.

17. The plaintiff further submitted that on the basis of the correspondences exchanged with the advocate notably the letters dated 23rd November 1988, 28th September 1989, 12th October 1989 and 16th November 1989 exhibited at pages 27-33 of the plaintiff's bundle of documents the defendants varied and/or waived the date of completion and on that account the plaintiff contended the defendants were estopped from placing reliance on the completion date set out under the agreement.

18. It is not in dispute that the agreement entered into between the parties was not completed within three months from the date of execution of the same as provided under clause 3 of the agreement. Although the agreement was intended to be completed by 10th May 1983, the evidence tendered shows the agreement had not been completed by the end of 1989. On 28th September 1989 S. P Punja advocates wrote to the plaintiff thus:-

“—Therefore please let me have the balance of the purchase price of Kshs.313,620.90 within 10 days from today, failing which my clients will be constrained to cancel the agreement of sale entered unto between yourself and my clients in respect of the sale of the above property. Also please note in the event of rescission of this agreement you will be liable to pay to my client repudiated damages amounting to Kshs.59,500.00”.

19. The plaintiff did not rectify the default but instead by a letter of 12th October 1989 wrote to SP Punja advocates stating he had sought assistance of the bank to pay. On 16th November 1989 the advocate again wrote to the plaintiff expressing his frustration that the balance had not been paid. This last letter from the advocate was not copied to the defendants although the earlier letter dated 28th, September 1989 was copied to them.

20. The defendants perhaps prompted by the lethargy displayed by S. P Punja Advocate in pursuing completion of the transaction changed their advocate and appointed the firm of Waruhiu & Muite Advocates to act for them. The said new firm of Advocates wrote to the purchaser, the plaintiff(original) the letter dated 2nd January 1990 exhibited at page, 34 of the trial bundle whose contents are as set out hereunder:-

REGISTERED

John Macharia Mwenda

P O Box 244

THIKA

Dear Sir.

RE: SALE OF L.R MO.4953/4/71-THIKA

LUKA NJARAHUHI KAMAU & OTHERS TO YOURSELF

We act for Luka Njararuhi Kamau & others the registered proprietors of the above property who have instructed us to write to you as hereunder:-

That you entered into a sale agreement which was duly executed by the parties on 10th February 1983 whereby you agreed to purchase and our clients agreed to sell to you the above property and the date of completion was agreed to be three (3) months from 10th February 1983.

The completion date was extended by mutual agreement until September 1989 when our clients instructed S.P Punja ESq. Advocates to give you notice of rescission as you failed to complete the said transaction for the past six (6) years or so.

We now enclose herewith copy of a self-explanatory letter from our clients cancelling the said agreement. In terms of the said letter we hereby give your notice of rescission for the breach on your part and request that you let us have within fourteen (1) days of today's date:-

(a) The title documents in respect of the said property.

(b) Agreed damages in the sum of Kshs59,500/=

(c) Mesne profit at prevailing market rate from the date of possession to the date of handing over vacant possession to our clients .

By a copy of this letter we are notifying Mr. Punja of our client's instructions and informing him not to accept any further payment from yourself.

Yours faithfully

J.R K'OWADE

CC.

Luka Njararuhi Kamau & Partners C.C S P Punja ESq.

P O Box 88

P O Box 339

THIKA

THIKA

21. This letter was unequivocal that the defendants had cancelled and rescinded the agreement of sale. This letter was copied to S.P Punja advocates. The plaintiff vide a letter dated 8th January 1990 purported to forward a cheque for Kshs.313,620.90 to S P Punja advocate which was supposedly the balance of the purchase price for the suit property. This cheque is not shown to have been received by S P Punja advocate's office and was apparently not receipted. The earlier payments made to S P Punja advocates were receipted as per the receipts at pages 18-26 of the trial bundle. The defendants have denied that this money was ever paid to them. On the basis of the evidence I cannot find and hold that the plaintiff has in fact paid the full purchase price for the suit property. There is no such proof and even if indeed the plaintiff had in fact paid the balance of the purchase price to S P Punja when he stated he did, it was after the defendants had exercised their right of rescission of the agreement after there had been inordinate delay in completing the transaction. In my view the defendants were not obligated to receive the balance after they had cancelled/rescinded the agreement. It is my finding that there was no mutual agreement between the parties to extend the completion date indefinitely as suggested by the plaintiff. The letter by S. P Punja advocate dated 23rd November 1988 and finally 28th September, 1989 clearly gave to the defendant notice of default and the need to rectify the default within set time lines which the plaintiff failed to seize opportunity of.

22. While it is true that the plaintiff was generously accommodated by the defendants to enable him to complete the transaction one cannot fail to see that there was inordinate and clearly unexplained delay on the part of the plaintiff. The conduct of the defendants in my view cannot in the circumstances be construed as giving the plaintiff unlimited time extension to complete the transaction when he so wished. The letters I have referred to from S. P Punja advocate who was acting jointly for the parties disclose a definite intention on the part of the defendants to make time of the essence in regard to the completion of the transaction. The defendants in my view, had not waived their right to rescind the agreement with the plaintiff and in the circumstances of the present matter the doctrine of estoppel would be in applicable. The defendants had made their intention clear to the plaintiff that should he fail to rectify his default within the set timelines they would move to rescind the agreement. The letter of 21st January 1990 from M/s Waruhiu & Muite Advocates communicated the cancellation and/or rescission of the agreement to the plaintiff in clear terms.

23. My foregoing discussion evaluation and analysis of the evidence has disposed of issues (i)-(iv) that I identified for determination. The net effect is that the plaintiff has failed to prove his case on a balance of probabilities.

24. The defendants pleaded a counterclaim and it is my finding and holding that the contract of sale was lawfully rescinded by the defendants. The defendants are entitled to liquidated damages of Kshs59,500/= as provided in the sale agreement. The defendants claimed mesne profits at the rate of Kshs4,500/= from 11th May, 1983 to the time vacant possession was delivered to them on the basis that such was the rent that was being paid monthly to the plaintiff for the premises when he took possession and occupation. There was no proof offered to support this assertion. For the court to award mesne profits, proof of the loss must be shown. The defendants did not demonstrate that the plaintiff was receiving rent in the amount stated. However it is not in dispute that the plaintiff continued in unlawful occupation and possession of the suit premises and clearly the defendants were denied its use. The plaintiff no doubt was deriving a benefit out of the suit premises. In lieu of an award of mesne profits I will make an award of Kshs.200,000/= being nominal damages for loss of user in favour of the defendants. The defendants will also be entitled to get vacant possession of the suit premises.

25. In conclusion, I therefore make the following final orders.

1. The plaintiff's suit is hereby dismissed.

2. The defendants are awarded Kshs.59,500/= being liquidated damages together with interest at court rates from the date of judgment.

3. The defendants are awarded Kshs.200, 000/= general damages for loss of user together with interest at court rates from the date of judgment.

4. The plaintiff is ordered to vacate and deliver vacant possession of LR No.4953/4/71 Thika to the defendants within the next 60 days from the date of judgment failing which the defendants shall be entitled to an order of eviction of the plaintiff on application.

5. The costs of the suit and the counterclaim are awarded to the defendants.

Judgment dated and signed at Nakuru this 4th day of October 2019.

J M MUTUNGI

JUDGE

Judgment delivered at Nairobi this 30th Day of October 2019

S OKONG'O

JUDGE