



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 440 OF 2010

CATHOLIC DIOCESE OF HOMABAY REGISTERED TRUSTEES....PLAINTIFF

VERSUS

CHRISTINE NYANCHAMA OANDA.....DEFENDANT

JUDGEMENT

1. The Plaintiff agreed to sell L.R. No. 12778/260 Langata, Nairobi measuring approximately 0.2 hectares (“the Suit Property”) to the Defendant at the agreed purchase price of Kshs. 3 million. Upon execution of the agreement, the Defendant was to pay the Government of Kenya on behalf of the Plaintiff Kshs. 412,911 on account of land rent. The balance of the purchase price was to be paid upon completion. The agreement incorporated the terms of the Law Society Conditions of Sale in so far as they were not inconsistent with the terms of the agreement.
2. The agreement did not set the date for completion, which would now be determined under the Law Society Conditions of Sale. The Plaintiff avers that the agreement having been dated 21/1/2009 by the Defendant, the date of completion should have been within 42 days of this date which would fall on 12/3/2009.
3. The Plaintiff claims that the Defendant failed to pay the balance of the purchase price and that it therefore issued a 21 days’ notice of intention to rescind the contract. The Plaintiff’s claim is that despite the rescission of the contract for sale, the Defendant went ahead and constructed on the Suit Property. The Plaintiff claims that it is entitled to rescind the contract based on the Defendant’s taking possession of the Suit Property and developing it without paying the entire purchase price.
4. The Plaintiff avers that it has been denied its right to possess and use the Suit Property and has suffered loss and damage. The Plaintiff seeks a declaration that the Defendant is a trespasser on the Suit Property; and a permanent injunction to restrain the Defendant or her agents from occupying or remaining in possession or developing the Suit Property. The other prayers sought in the Plaintiff are vacant possession; a mandatory injunction to compel the Defendant to demolish and remove the structures and developments she put up on the Suit Property at her expense; general damages, interest and costs.
5. In her defence filed in court on 19/10/2010, the Defendant admits entering into the agreement with the Plaintiff for the purchase of the Suit Property for Kshs. 3 million. She claims she paid Kshs. 412,911 towards the land rent for the Plaintiff’s parcels of land being L. R. Nos. 12779/257, 258, 259, 260 and 261. The Defendant claims to have incurred further costs at the Plaintiff’s requests in procuring titles for the aforementioned parcels. She claims she paid Kshs. 1,250,000 over and above the agreed deposit sum of Kshs. 412,911.
6. According to the Defendant, the balance of the purchase price is Kshs. 1,336,589 and not Kshs. 2,587,089 as the Plaintiff claims. The Defendant avers that she has always been ready and willing to complete the sale transaction and pay the balance of purchase price.
7. The Defendant urges that her right to possession of the Suit Property was confirmed when the court granted an injunction restraining the Plaintiff from interfering with her possession of the Suit Property on 23/2/2012.
8. The Defendant filed the application dated 15/7/2011 seeking leave to amend her defence and filed a counter claim against the Plaintiff and to deposit the sum of Kshs. 1,296,589 held by Nyaencha Waichari & Co. Advocates in court. The court allowed this application on 17/5/2014.
9. The Defendant amended her defence on 30/5/2013 in which she maintains that the Plaintiff was not entitled to rescind the sale agreement as it did. She counterclaims for a declaration that the contract signed on 21/1/2009 was valid and the Plaintiff’s purported rescission was unlawful and void; She seeks an order of specific performance to compel the Plaintiff to complete the sale; and that the Plaintiff should be compelled to execute the transfer of the Suit Property in her favour in default of which the Registrar of the High Court should sign the transfer documents to facilitate the registration of Suit Property in her name.
10. The issues for determination are as follows: -

- a. When was the agreement for sale executed?
- b. How much was the deposit paid by the Defendant and what was the balance of the purchase price?
- c. Was time of the essence for the sale agreement?
- d. Was the Plaintiff entitled to rescind the contract of sale?
- e. Should an order of specific performance issue to compel the Plaintiff to transfer the Suit Property to the Defendant?
- f. Should the court issue a permanent injunction to restrain the Defendant from occupying the Suit Property?

11. It is not in dispute that the Defendant paid the sum of Kshs. 412,911 as a deposit which was expended on account of outstanding land rent for the Suit Property.

12. The Plaintiff called three witnesses to testify on its behalf. The first witness testified that when the Defendant failed to conclude the agreement, the Plaintiff instructed its advocates to issue a notice of rescission.

13. Mr. Francis Eric Wasuna, who handled the sale transaction on behalf of the Plaintiff gave evidence. His law firm oversaw the subdivision of the Plaintiff's land in 2006. The deed plans in respect of the plots created being L.R. No. 12778/258, 259 and 261 were registered on 2/8/2006. He produced the receipts together with the subdivision scheme approvals dated 18/5/2007 and copies of the receipts issued by the Lands Office on account of conveyancing and registration fees for these plots. It was his testimony that by the year 2007 all the plots had been subdivided and the registration fees paid for and the only thing outstanding was valuation for land rent.

14. The Plaintiff instructed him to sell some of its plots which included the Suit Property. He introduced the Defendant's husband, Chris Oanda to the Plaintiff as a potential purchaser for the Suit Property. He negotiated with Mr. Oanda and eventually they agreed that the Plaintiff would sell the Suit Property to him for Kshs. 3 million. Mr. Oanda advised the advocate to prepare the sale agreement in his wife's name.

15. Mr. Wasuna forwarded copies of the sale agreement that he drew to the Defendant's advocate for execution and dating sometime in 2008. The sale agreement was not returned until 11/9/2008 when the Defendant's advocate requested for a copy of the title to enable them prepare the transfer. The copy of title was forwarded vide the Plaintiff's letter of 21/9/2008. The Defendant's advocate returned the copy of the sale agreement under cover of their letter of 22/1/2009.

16. Mr. Wasuna testified that other than the sum of Kshs. 412,911 which was captured in the agreement as the deposit, no other payment was disbursed by the Defendant at the time the sale agreement was drawn. The Plaintiff's advocates letter of 4/4/2008 had allowed the Defendant to expend monies up to a maximum of Kshs. 750,000/=.

17. The Plaintiff's advocates gave notice to the Defendant to complete the sale by paying the balance of the purchase price of Kshs. 2,586,589 vide the letter of 9/9/2009, following which the Defendant's advocates sent a transfer for execution to the Plaintiff's advocate by their letter of 17/9/2009.

18. The Plaintiff maintains that the sale agreement only permitted the Defendant to take possession of the Suit Property but it did not permit her to develop the Suit Property or alter its condition. The Plaintiff contended that the Defendant was developing a mansion on the Suit Property without its consent and before paying the full purchase price.

19. The Plaintiff relied on copies of the certificate of title to which it attached a deed plan dated 2/8/2006; the agreement of sale; the Plaintiff's advocates letter authorising disbursement of up to Kshs. 750,000 to facilitate registration of the titles; and the Plaintiff's advocate's letter dated 1/7/2008 requesting the Defendant's advocate to prepare and forward the transfer. The Defendant's advocate's letter of 11/9/2008 mentions that the agreement had been signed and would be forwarded shortly. The correspondence exchanged by the parties confirms that the agreement was prepared in 2008 and forwarded for execution in 2008.

20. The Plaintiff also produced the Defendant's advocate's letter of 22/1/2009 which forwarded the signed sale agreement and, which stated that they were preparing the transfer for the vendor's signature. The Plaintiff also relied on its advocate's letter of 21/10/2009 addressed to the Defendant's advocate stating that they were treating the agreement as determined since the 21 days' period within which the outstanding balance of the purchase price of Kshs. 2,586,589 was to be paid had expired without the Defendant making payment.

21. The Plaintiff's advocate's letter of 9/9/2009 took issue with the date of the agreement. They stated that they would treat the agreement as being dated 29/8/2008. They made reference to clause 2C and D of the Law Society Conditions which provides that where the completion period is not provided in the agreement, it shall be 42 days after the date of the contract. The letter stated that the Defendant was in default of her obligations to complete the sale having not paid the balance within 42 days of 29/1/2009.

22. The Defendant gave evidence and called three other witnesses. It was her evidence that she spent a further sum of Kshs. 750,000/= on the property with the approval of Mr. Wasuna advocate and that there was further authorisation to spend Kshs. 500,000/= on the 5 plots. She maintained that she performed her part of the agreement and was always ready and willing to complete the sale transaction. The balance of Kshs. 1,296,589 was deposited in court on 20/6/2013.

23. The Plaintiff's husband gave evidence. He dealt with the vendor's advocate on behalf of his wife. He could not remember whether the payment he made to Patrick Osero was through cash or cheque. Mr. Osero was tasked to do the conveyancing work and procure titles. It was

his evidence that the Plaintiff's titles were not ready since it had not paid land rent and the issue of beacon alignment was outstanding. He stated that he instructed Mr. Osero in 2007 to process the title for the Suit Property. He maintained that Mr. Osero undertook the subdivision and survey work and got the deed plans that is why he raised the invoice for Priority Management & Property Limited.

24. On cross examination, he conceded that he was not aware that the Subdivision Scheme Approval was done in 2005. He also confirmed that Mr. Osero did not show him any evidence of payment of statutory dues in respect of the survey and subdivision. He confirmed that he met Mr. Wasuna in 2007 and that Mr. Wasuna asked him to process the titles for the 5 plots after which he would sell one plot to him.

25. Mr. Kennedy Nyaencha, the advocate who acted for the purchaser in the sale transaction gave evidence. He confirmed that the sale agreement did not have a completion date but incorporated the Law Society of Kenya Conditions of Sale. He maintained that his client paid the balance of the purchase price within the time set by the Law Society Conditions of Sale and that the default notice was not necessary since the purchaser had not defaulted. According to him, the default notice extended the period for completion by 21 days. He agreed that the period was extended since it had expired. He also conceded that the purchaser did not pay the balance of the purchase price within the 21 days given by the Plaintiff.

26. Mr. Nyaencha was only aware of the deposit of Kshs. 412,911 and was not privy to the discussions on the payment of the other sums by his client. He maintained that the sale agreement was executed in January 2009. He stated that his firm wrote three letters to the vendor's advocates within the 21 days' notice given by the vendor's advocate. He forwarded the transfer document for execution. He maintained that the Plaintiff was in default because it failed to return the executed transfer.

27. Mr. Patrick Osero also testified for the defence. He confirmed that he issued the invoice by Priority Management & Properties Limited and that he was paid the sum of Kshs. 1,250,000 by Chris Oanda for which he issued a receipt. It was his evidence that he undertook the survey and subdivision work and got the 5 titles which he gave to Chris Oanda.

28. He stated that he personally undertook the work for which he invoiced. He is an Agriculturalist by profession. The work for which he invoiced included survey, subdivision, registration, beacon alignment, resurvey for change of user, deed plan authentication and deed plan fees in respect of the 5 plots which include the Suit Property. He was aware that such survey services can only be rendered by a licensed surveyor. He was not a surveyor. He had no evidence in court to show that he rendered the services for which he invoiced.

29. He stated that he was given instructions by Mr. Chris Oanda in May 2008 and that he was paid at KCB Westlands Sarit Centre. He conceded that the receipt that he issued does not comply with the Stamp Duty Act and that he did not charge and remit VAT as required by law. He was shown the subdivision scheme approvals dated 18/5/2005 and the receipts for payment and confirmed that none of the payments was made in 2008. He stated that he was in the picture when the title was issued but did not pay for the deed plans. He later conceded that the subdivision was done in 2005 and the grant issued in 2008.

30. The Plaintiff maintains that Priority Management & Property Limited did not do any work. The court is inclined to agree with the Plaintiff that the Defendant failed to prove that the sum of Kshs. 1,250,000 was paid by the Defendant's husband for the subdivision and preparation of the titles for the Suit Property and the Plaintiff's other plots in 2008 based on the fact that the Subdivision Scheme Approval was done in 2005.

31. Looking at the subdivision scheme approvals produced by the Plaintiff for plot numbers 12778/146, 12778/147, 12778/153, 12778/258, 12778/259 and 12778/261; they were prepared on 18/5/2005 and 27/11/2006. Payments were made to the Lands Office on 15/6/2007 and 4/10/2007. The deed plan for the Suit Property is dated 2/8/2006. Based on the foregoing it is highly unlikely that Mr. Patrick Osero who was instructed by the Defendant's husband to carry out conveyancing work undertook the subdivision work as he claims. By the time Mr. Osero was instructed in 2008, the survey work had already been concluded.

32. It is noteworthy that the payment of Kshs. 1,250,000 said to have made by Chris Oanda is not mentioned in any of the correspondence exchanged between the parties.

33. The Defendant failed to prove that Patrick Osero and her husband are the ones who carried out the work relating to the survey and subdivision of the plots that culminated in the registration of the Plaintiff as the proprietor of L.R. Numbers 12778/257, 258, 259, 260 and 261.

34. Even if the sale agreement was executed on 21/1/2009 as the Defendant maintains, then the sale ought to have been completed by 12/3/2009 based on the Law Society Conditions of Sale. The Defendant's advocate's letter of 22/1/2009 stated that they were preparing the transfer and would forward this. No transfer was forwarded for over eight months until September 2009 when the Plaintiff gave the Defendant 21 days' notice to complete the sale by paying the balance of the purchase price of Kshs. 2,587,689/=. The Plaintiff was already in possession of the Suit Property and had commenced construction. Time became of essence when the Plaintiff's advocate issued the 21 days' notice to the Defendant to complete.

35. The Defendant's advocate only forwarded the transfer after receiving the 21 days' notice which intimated that she was ready and willing to complete. Merely stating a willingness to pay does not of itself confirm that she was ready, able and willing to complete the sale. No explanation is given as to why it took more than 8 months after the execution of the sale agreement for the Defendant's advocate to forward the transfer to the Plaintiff's advocate. The Defendant did not make payment after the Plaintiff's advocates gave the 21 days' notice on 9/9/2009 to pay Kshs. 2,586,589 being the balance of the purchase price. At no time did the Defendant challenge this sum demanded as the balance of the purchase price in any of its letters.

36. The Defendant has all along maintained that the balance of the purchase price was Kshs. 1,336,589 and not Kshs. 2,587,089. She relies on the Plaintiff's advocate's letter of 4/4/2008 authorising the Defendant to pay land rent and deduct from the purchase price. The letter authorised the Defendant to disburse up to a maximum of Kshs. 750,000/= to facilitate registration of all the titles in the Plaintiff's name. It is not clear why the Plaintiff authorised the Defendant to expend this sum to facilitate the registration of the five titles in its name yet the

subdivision of the Plaintiff's land had already been done.

37. The court finds that the balance of the purchase price outstanding was Kshs. 2,587,089 and not Kshs. 1,336,589 as the Defendant submits.

38. The Defendant deposited the sum of Kshs. 1,296,589 in court on 20/6/2013, which was not the entire balance of the purchase price. She has not demonstrated that she was ready to complete within a reasonable time for the court to grant the order of specific performance that she seeks.

39. The Defendant argues that the fact that she deposited the sum of Kshs. 1,296,589 in court in 2012 shows that she was ready and willing to complete the transaction. This sum is less than the balance of the purchase price. The court finds that the fact that the Defendant was not prepared to pay the balance of the agreed purchase price in full shows that she was not ready and willing to conclude the transaction within a reasonable time. The court finds that the Plaintiff was entitled to rescind the sale as it did.

40. The sale agreement provided at clause 5 that the Defendant would be given vacant possession upon execution of the sale agreement. The Law Society of Kenya Conditions of Sale stipulate that where a purchaser takes possession of the property before completion, the purchaser occupies the property as a licensee of the vendor. The Defendant was enjoined to keep the Suit Property in as good a state of repair and condition as it was when she took possession from the date of taking possession until completion, or until the vendor retakes possession.

41. Unreasonable delay in performing the obligation of completion would entitle a party to make time of the essence of the contract. The Defendant failed to prove her ability and readiness to pay the balance of the purchase price at the time the Plaintiff's advocates gave notice on 9/9/2009 as well as on 21/10/2009 when the Plaintiff's advocates wrote to the Defendant's advocate stating that they were treating the agreement as determined since the balance of the purchase price had not been paid within the 21 days' period. The Plaintiff was therefore entitled to rescind the contract of sale.

42. The court finds that the Plaintiff has proved its claim on a balance of probabilities and grants prayers (a) to (g) of the Plaint dated 21/9/2010. The Defendant's counterclaim is dismissed with costs to the Plaintiff. The funds the Defendant deposited in court will be released to the Defendant forthwith.

Dated and delivered at Nairobi this 4th day of April 2018.

K. BOR

JUDGE

In the presence of: -

Mr. Ong'anda junior holding brief for Mr. Mbaka for the Defendant

Mr V. Owuor- Court Assistant

No appearance for the Plaintiff