



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C. CASE NO. 177 OF 2016 (FORMERLY HCCC NO. 872 OF 2006

CAROLINE NJERI MWICIGI.....PLAINTIFF

VERSUS

MANOHAR SINGH SAGOO AKA MR. SAGOO...1ST DEFENDANT

SARINDER KAUR SAGOO AKA MRS SAGOO...2ND DEFENDANT

PRAMOD PATEL.....3RD DEFENDANT

KANDIE KIMUAI & CO. ADVOCATES.....4TH DEFENDANT

THE HONOURABLE ATTORNEY GENERAL

ON BEHALF OF THE REGISTRAR OF TITLES.....5TH DEFENDANT

JUDGEMENT

1. The Plaintiff entered into an agreement with the 1st and 2nd Defendants on 28/6/2005 for the sale of L.R. No. 7785/792 situated in Runda, Nairobi (“the Suit Property”) at the agreed purchase price of Kshs. 10 Million. The 4th Defendant represented the Plaintiff in the sale transaction; which was subject to the Law Society Conditions of Sale, 1999 Edition.

2. The Plaintiff claims she complied with her obligations under the sale agreement but that the 1st and 2nd Defendants did not fulfil their part under the agreement. The Plaintiff wrote to her advocate who is the 4th Defendant on 10/11/2005 intimating her unwillingness to complete the sale pursuant to the 1st and 2nd Defendant’s breach of the agreement. The 4th Defendant issued a notice to the 1st and 2nd Defendants on 24/11/2005 requiring them to complete the sale. The Plaintiff maintains that the 1st and 2nd Defendants did not complete the sale upon the expiry of 21 days’ notice given on 24/11/2005 and that on 19/12/2005 she wrote to the 4th Defendant demanding the return of her original title in exercise of her right under the sale agreement and the Law Society conditions of sale.

3. The Plaintiff avers that the 1st and 2nd Defendants connived with the 1st and 2nd Defendants by presenting the Plaintiff’s documents for registration in the land’s office on 19/12/2005. The Plaintiff maintains that she had instructed the 4th Defendant not to register or present the documents which she had not even executed. She avers that she never executed the sale agreement dated 1/11/2005 which varied the earlier one dated 28/6/2005.

4. The Plaintiff seeks a declaration that the registration of the 1st and 2nd Defendants as proprietors of the

Suit Property was done fraudulently and is therefore null and void. She also seeks a mandatory injunction to restrain the 1st and 2nd Defendants from alienating, selling, transferring or in other way interfering with her possession of the Suit Property. She seeks cancellation at the Defendants' expense, of the entries in the register and the return of the original title document to her as well as damages, interests and costs.

5. The 1st, 2nd and 3rd Defendants amended their defence on 8/6/2013. These Defendants admit receipt of the notice of rescission dated 24/11/2005 but contend that they complied with it and completed the terms of the agreement. The Defendants deny colluding with the Plaintiff's advocate. They admit preparing the transfer which was returned to them duly executed by the Plaintiff and witnessed by the 4th Defendant who was her advocate in the transaction. The Defendants deny that the Plaintiff was entitled to rescind or go back on the agreement for sale.

6. The 1st and 2nd Defendant state that they tendered the balance of the purchase price which the 4th Defendant refused to accept forcing them to deposit the sum in court.

7. The issues for determination are:

- i. Was the Plaintiff entitled to rescind the sale agreement?
- ii. Did the 1st, 2nd and 4th Defendants collude in registering the transaction in favour of the 1st and 2nd Defendants?
- iii. Is the Plaintiff entitled to the reliefs she seeks in the plaint?

8. The Plaintiff amended the plaint on 5/2/201 and joined the Honourable Attorney General as the 5th Defendant on behalf of the Registrar of Titles. She also amended the prayers she seeks to include an order to direct 5th Defendant to cancel entry number 2 dated 19/12/2005 on her certificate of title.

9. The Plaintiff gave evidence and adopted her witness statement. She maintains that the Defendants were not prepared to complete the agreement and that by 29/11/2005 the purchaser's advocates had not received the balance of the purchase price.

10. The Plaintiff takes issue with the manner in which the rates clearance certificate was extended and the Defendant's advocates correspondence on the issue. She maintains that the transfer was lodged for registration at the lands office on 10/11/2005 and the extended clearance certificate issued on 15/12/2005 was supposedly forwarded on 14/12/2005. She claims that the 3rd Defendant attempted to forward the balance of the purchase price on 23/6/2006 which was rejected by her lawyer through his letter of 26/1/2006.

11. She also argues that the transfer having been valued for purposes of stamp duty on 23/1/2006, the transfer could not have been registered on 19/12/2005. She wishes to have the Suit Property revert to her name since she no longer wishes to dispose of her property. She attaches a lot of sentimental value to the Suit Property and was only trying to sell it at the time to meet the expenses of specialised medical attention her daughter required. She was forced to rescind the sale agreement after the purchasers frustrated her.

12. She also testified that under the agreement the balance of purchased price should have been released to her 7 days after the transfer had been registered. She submits that she gave her pin certificate before the rate clearance certificate had expired.

13. The 1st Defendant testified. He also adopted his witness statement. He stated that he used to pay the purchase price through his advocates who would forward it to the vendor's advocate. He told the court the balance of the purchase price was deposited in court when the vendor's advocate declined to accept the funds. The money was paid into court on 22/9/2006. The sum of Kshs. 8,970,000/= was deposited and a notice duly given to the Plaintiff's advocate.

14. The 1st Defendant confirmed that he was given the title deed and that his advocate, who is the 3rd Defendant in this case, was the one who handed over possession of the Suit Property to him and not the Plaintiff.

15. The 3rd Defendant testified in the matter. He confirmed that he represented the 1st and 2nd Defendants in the sale transaction. He stated that when the Plaintiff changed advocates they had to change the completion date in the agreement to 5/10/2005. He stated that he gave a professional undertaking to the Plaintiff's previous advocate that he would hold the deposit of Kshs. 1 million as trustee. He claimed that he received the new rates clearance certificate on 16/12/2005.

16. He stated that the transfer of land was registered at the lands office on 19/12/2005 and that he forwarded the balance of the purchase price vide his letter forwarding the cheque. He maintained that there was no breach on the part of the purchasers. He also confirmed that he received a note dated 23/12/2005 from the Plaintiff's advocate asking him to release Kshs. 20,000/= to an agent. By this time, the transfer had been lodged for registration.

17. The Plaintiff denies signing the agreement dated 1/11/2005. Paragraph 5 of that agreement states that the completion date was 5/10/2005. Paragraph 3(i) of the agreement is amended to read, the purchaser's hereby pays to the vendor to disburse a sum of Kshs. 1 million being an initial payment.

18. Clause 12 stated that the balance of the purchase price was to be deposited with the purchaser's advocates who in turn was to give a professional undertaking to release this to the vendor's advocate upon registration of the transfer in favour of the purchasers and handing over vacant possession. The Plaintiff denies signing these agreements.

19. The agreement cannot possibly have been made on 1/11/2005 if the completion date was 5/10/2005. The Plaintiff's Advocates M/s A.G.N. Kamau wrote to the 3rd Defendant on 22/6/2005 stating that the advocate was to hold the original title as a lien for the disbursements pending completion. The lawyers were to give a professional undertaking to hold the title to the order of the vendor's advocate and that it was returnable on demand in the event that the purchasers defaulted. The letter stated that the completion could be moved to 15/9/2005 provided time was made of the essence.

20. The Plaintiff admits signing the agreement dated 28/6/2005. Under clause 12 of that agreement the balance of the purchase price was to be deposited with the purchaser's advocate.

21. The Plaintiff's letter dated 10/11/2005 advised her advocates that she was reluctant to transfer her property unless she had concrete evidence that the purchaser's advocates were holding the balance of Kshs. 9 million since she would not accept part payment or delayed payment.

22. The 4th Defendant wrote to the 1st and 2nd Defendants on 24/11/2005 giving them notice to complete the sale and pay the balance of the purchase price by the 22nd day after service of the notice in default of which the vendor would rescind the agreement. This date appears to be in reference to 22/12/2005.

23. The 3rd Defendant's letter dated 26/11/2005 stated that the purchaser's advocate would be placed in funds and ready to complete on 29/11/2005.

24. The Plaintiff wrote to her advocate on 19/12/2005 seeking her advocate's confirmation that the agreement had been rescinded while requesting the return of her title deed. The Plaintiff wrote to her advocate on 10/1/2006 reiterating her intention to cancel the agreement and stating that she had entered into an agreement to sale the same plot to other people.

25. The Plaintiff also wrote to the 3rd Defendant on 13/1/2006 expressing her disturbance that this advocate had proceeded to lodge the document for registration on 19/12/2005 yet she had given notice on 19/12/2005 that she had rescinded the agreement. The letter states that the notice given by her advocates on 24/11/2005 expired on 16/12/2005.

26. The copy of the application for registration is dated 10/11/2005 and bears the stamp of the

Department of Lands Central Registry of 19/12/2005 while at the bottom it is dated 19/12/2005 and is stamped Pramod Patel Advocate on the place reserved for signature.

27. The 3rd Defendant wrote to the Plaintiff's advocate on 20/12/2005 confirming that the transfer had been presented for registration while promising to forward a copy of the presentation form. That letter was received on 9/1/2006. The Plaintiff's advocate wrote to the purchaser's advocate on 26/1/2006 confirming that the Plaintiff had terminated the transaction and was therefore returning the cheque. The letter was received on the same date.

28. On 27/1/2006, the purchaser's advocate wrote to the vendor's advocate stating that they did not accept the attempt to terminate. The letter stated:

"Your letters of 28/11/2005 and 14/12/2005 coupled with what we clearly agreed confirmed that the rescission notice was waived".

29. The purchaser engaged new advocates who issued a demand letter to the 3rd and 4th Defendants on 21/2/2006. Mr. P. K. Kandie who was a partner in the 4th Defendant died as confirmed in the letter of 1/3/2006 addressed to the 3rd Defendant.

30. The 3rd Defendant attempted to explain in the letter of 10/3/2006 that it was mutually agreed with Mr. Kandie that the date of completion had been extended and there was no need to amend this on the agreement for sale. The Plaintiff wrote to the 4th Defendant on 18/1/2006 denying that she signed any other agreement other than the one dated 28/6/2005.

31. The 3rd Defendant wrote to the 4th Defendant on 23/1/2006. The letter read:

"I refer to the above transaction and write to confirm that the valuer has accepted the value of Kshs 10 million and the transfer is being registered".

32. The letter forwarded a cheque for Kshs, 8,950,000/= being the balance of the purchase price. The figure on the letter is amended by hand. The letter asked the 4th Defendant to retain Kshs. 20,000/= until on beacon which had not been identified is located. A breakdown for the sum forwarded is given which shows that Kshs. 30,000/= was paid to Mr. Gichere and 20,000/= was retained.

33. The vendor's advocate had forwarded the transfer together with the rate clearance certificate on 8/11/2005 while urging the 3rd Defendant to move with dispatch since the clearance certificate would expire on 18/12/2005.

34. The 3rd Defendant's letter dated 26/11/2005, stated at the bottom which is not on the original as follows: -

"Bearing in mind the fact that the vendor could change his mind it is imperative you let me have the funds as stipulated in the letter."

There is no evidence on when the 3rd Defendant was placed in funds by the 1st and 2nd Defendants which would confirm that they were able, willing and ready to complete the sale transaction.

35. The copy of the transfer produced by the Defendants shows an endorsement dated 23/1/2006 which appears to have been made by the valuation department at the Lands office. This confirms that the transfer could not have been registered until the value declared had been accepted by the valuation department. It is therefore inconceivable that the transfer was registered on 19/12/2005 as alleged by the Defendants.

36. The fact that payment of the purchase price was not forwarded within 7 days of 19/12/2005 but was forwarded on 23/1/2006 further confirms that the transfer was not registered on 19/12/2005 as alleged by the Defendants. It could only have been registered after 23/1/2006 once valuation had been done.

37. The court prefers the evidence of the Plaintiff that she did not sign the 2nd sale agreement and never extended the completion date for the agreement.

38. From the correspondence relied on by the 3rd Defendant, it appears the 3rd Defendant obtained the indulgence of the 4th Defendant and that the 4th Defendant totally disregarded the Plaintiffs notice of rescission.

39. The Plaintiffs previous advocates having made time of the essence for the completion of the transaction, the court finds the 1st and 2nd Defendants were in breach of the agreement for sale since they failed to complete the sale within the time stipulated in the agreement or the notice.

40. The 1st and 2nd Defendants aver that they complied with the 21 days' notice issued by the Plaintiff's advocate on 24/11/2005. Unfortunately, that letter makes reference to payment of the balance of the purchase price by the 22nd day after service of the notice otherwise the vendor would be entitled to rescind the agreement. The Plaintiff maintains that the notice expired on 16/12/2005. The court finds that as at 25/12/2005 when the notice was set to expire the Defendants had neither completed the sale nor paid the balance of purchase price.

41. The court finds that the Plaintiff has proved her case on a balance of probabilities and grants the reliefs sought in the amended plaint.

42. A mandatory injunction is issued to restrain the 1st and 2nd Defendants from alienating, selling, transferring or in other way interfering with the Plaintiff's possession of the Suit Property.

43. The 5th Defendant is directed to cancel the entries in the register in relation to the Suit Property. The 1st, 2nd and 3rd Defendants are directed to return the original title documents to the Plaintiff within 14 days of the date of this judgement.

44. The Plaintiff is awarded the costs of this suit to be borne by the 1st and 2nd Defendants.

Dated and delivered at Nairobi this 25th day of January 2018.

K. BOR

JUDGE

In the presence of: -

Ms. Njoroge for the Plaintiff

Mr. Were for the 1st, 2nd & 3rd Defendants

No appearance for the 4th & 5th Defendants

Mr. J. Okumu- Court Assistant