



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ELC CASE NO.155 OF 2012

DORCUS ADHIAMBO MBUDI.....PLAINTIFF

VERSUS

THE ARCHDIOCESE OF KISUMU

CATHOLIC CHURCH.....1ST DEFENDANT

ERASTUS KHANDIRA.....2ND DEFENDANT

JUDGMENT

1. **Dorcus Adhiambo Mbudi**, the Plaintiff, commenced this suit against **The Archdiocese of Kisumu Catholic Church and Erastus Khandira**, the Defendants through the plaint dated 19th September 2012 and amended on 19th March 2014 seeking for the following prayers;

- a. An order of specific performance of the agreement between the parties for sale of the said house in dispute or any other house of equivalent value within the same estate.
- b. An order of permanent injunction restraining the Defendant whether by itself, its agents, servants or other persons claiming through it howsoever from selling, disposing, charging, transferring, pledging, leasing or by other means whatsoever disposing of or otherwise dealing, adverting with the suit property allotted to the Plaintiff and/or all rights and privileges incidental thereto.
- c. In the alternative, an order or requiring the Defendants to compensate the Plaintiff for the current value of the house in the sum of Ksh.7,000,000/= plus a refund of the cost of the initial valuation and the subsequent re-evaluation at Ksh.42,000/=.
- d. Costs of this suit plus interest on prayer (c) and (d) from the date of filing suit until payment in full.”

2. The Plaintiff’s claim is based on the following averments among others;

- That following the 1st Defendant’s invitation to the public to apply for houses it was constructing at Sifa Gardens Estate Kisumu, the Plaintiff put in her application and was allocated plot No.KSM/MUN.BLOCK/6/587.
- That the agreed purchase price was Ksh.3,600,000/= payable in installment of a minimum of 20% at allocation, and the balance to be paid at the completion of the construction through a mortgage to be arranged by the Plaintiff.

- That the Plaintiff had the leeway to continue making additional payments towards reducing the remaining purchase price as she awaited the completion of the house.
- That the Plaintiff paid Ksh.2,320,000/= leaving a balance of Ksh.1,380,000/= that was to be paid through a mortgage facility the Plaintiff had arranged with Savings and Loans (K) Ltd. That the lender communicated to the Defendants that they would settle the balance upon completion of the house.
- That the 2nd Defendant who at all material times was the 1st Defendant's real estate agent in the transactions, wrote letters dated 20th August 2008 and 8th June 2009 on behalf of the 1st Defendant re-affirming the agreed purchase price and receipt of the payment made by the Plaintiff to the Defendants.
- That pursuant to the agreement between the Plaintiff and the Defendants, the latter allowed the former to provide floor tiles of her choice in the house at her own expense in place of those being installed by the Defendants.
- That on the 28th August 2012 the Plaintiff learnt from the 2nd Defendant that, the house earmarked for her had been re-allocated to another person. That was done without communicating with her and despite her preparedness to pay the balance of the purchase price. That action amounted to breaching their agreement for sale and was also breach of trust.
- That the breach by the Defendants has caused the Plaintiff to suffer loss and damages and hence this suit.

3. The Plaintiff's claim is opposed by the Defendants through their joint statement of defence dated 8th October 2012 in which they among others avers as follows:

- That indeed the 1st Defendant embarked on a development of residential houses in Kisumu in 2007 for sale to the public.
- That the Plaintiff applied to purchase one of the houses by filling an application form provided by the 2nd Defendant. That the filling of the form did not constitute an offer or invitation to purchase as it was meant only for screening and verification.
- That there was no sale agreement over any of the houses executed between the Plaintiff and the Defendants.
- That the 1st Defendant offered to sell the Plaintiff the house at Ksh.6,500,000/= vide its letter dated 22nd October 2009 but the Plaintiff failed to respond within the time given and the unit was sold to one Peter Okeyo Oraro on or about the 5th June 2012.
- That specific performance, injunctive orders and damages cannot issue against the Defendants in the absence of a sale agreement.

4. The Plaintiff testified as PW1 and told the court that towards the end of 2007, she saw a billboard next to the then Midway Hotel, along Kisumu/Kakamega road, advertising houses for sale being developed by the 1st Defendant. The advert indicated that the sale would be through Tumsifu Agency. That the Plaintiff went to Sifa House where the 1st defendant offices are situated and met the 2nd Defendant, who was the Managing Director of Tumsifu

Agency. That after getting a brief she expressed her interest to buy one of the units. That the 2nd Defendant gave her a brochure with a picture of the development and an application form which she filled

and left the original with the 2nd Defendant and retained a copy. That she consequently made the following payments;

<u>DATE</u>	<u>PURPOSE OF PAYMENT</u>	<u>AMOUNT</u>
6.11.2007	APPLICATION	3,000
17.12.2007	DEPOSIT	820,000
27.6.2008	1 ST INSTALLMENT	400,000
31.10.2008	2 ND INSTALLMENT	400,000
16.1.2009	3 RD INSTALLMENT	600,000

That the Plaintiff then made arrangement for a mortgage with Savings & Loan Limited for the balance of purchase price being Ksh.1,380,000/=. That the Advocate for the Kenya Commercial Bank wrote to the Defendants Advocates the letters dated 16th July 2009 and 24th September 2009 but there was no response. That earlier in May 2009, the Plaintiff had with the concurrence of the 2nd Defendant purchased floor titles of her choice to be fitted in the house in place of those earmarked by the developer. That in August 2012, the Plaintiff discovered that the house earmarked for her had been occupied by another person and after failing to

get an amicable solution she instructed her advocate to file this suit. That the valuation of the house done on 19th May 2009 gave the property value at Ksh.4,500,000/=, while a subsequent one done on the 27th February 2013 gave a value of ksh.7,000,000/=. That she paid Ksh.21, 000/= for the valuation.

5. The counsel for the Defendants closed the Defendants case without calling any evidence. The court then gave directions on filing and exchanging of submissions. The counsel for the Plaintiff filed their submissions dated 14th July 2017 but none was filed for the Defendants.

6. The following are the issues for the court's determination;

- a) Whether there existed a binding contract that was capable of being acted upon and enforced between the Plaintiff and the Defendants
- b) Whether, if the answer to (a) is in the affirmative, there has been any breach and by which party.
- c) Whether the purchase price communicated to the Plaintiff was Ksh.3.6 million or Ksh.6.5 million.
- d) What remedies are available to the Plaintiff.

7. The court has carefully considered the pleadings filed, oral and documentary evidence adduced by the Plaintiff, written submissions by the counsel for the Plaintiff and come to the following findings;

- a) That though the application form the Plaintiff obtained from the 2nd Defendant and filled dated 17th December 2007 does not amount to a contract for sale as envisaged under **Section 3(3) of the Law of Contract Act Chapter 23 of Laws of Kenya**, it is sufficient evidence that the Plaintiff had shown interest in the purchase of one of the units being developed by the 1st Defendant.
- b) That the evidence by the Plaintiff that her further communication with the 2nd Defendant led to a specific unit being Kisumu Municipality/Block 6/587 being identified for her at a purchase price of Ksh.3.6 million is uncontroverted. That evidence is actually supported by the letter dated 20th August

2008 by the 2nd Defendant to the Plaintiff. The letter is referenced “**LETTER OF ALLOTMENT –SIFA GARDEN HOUSES – KISUMU’** and goes to state as follows;

“We refer to the above matter and are pleased to inform you that you have been allotted house No. KISUMU MUN BLOCK 6/587 at a purchase price of Ksh.3,600,000/00 which you should settle immediately.”

c) That out of the representation made by the 2nd Defendant to the Plaintiff, she paid to the Defendants through their appointed bankers Kshs.2,220,000/= towards clearing the purchase price of Kshs.3,600,000/=. That appropriate receipts in the name of the 1st Defendant carrying the heading “**MANAGEMENT AND MAINTENANCE SERVICES**” were issued. That the said receipts were produced in court and their authenticity have not been challenged. That further to the receipts, the 2nd Defendant’s letter dated 20th August 2008 referred to in (b) above, at paragraph 2, confirmed that as of that time the Plaintiff had paid Ksh.1,220,000 leaving a balance of 2,380,000/=. That amount had been made up of the first deposit of Kshs.820,000/=, made on 17th December 2007, and Ksh.400,000/= paid on 27th June 2008.

d) That the totality of the filled application form, receipts evidencing payment of Ksh.2,220,000/= and the letter of allotment dated 20th August 2008 constituted a complete understanding of the terms of sale of Kisumu Municipality/Block 6/587 by the Defendants to the Plaintiff. That the absence of a single document, possibly headed agreement for sale, does not mean the parties had no meeting of mind as of the date the 2nd Defendant wrote the said letter, and the Plaintiff made the payments which were received by the 1st Defendant. That accordingly the court finds that there existed a binding contract of sale of **Kisumu Municipality Block 6/587** by the Defendants to the Plaintiff.

e) That the application form had provided for three payment options. The first was cash buyer being required to pay 20% minimum deposit followed by 60% during construction; second was outright purchasing with a single cheque up front, and thirdly was the mortgage buyers. That the evidence adduced by the Plaintiff shows her’s was a mixer of cash buying up to Ksh.2,220,000/=: and the balance through mortgage arrangement. The Plaintiff has availed supporting documents which have not been disputed. That the evidence availed shows that the Plaintiff was ready, willing and able to clear the balance of the purchase price through mortgage, had the Defendants advocates responded to the enquiries contained in the letters dated 16th July 2009 and 24th September 2009 from the lending company’s Advocates. That as the testimony of the Plaintiff remains uncontroverted, the court find that the Defendants are the ones who failed to perform their part of the agreement in failing to put the Plaintiff in possession of the suit property and instead selling it to a third party. That the averment by the Defendants that the Plaintiff failed to indicate or communicate her acceptance of the varied purchase price of Kshs,6,500,000/= is not supported by any evidence, and the alleged letter by the Defendants, which the Plaintiff declined ever having received, was not filed with the court.

8. That as the suit property has already been sold to a third party who has not been made a party in this suit, the prayer of specific performance will be impossible to implement or execute. That the Plaintiff is entitled to a refund of the monies she paid the Defendants totaling Kshs.2,220,000/ plus interest at the banks/market rate from the date of payment to full payment. The Plaintiff is also entitled to costs but the other claims fails.

9. That flowing from the foregoing, the court finds that the Plaintiff has proved her case against the Defendants to the standard required of balance of probabilities. The court enters judgment for the Plaintiff against the Defendants and orders as follows;

a) That the Defendants do refund to the Plaintiff the money paid to them at various times totaling Ksh.2,220,000/= with interest at banks/market rate from the time of payment till payment in full.

b) That the Defendants do pay the Plaintiff’s costs.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 14TH DAY OF FEBRUARY 2018

In presence of;

Plaintiff Absent

Defendants Absent

Counsel Nrs. Onyango for the Plaintiff

M/S Olango for Awino for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/2/2018

14/2/2018

S.M. Kibunja Judge

Joane court assistant

Parties absent

Mrs. Onyango for Ragot for the Plaintiff

M/S Olango for Awino for the Defendant

Court: Judgment dated and delivered in open court in presence of Mrs. Onyango for Ragot and M/S Olango for Awino for the Plaintiff and Defendant respectively.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

14/2/2018