



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC NO.666 OF 2012

MARY WANJIRU NDEGWA.....PLAINTIFF

=VERSUS=

WANDEMI DEVELOPERS LIMITED.....DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit against the defendant in which she sought a permanent injunction restraining the defendant or its agents from transferring, disposing or in any other way with **LR No.2798/12** in favour of any person other than her. The Plaintiff also sought for an order of specific performance directing the defendant to **transfer LR No. 27981/12** (suit property) to her.
2. The Plaintiff and the defendant had entered into a sale agreement dated 19th June 2007 in which the Plaintiff agreed to purchase the suit property from the defendant at a consideration of Kshs.2,000,000/-. The Plaintiff made a down payment of Kshs.650,000/- on execution of the agreement. The balance was to be paid within 3 months. The Plaintiff thereafter made a further payment of Kshs.900,000/- making a total of Kshs.1,550,000/-. The Plaintiff was unable to clear the balance of Kshs.450,000/- in good time owing to financial difficulties.
3. The defendant through letter of 21st June 2008 threatened to cancel the sale but following discussions, it was agreed that the Plaintiff would clear the balance. On 7th January 2009 the Plaintiff cleared the outstanding balance of Kshs.450,000/-. On 10th February 2016, the defendant wrote to the Plaintiff indicating that the Plaintiff owed the defendant some balance. The Plaintiff was asked to go to the Defendant's office for more consultations.
4. The Plaintiff later engaged the defendant on the alleged outstanding balance. The defendant explained that the Plaintiff was required to pay penalty of Kshs.1,000,000/- for late payment. After negotiations it was agreed that she pays Kshs.500,000/-. The agreed amount was paid and when the Plaintiff was pursuing transfer of the suit property, she was asked to make an additional amount of Kshs.2,500,000/- to make the purchase price to be Kshs.5,000,000/-. The Plaintiff did not agree with this as she had already paid the entire purchase price as well as penalty for late payment.
5. The defendant in its evidence through the director stated that the Plaintiff was one of the initial purchasers of the suit property. The Plaintiff was given the introductory price of Kshs.2,000,000/- but because she could not pay the entire amount within 3 months, she was advised that the price had appreciated and was required to make an additional Kshs.1,00,000/-. The Plaintiff paid 500,000/- but did not clear the other 500,000/- in time. Due to the delay in paying the price went up to Kshs.10,000,000/- per plot in the area. The Plaintiff was however asked to up the amount to Kshs.5,000,000/- on the ground that she was one of the initial purchasers.
6. The defendant denies that the amount which the Plaintiff was asked to pay was penalty for late payment. The defendant states that after the Plaintiff refused to pay the amount asked, the agreement was cancelled and the suit property sold to a third party called Jacinta Kingi.
7. I have gone through the evidence accused by the Plaintiff as well as that of the defendant. I have also gone through the submissions filed by the parties herein. There is no contention as to the identity of the suit property. Before the registration of the suit property in the name of the defendant, it was described as **Plot No. 46 Roysambu V**. The Plaintiff commissioned the services of a Surveyor who went to the ground and confirmed that the suit property was still intact only that there was a small structure of iron sheets on it.
8. The parties herein did not file agreed issues. The defendant filed its own issues on 30th September 2013. The Plaintiff did not file any issues but has raised her issues through the written submissions filed on 30th January 2018. A look at the separate issues filed shows that the following are the issues which are for determination:-

i. Did the Plaintiff clear payment of the purchase price?

ii. Was there an agreement between parties to enhance the purchase price to kshs.5,000, 000/-?

iii. What was the effect of the Plaintiff making payments outside the 90 days granted in the agreement?

iv. Was the defendant entitled to rescind the agreement?

v. Is the Plaintiff entitled to an order of specific performance?

vi. Who is to bear the costs of this suit?

9. The agreed purchase price according to the agreement of 19th June 2007 was Kshs.2,000,000/-. The defendant acknowledged Kshs.650,000/-. On 20th November 2007, the Plaintiff paid Kshs.50,000/-. On 4th November 2007 she paid Kshs.550,000/-. On 22nd December 2007, she paid Kshs.300,000/-. The final payment of the purchase price was made on 7th January 2009. This final payment effectively cleared what was outstanding. Except for the amount which was acknowledged in the agreement, the Plaintiff was issued with receipts for all the subsequent payments until she cleared the balance of purchase price.

10. Though the defendant claims that the purchase price kept changing, there is nothing which shows that the purchase price was adjusted upwards. It is the defendant's evidence that after the plaintiff cleared paying Kshs.2,000,000/- she was asked to pay an additional amount of Kshs.100,000/- to make it 3,000,000/-. The defendant later demanded that the Plaintiff pays Kshs.5,000,000/-. The purchase price had been fixed by the agreement of 19th June 2007. The defendant could not unilaterally seek to increase it.

11. If there was to be any variation of the amount, then this would only be introduced by an addendum to the agreement. There is nothing at all to show that there was an agreement between the parties to enhance the purchase price. The only time the defendant mentions the figure of Kshs.5,000,000/- is through letter dated 18th September 2012 when the defendant purported to rescind the agreement on account of nonpayment of the balance of the purchase price. The handwritten notes on the letters dated 10th June 2008 and 10th February 2011 were made by the husband of the Plaintiff. The balance, referred to in those letters is what they later paid as penalty. That did not refer to balance over and above the Kshs.2,000,000/- which had been agreed upon in the agreement.

12. Though the agreement stated that the balance of the purchase price was to be paid within 90 days from 19th June 2007, it is clear that the balance was cleared outside that period. The defendant agreed to accept payment outside the stipulated 90 days. He is therefore stopped from raising the issue of payment having been made outside the set time. The defendant by accepting payment outside the three months shows that they had waived their rights under the agreement of 19th June 2007. In the case of **Prisca Kemboi & 2 others –Vs- Kenya Post Office Savings bank [2014] Eklr.** Justice Ndolo quoted from the case of **Sita Rollngs Mills Ltd. –Vs- Jubilee Insurance Company Ltd. [2007] eKLR** where the court states as follows:-

“A waiver may arise where a person has pursued such a course of conduct as to evidence an intention to waive his right or where his conduct is inconsistent with any other intention then to waive it may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his rights”.

13. In the case of **Prisca Kemboi (supra)** quoted from the case of **Serah Njeri Warobi –Vs- John Kimani Njoroge [2013] eKLR** where it was stated as follows:-

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person”

14. The principles of waive and estoppels as stated in the two cases hereinabove clearly apply to the present case. The defendant having accepted payment outside the 90 days period agreed to waive his right to that clause and is therefore estopped from raising it now to show that payment was not made in accordance with the agreement.

15. The defendant has threatened to rescind the agreement vide its letter of 10th June 2008 on the grounds that the Plaintiff had not paid the balance of Kshs.45,000/-. The Plaintiff made arrangements to pay the balance which was finally paid on 6th January 2009 through a banker's cheque. This is the time when the issue of penalties for late payment arose. These penalties were paid through two installments on 12th September 2011 and 25th November 2011. There was therefore nothing outstanding which would have made the defendant to rescind the agreement as it purported to do through its letter of 18th September 2012.

16. Rescission of an agreement can only occur if there is breach of the terms of the contract. The defendant demanded for payment of the balance of the purchase price of 450,000/- on 10th June 2008. That balance was paid on 6th January 2009. It was accepted. There was therefore no basis upon which the defendant could purport to rescind to. It is clear from the evidence that the defendant was trying to arm-twist the Plaintiff into paying a higher price which was the prevailing market price. What the defendant forgot is that there was binding agreement entered into on 19th June 2007 and that it could not keep demanding more money from the Plaintiff.

17. The Plaintiff is entered to an order of specific performance. I have already found hereinabove that the Plaintiff has already fulfilled all that was required of her. It is the defendant who is refusing to transfer the suit property on spurious grounds that there is outstanding balance. The defendant in its submissions claim that the Plaintiff is not entitled to specific performance because she went to report the directors of the defendant at the Directorate of Criminal Investigations where the directors are under investigation for obtaining money by false pretences.

18. The Plaintiff has never demanded for refund of her money. We do not know the nature of complaint which was made to the Directorate of Criminal Investigations. What is clear is that there were some investigations going on regarding the suit property. The suit property was available and is still available though the defendant has purported to sell it to a third party. The suit property is preferred by an injunction and the defendant's director confirmed that he cannot transfer the land to any other person due to the injunction which is in place. It is therefore clear that the case before the Directorate of Criminal Investigations is not on refund. The issue of the Plaintiff having asked for her refund does not arise.

19. The remedy of specific performance is a discretionary remedy. It can be granted or refused based on circumstances of each case. In the instant case, the suit property is intact save for a temporary structure which is on the suit property. This is according to the report by a surveyor who was commissioned by the Plaintiff. The property was preserved by the court until the determination of this suit. The Plaintiff has fulfilled all that she was required to do under the agreement. This is a clear case where the remedy of specific performance should be granted. The authorities cited by the defendant on both the issue of estoppels and specific performance cannot be applicable in this case.

20. From the analysis hereinabove, I find that the Plaintiff has proved her case on a balance of probabilities. I enter judgment in her favour against the defendants in terms of the prayers in the plaint.

Dated, Signed and delivered at Nairobi on this 28th day of June 2018.

E.O.OBAGA

JUDGE

In the presence of :-

M/s Migale for Plaintiff

Mr Kimani for Mr Mbigi for defendant

Court Clerk: Hilda

E.O.OBAGA

JUDGE