



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO 107 OF 2012

BEATRICE NYAMBURA MURIUKI.....1ST PLAINTIFF

ISABEL WANJIKU MUCHEMI.....2ND PLAINTIFF

- VERSUS -

1. JEREMIA KITHEKA MUSUVAI

2. ALFRED VINCENT OTIENO

3. WILBERFORCE JECONIAH

ODHIAMBO(Sued as the Trustees of the

INSTITUTE OF ENGINEERS OF KENYA).....DEFENDANTS

JUDGMENT

1. By a plaint dated 1/3/2012 and filed in court on 2/3/2012, the plaintiffs sued the Trustees of the Institute of Engineers of Kenya (hereinafter referred to as **the trustees**) seeking the following orders:

a. An order for specific performance of the contract dated 7th September 2006 directing that the defendants complete the sale of the parcel of land known as LR No 209/12328 to the plaintiffs by furnishing all the outstanding completion documents to the plaintiffs and signing the transfer forms in favour of the plaintiff

b. Alternatively, an order that the Deputy Registrar do execute all the transfer instruments in favour of the plaintiff.

c. Costs of the suit.

2. The plaintiff's claim arise out of an agreement for sale dated 7/9/2006 executed between the Trustees and the plaintiffs for sale of Land Reference Number 209/12328 to the plaintiffs at a purchase price of Kshs 3,400,000. Under Clause 2 of the agreement for sale, a deposit of Kshs 1,700,000 was to be paid on or before the signing of the agreement. Balance of the purchase price (Kshs 1,700,000) was to be paid on completion. Clause 6 which contained the parties' contractual framework on completion date provided as follows:

6. Completion Date

Subject to Clause 3 above the date of completion shall not exceed eighteen (18) months from the execution of this agreement or such other date as the parties may agree in writing (the Completion Date).

3. Clause 10 which contained the parties' contractual framework on completion procedure provided as follows:

10. Completion

Before the completion date, the vendors through the vendors' advocates shall procure and hand over to the purchasers' advocates the following documents in exchange with the banker's cheque for the balance of the purchase price in the manner appearing in Clause 2.2.to be held by them as stakeholders and to be released to the vendor

fourteen (14) days after the exchange:-

10.1 Original title

10.2 Valid Rates and Land Rent Clearance Certificates

10.3 Original executed transfer in favour of the purchasers and or their nominee or nominees

10.4. Certified true copies of all payment receipts issued by Nairobi City Council (NCC) and the lands office with respect to the settlement of rates and land rent (if any)

10.5. Original duly executed and stamped discharge from the current charge (if any):

10.6. Valuation form for stamp duty

10.7 Valid Commissioner of Lands consent to transfer the property

10.8 Personal identification number for the vendor

The documents listed in clause 10.1 to 10.8 (both inclusive) are hereinafter referred to as the (completion documents)

4. Clause 8 which contained the parties contractual framework on possession of the suit property provided as follows:

8. Possession

Possession to be given on payment of the deposit with authority for the purchasers to prepare development plans and to commence requisite developments plans to commence requisite developments on the property within (12) months of taking possession and to inform the vendor that the developments have been done to enable the vendor to apply for the consent to Transfer. Further the purchasers are at liberty to apply in the name of the vendor for and obtain change of user to commercial cum residential or any other user suitable to the purchasers.

5. The plaintiffs contend that they took possession of the suit property upon payment of the deposit, in tandem with Clause 8. It is further contended that the defendants authorized the plaintiffs to pay Kshs 1,350,140 towards rates which the defendants owed the City Council of Nairobi and offset the amount against balance of the purchase price and this was done. It is similarly contended that the defendant authorized the plaintiff to pay land rent to the Department of Lands. This left a balance of Kshs 224,520 payable to the defendants from the plaintiffs.

6. The plaintiffs contend that the defendants failed to avail completion documents and instead, on 13/1/2012, purported to rescind the sale agreement by offering to refund to the plaintiffs the initial deposit of Kshs 1,700,000 paid at the time of execution of the agreement for sale. Aggrieved by that decision, the plaintiffs brought this suit seeking an order of specific performance of the agreement.

7. The defendants filed a joined statement of defence. Their case is that indeed they entered into the subject agreement. They further contend that they received the initial deposit of Kshs 1,700,000 from the plaintiffs and handed over possession of the suit property to the plaintiff in expectation that the plaintiffs would prepare development plans within 12 months and inform the defendants so that they could apply for a consent to transfer the suit property.

8. The defendants contend that they paid outstanding land rent and City Council rates and forwarded receipts to their advocates at the time, M/s Murimi & Co Advocates, for onward transmission to the plaintiffs. They contend that the payment of Kshs 1,350,140 made by the plaintiff was made without the knowledge and authority of the Institute of Engineers of Kenya and that at no time did the parties to the agreement agree to any amendment to the agreement to allow the plaintiffs to pay land rates and land rent. They further contend that their advocates acted without instructions.

9. The defendants add that subsequently, the Council of the Institute of Engineers of Kenya held a meeting and resolved to rescind the agreement. It is their case that the plaintiff breached the agreement for sale. They add that they were not liable to pay the sum of Kshs 1,350,140 to the city Council.

10. At the hearing, the 1st plaintiff, Beatrice Nyambura Muriuki (PW1) testified on her own behalf and on behalf of the 2nd plaintiff. She stated that in the course of seeking the City Council's consent to change the user of the suit property, they discovered that the defendants had not been paying rates and land rent to the Council and to the Department of Lands. Through their advocates, the defendants authorized them to pay the outstanding rates and rent and offset the amounts against the balance of the purchase price and they duly paid. She added that they duly informed the defendants that they had prepared the development plans and forwarded them to the defendants through a letter dated 16/7/2007. PW 1 further stated that they started building within the time stipulated in the agreement for sale.

11. The defence called one witness, Engineer Mwamzali Shiribwa - DW 1. He adopted his witness statement in which he contended that the defendants paid rates and rent and that they did not authorize the plaintiffs to pay rates on their behalf. He stated that their advocates acted without instructions in authorizing the plaintiff to pay rates and rent. He further stated that the plaintiffs breached the agreement, first, because they failed to prepare and submit development plans to enable the defendants apply for the consent to transfer; and secondly, by varying the terms of the agreement in relation to payment of land rates and land rent. He urged the court to dismiss the plaintiff's suit.

Issues and Determination

12. I have considered the parties' pleadings, evidence and rival submissions. I have also considered the relevant law and the applicable jurisprudential principles. Three key issues fall for determination. The first issue is whether the plaintiff breached the sale agreement dated 7/9/2006. The second issue is whether the material agreement was duly rescinded by the defendant. The third issue is whether the agreement is enforceable through an order of specific performance.

13. The defendants' contention of breach on part of the plaintiff is twofold: that the plaintiff did not avail development plans to the defendants to enable them seek consent to transfer; and secondly, that the plaintiffs unilaterally varied the agreement and proceeded to pay rates and land rent in respect of the suit property without the defendants' consent.

14. Clause 8 of the material agreement alluded to development plans. It provided that upon payment of the deposit, the plaintiffs would be entitled to possession and would have the authority to prepare development plans and commence development. It also authorized the plaintiffs to use the names of the defendants to apply for change of user. It did not require the plaintiffs to submit the development plans to the defendants within a specified timeframe or at all. The court therefore find no basis for the contention that the plaintiffs breached the agreement by failing to present development plans to the defendants.

15. The second limb of the alleged breach relates to the payments made to the City Council of Nairobi and to the Department of Lands in relation to land rates and land rent. There is common ground that the payments were authorized in writing by the defendants' advocates. The advocates were retained by the defendants to handle and complete the conveyance on their behalf. The defendants contend that their advocates acted without instructions and therefore they are not bound by their advocates' action.

16. The court does not agree with that view. A firm of advocates duly appointed to complete a conveyance on behalf of a vendor or a purchaser is presumed to have the instructing client's instructions to give binding directions and instructions relating to the completion procedures of the conveyance.

17. In the present dispute, the plaintiff's advocates properly drew the attention of the defendants' advocates to the outstanding rates and rent and enquired whether it would be acceptable to the defendants if the plaintiffs paid the rates and rents and deducted the sum from the balance of the purchase price. The authorization from the defendants' advocates was unequivocal and formal. Based on the formal authorization, the plaintiffs went ahead to pay the rates and rent with a view to procuring approval of change of user and development plans by the City Planning Department. Approval would not have been forthcoming without clearance of rates and obtention of rates clearance certificate. The defendants contended that they had duly paid land rates and land rent. No evidence was presented to support that contention. Consequently, the court's finding on this limb of the allegation of breach is that the plaintiffs properly acted as directed by the defendants' advocates and the defendants were and are bound by the actions of their advocates. If the defendants were aggrieved, the party against whom to ventilate their grievance in relation to the payments made towards rates and rent was their advocate. The totality of the above finding is that there was no breach disclosed on part of the plaintiffs.

18. The second issue is whether the material agreement was properly rescinded. Under clause 5 of the agreement, the parties incorporated into the agreement the 1989 Edition of the Law Society Conditions of Sale. The incorporated conditions of sale clearly stipulate how rescission would be effected. First, the party contemplating rescission on account of breach had to give the party in breach a 21 days written notice requiring the party in breach to complete the contract. In the present dispute, there is no evidence of any completion notice issued by the defendants. All that the defendants are saying is that the Council of the Institute of Engineers of Kenya met and resolved to rescind the sale. Without saying much, a resolution of the Council did not in itself constitute a rescission. Rescission had to follow the procedure stipulated in the Law Society Conditions of Sale. Secondly, rescission would not crystalize if upon receipt of completion notice, the party in breach complies with the notice. The court's finding on this issue is that there was no proper rescission. The result is that the material contract remains in force to date.

19. The last issue is whether the material contract is enforceable through an order of specific performance. The court has already made a finding to the effect that the contract was not rescinded in the stipulated manner and that it is still in force. What remains is the question as to whether an order of specific performance should be issued in the circumstances of this case.

20. This court's jurisdiction to grant an order of specific performance is guided by common law principles. An order of specific performance decrees the due completion of a contract in its proper form. As a common law principle, the court will not decree specific performance where, if at trial, evidence is tendered to demonstrate that the vendor is unable to convey the land. This principle is informed by the philosophy that it is the essence of the remedy of specific performance that the purchaser should obtain the land. Secondly, an order of specific performance is an equitable remedy and is granted at the discretion of the court. This discretion is governed by certain principles. For instance, the remedy will not be granted if its enforcement will entail great hardship or if the vendor's title is in doubt or if its enforcement would entail protracted or difficult litigation. Lastly, the essence of an order of specific performance is that the contract remains in force and the parties are required to discharge their obligations under the contract.

21. In the present suit, the plaintiffs were given possession in 2006 and have been in possession since then. The plaintiffs paid the 50% deposit in the manner stipulated in the agreement. The plaintiffs paid a subsequent sum of Kshs 1,350,140 on directions of the defendants' advocates towards land rates. They paid money towards land rent on the direction of the defendants' advocates. The understanding was that the sums would be deducted from the balance of the purchase price (Kshs 1,700,000). Going by the defendants advocates' letter dated 26/3/2009, what remains to be paid is Kshs 224,520. In the circumstances, it is the court's finding that this is a proper case where the equitable remedy of specific performance should be granted as prayed.

Disposal Orders

22. In light of the above findings, judgment is hereby entered in favour of the plaintiffs in terms of prayers (a) (b) and (c) of the plaint. The plaintiffs shall within thirty five (35) days deposit the sum of Kshs 224,520 in court to be released to the defendants. In default of the

deposit, the judgment herein shall stand vacated and the suit shall stand dismissed. The defendants' advocates shall notify the plaintiffs' advocates within five (5) days about the order requiring the plaintiffs to deposit the money in court within 35 days.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 20TH DAY OF JULY 2018.

B M EBOSO

JUDGE

In the presence of:-

Ms Kinyanjui Advocate for the defendants

Ms Halima Abdi - Court Clerk