



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO.809 OF 2012

MAUREEN MUTHUA.....PLAINTIFF

=VERSUS=

NATHAN KAHARA & ANOTHER.....DEFENDANT

JUDGEMENT

1. The Plaintiff filed a suit against the defendants claiming the following reliefs:-

a. A permanent injunction restraining the 1st and or the 2nd defendant by themselves, their servants, agents or otherwise howsoever, from advertising for sale and/or selling and/or transferring to any other party other than the plaintiff the property known as Apartment No.E4 on L.R No.5/55, Nairobi formerly L.R No.5/47, Nairobi in Westlands are in the City of Nairobi.

b. Specific performance of the agreement.

c. Damages for breach of contract being equivalent of the value of the apartment at the date of judgement in lieu and/or in addition to specific performance.

d. Costs of this suit plus interest thereof

e. Any other or further relief this Honourable Court deems fit to grant.

2. The Plaintiff entered into a sale agreement with the first defendant on 31st March 2008 in which the plaintiff agreed to purchase Apartment No. E 4 on LR No. 5/55 Nairobi formerly LR No. 5/47. The purchase price was Kshs.7,250,000/=.The plaintiff paid a deposit of Kshs.1,450,000/= on execution of the agreement. The balance of the purchase price was to be paid at the completion of the project in accordance with the terms of the agreement.

3. The defendants were putting up 54 Apartments at Westlands. The second defendant was a special purpose vehicle through which the project was being undertaken. The estimated completion date of the project was April 2009 or within 30 days of the issue of certificate of occupation by the Nairobi City Council. The project was not completed by the anticipated completion date. This was because of problems between the defendants and the contractors who had been contracted to carry out the project. The Plaintiff was however briefed of the problems and accepted to hold on.

4. The Plaintiff who kept on going to the project site to ascertain the progress became impatient and on 24th February 2011, she wrote a letter through her Advocates giving 14 days notice to complete the agreement failing which she would demand for a refund of the deposit paid. The defendants Advocates wrote to the plaintiff's Advocates on 14th April 2011 in which the Advocates referred the plaintiff's Advocates to clause 3 of the sale agreement and indicated that their client was proceeding in accordance with clause 11 of the agreement.

5. The defendants later wrote to the plaintiff's lawyers on 7th June 2012 and informed them that their clients had already sold the apartment to a third party and asked for account details of the plaintiff so as to make a refund of the deposit paid. The plaintiff did not provide account details. She instead went on to file this suit.

6. The plaintiff contends that though she had indicated that she was pulling out of the agreement, she later changed her mind and opted to wait for completion of the project; that it is the defendants who are in breach of the agreement as she was always ready to perform her part but that the defendants are the ones who have refused to perform their part.

7. The defendants stated that there was an agreement between the first defendant and the plaintiff for purchase of Apartment E4 on LR No. 5/55. Before the project could be completed, the plaintiff wrote a letter dated 24th February 2011 opting out of the agreement. The defendant's lawyers accepted the plaintiff's request to opt out of the agreement and called for her account details through letter dated 7th June 2012. The plaintiff did not supply the account details. The Apartment which was meant for the plaintiff was sold to a third party upon the plaintiff's withdrawal from the agreement.

8. I have carefully considered the evidence adduced by the plaintiff as well as the evidence of the defendants. I have also considered the submissions by the parties herein. The Court was asked to determine the following issues.

1. What were the material terms of the sale agreement dated 31.3.2008?

2. As between the plaintiff and the defendants, who was in breach of the sale agreement?

3. Is the plaintiff entitled to the reliefs sought in the Plaintiff?

4. Who is to pay the costs of the suit?

9. In determining the first issue this court has to consider the case before the Court. It is the plaintiff's case that she performed her part of the contract but that it is the defendants who did not perform their part. The estimated completion date was April 2009 but this date kept changing due to circumstances which the plaintiff was kept aware of and accepted the new estimated completion date. However what remained material, the completion date notwithstanding was clause 3 of the agreement which clearly stated that the completion of the transaction was the 30th day next after the vendor sent to the purchaser a letter confirming that authority to occupy the said apartment had been granted by the City Council of Nairobi.

10. The material terms of the agreement having been singled out, the next issue for determination is whether it is the plaintiff or defendant who was in breach of the agreement. From the correspondence exchanged between the plaintiff's Advocates and the defendants Advocates, it is clear that the estimated time for completion of the project kept changing because of the contractors. The plaintiff was kept informed of the challenges which the defendants had with the contractors. The plaintiff sought to know about the new expected completion date and was duly informed and accepted the new expected completion date. There was one time when a draft new agreement was sent to the plaintiff's advocates incorporating the fresh completion date but this agreement was not executed. This therefore meant that the governing agreement was that of 31st March 2008.

11. On 23rd September 2010, the defendants Advocates wrote to the plaintiff's advocate indicating that completion was expected within 70 weeks from 1st October 2010 when a new contractor was expected to take over the site. This is the letter which prompted the plaintiff to write a letter dated 24th February 2011 giving the defendants 14 days to complete failing which she would demand refund of the deposit made. The defendants wrote back on 7th June 2012 accepting the withdrawal of the plaintiff from the agreement and asking for her account details for purposes of refund.

12. It is the Plaintiff who opted out of the agreement. This was accepted by the defendants. The Plaintiff cannot therefore blame the defendants for breach of contract. Even though the Plaintiff later seemed to change her mind on her rescission of the contract, all correspondence which followed touching on the issue were made on a without prejudice basis and as there was no agreement reached on that issue, the correspondence cannot be admissible in evidence. The fact therefore remains that the plaintiff rescinded the contract and pursuant to that rescission, the defendants went ahead to sell the Apartment to a third party. It is therefore clear that there was no breach of contract on the part of the defendants.

13. The plaintiff is seeking a permanent injunction restraining the defendants from advertising for sale or selling or transferring Apartment No.E4 on LR No. 5/55 Nairobi formerly LR No. 5/47. The defendant's evidence is that after the plaintiff opted out of the contract, they proceeded to sell the Apartment to a third party. The plaintiff had tried to obtain a temporary injunction to stop the defendants from going ahead to sell the Apartment, but that application could not succeed as the Apartment had already been sold. The case is now concluded and no injunction can be given as to do so will be acting in vain and furthermore there will be no basis for grant of the same.

14. The Plaintiff is seeking specific performance of the contract. The Plaintiff cannot have an order of specific performance when it is clear that she is the one who opted out of the contract. She cannot claim that her letter of 24th February 2011 did not amount to rescission of the agreement. In Chitty on Contracts paragraph 24-018 the author says as follows:-

“A renunciation of a contract occurs when one party by words or conduct evinces an intention not to perform or expressly declares that he is or will be unable to perform his obligations under the contract in some essential respect. The renunciation may occur before or at the time fixed for performance. An absolute refusal by one party to perform his side of the contract will entitle the other party to treat himself as discharged”.

15. The Plaintiff's letter of 24th February 2011 was plain and clear that she opted out of the contract. There is no any other way that letter would be interpreted other than a plain refusal to carry on with the contract. The Plaintiff argued that it took time for the defendant to react to her letter. The length of period taken before a response was made is immaterial. The fact remains that her rescission was accepted and the defendants were accordingly discharged from the contract. In this regard, I do not find the case of **Cheong Lay Yong Vs Muthukumaran S/O Varthan and another (2010) SGHC 59** cited by plaintiff to be of any assistance to the plaintiff's case. In the present case, the plaintiff's letter of 24th February 2011 was clear that she was not going to wait for another 70 weeks and therefore opted out and sought refund of the deposit paid.

16. I have already found that there was no breach of contract on the part of the Defendants. It therefore follows that no damages for breach of contract can be claimed. All in all I find that the Plaintiff has failed in her claims. Her suit is accordingly dismissed with costs to the Defendants.

It is so ordered.

Dated, Signed and delivered at Nairobi on this 19th day of April 2018.

E.O.OBAGA

JUDGE

In the presence of :

M/s Mochama for Plaintiff

M/s Mengesa for Mr Mahugu for Defendants

Court Assistant: Hilda

E.O.OBAGA

JUDGE