



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 68 OF 2015

ANNE MURAMBI.....PLAINTIFF

VERSUS

JOHN MUNYAO NYAMU.....1ST DEFENDANT

AGNES JOHN NYAMU.....2ND DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit relates to Land Reference Number 330/403 situated on Riara Road, Nairobi (**the suit property**). The genesis of the dispute is an agreement for sale of the suit property signed on 14/7/2004 by the defendants as holders of a power of attorney donated by the then registered proprietor, Josephine Nthambi Kioko, as vendor on the one hand (**the deceased**); and the plaintiff herein, Ann Murambi as purchaser on the other hand (**the plaintiff**). The purchaser paid the agreed deposit of Kshs 670,000. Under Clause 5 (iii) of the agreement for sale, balance of the purchase price was to be paid upon delivery of completion documents to the purchaser's advocates and fourteen days after registration of the transfer in favour of the purchaser and registration of the mortgage in favour of the purchaser's lender. Two days after execution of the agreement for sale, the registered proprietor and donor of the power of attorney, Josephine Nthambi Kioko, died. As a consequence of the death of the vendor, the sale contract was not completed within the envisaged 90 days. The defendant's advocates, Mr. A F Kisebu nonetheless gave the plaintiff vacant possession of the suit property to occupy it pending completion of succession proceedings and eventual completion of the sale contract. Going by the correspondence exchanged between the parties' respective advocates and the financier, the sale appears to have remained on course notwithstanding the long lapse of time. Things took a different turn soon after the demise of the vendor's advocate, Mr Anselmi Francis Kisebu, in February 2011.

2. Following the demise of Mr A F Kisebu, the defendants appointed Ms Nzioki Mutua & Associates to act for the estate of Josephine Nthambi Kioko. Vide a letter dated 28/2/2012 addressed to the plaintiff, the vendor's new advocates informed the plaintiff that the sale agreement had been overtaken by events and was no longer binding. They demanded that the plaintiff vacates the suit property effective 1/3/2012. The letter was copied to the plaintiff's advocates, M/S L M Ombete & Co Advocates. On 12/3/2012, the plaintiff's advocates responded to the letter advising that the plaintiff was in the Democratic Republic of Congo and that they would wait for her instructions. On 25/4/2012, the plaintiff's advocates issued a substantive response, contending that the agreement was valid and bound both the deceased and her estate and that failure to complete the contract within the envisaged period was wholly due to the vendor's estate's inability to discharge the vendor's contractual obligations. M/s Nzioki Mutua & Associates responded, reiterating that there was no binding agreement. The standoff culminated in the filing of this suit by the plaintiff on 21/5/2012 seeking the following orders:

- a. **An order of specific performance of the agreement to compel the defendants to transfer the suit property to the plaintiff;**
- b. **General damages for breach of contract in lieu of or in addition to the Order of specific performance;**
- c. **Special damages of Kshs 9,328,394/-**
- d. **An injunction restraining the defendants whether by themselves, their servants and/or agents or howsoever from ejecting the plaintiff from the suit property or demanding that the plaintiff pays them rent of Kshs 100,000 per month from 1st day of June, 2012 until final determination of this suit;**
- e. **Interest on special damages at the rate of 30% p.a with effect from 13th July, 2004 until payment in full and interest on general damages at court rate;**
- f. **Costs of this suit;**

g. Any other or further remedy deemed appropriate:

Case of the Plaintiff

3. The plaintiff's case is that the defendants are administrators of the estate of the late Josephine Nthambi Kioko to whom the deceased had in her life time donated the power of attorney to act for her. She contends that by an agreement dated 14/7/2004 between the plaintiff and the deceased, and executed by the defendants on behalf of the deceased, then living, the deceased agreed to sell the suit property to the plaintiff at a consideration of Kshs 6,700,000. The agreement incorporated the Standard Terms and Conditions of Sale of the Law Society of Kenya, 1989 Edition. She further contends that she paid the agreed deposit of Kshs 670,000 and she has all along been prepared to complete the purchase but the deceased was and has been unable to perform her part of the agreement to facilitate completion. Consequently, she prays for an order of specific performance against the deceased. She adds that the said agreement can only be rescinded in accordance with the terms and conditions contained therein.

4. The plaintiff further contends that, with the consent of the deceased, she took possession as a licensee in the suit property which was unoccupied, to prevent it from being vandalized and/or taken over by third parties, and has over the years, as a purchaser ready to complete the purchase, spent considerable amounts in renovating the suit property to put it in a habitable state. She adds that her licence to occupy the suit property was coupled with a grant and cannot be revoked as to defeat the purpose for which the licence was granted.

Case of the Defendants

5. The defendants filed a defence and counterclaim. They conceded that the agreement was executed and bound the parties; the Law Society of Kenya Standard Terms & Conditions of Sale were incorporated in the agreement; and that the deposit of Kshs 670,000 was paid by the plaintiff. The defendants however contend that enforcement of the agreement is not possible because the agreement has been overtaken by events. They further contend that the plaintiff is not entitled to general and special damages for breach of contract.

6. The defendants further contend that in or about September 2004, the plaintiff, without consent of the defendants, took possession of the suit property and has since then resided in the suit property without paying rent. They aver that at the completion date on 11/10/2004, the plaintiff had failed to secure a loan facility hence her only available remedy is to reclaim her deposit.

7. The defendants add that the deceased's estate is entitled to *mesne profits* for the period the plaintiff has resided in the suit premises without paying rent. They argue that the plaintiff's suit is statute barred under the Limitation of Actions Act.

8. By way of counterclaim, the defendants seek the following orders against the plaintiff.

a. A declaration that the Agreement dated 14th July 2004 lapsed, is null and void and of no effect;

b. A declaration that the Defendant's continued possession and occupation of the suit premises is illegal and unlawful;

c. An order for assessment of rent payable on the premises and payment of the amounts assessed to the defendants.

d. General, aggravated and exemplary damages.

e. An order of eviction to issue as against the plaintiff.

f. Such other and further relief as the Court may deem just to grant.

g. Costs of this suit with interest at court rates.

Evidence by the Plaintiff

9. At trial, the plaintiff adopted her written statement and produced 37 Exhibits. She testified that she entered into the sale agreement on 14/7/2004 and proceeded to pay the agreed deposit of Kshs 670,000. She stated that Clause 5 of the sale agreement required that the vendor submits specific completion documents before the completion date but the vendor did not furnish the documents and up to the time of initiating this suit, the vendor had not furnished the completion documents. She further testified that the balance of the purchase price was to be raised through a loan from her bank against the title to the suit property and the bank duly approved her loan application. She contended that she has at all material times been ready and willing to perform her obligations under the contract. She added that she was not able to remit balance of the purchase price because completion documents were not availed by the defendants.

10. The Plaintiff further testified that upon signing the agreement for sale, she learnt that there was a caveat lodged against the Title by Stanley Olonana Ntutu and Jane Thira Ntutu. She further learnt that the vendor had passed on. She added that neither the defendants nor their lawyers alerted her that there would be delay. The Plaintiff stated that on 22/3/2005 the vendor's advocates wrote to her through her advocates advising her that she would continue to occupy the house and that the transfer process would be effected after the personal representatives of the vendor obtained a Grant of Letters of Administration.

11. The plaintiff testified further that she was put in possession by the vendor's advocate in September 2004 as a purchaser who was ready to complete the purchase and emphasized that she did not go into the house as a tenant. She added that the property was in a bad shape when she was given possession and she had to put it in a habitable state. She contended that she incurred expenses because she was a buyer ready to pay balance of the purchase price upon delivery of completion documents by the vendor. She stated that she waited for the completion

documents up to 2011 when she learnt that the vendor's advocate, Mr Kisebu had also died. She then instructed her advocate to write to the Law Society of Kenya to establish who was in charge of the law firm for the purpose of completing the transaction.

12. The plaintiff added that there was no notice by the vendor rescinding the sale contract. She stated that on 28/2/2012, she received a letter from the vendor's new advocates, Nzioki Mutua & Associates, demanding that she vacates the suit property within 3 months. The plaintiff further testified that with the sanction of the vendor's advocates, she paid land rates since 2004 and spent Kshs 8,658,394 on renovation. She further testified that at one point her financiers advised her to have her husband on board and she approached the defendant who agreed to sign another agreement but this subsequent agreement was mutually abandoned. She added that balance of the purchase price was deposited in a joint interest earning account at Diamond Trust Bank.

Evidence by the Defendants

13. The defence called one witness, DW 1 – John Munyao Nyamu (1st defendant). He adopted his written witness statement dated 16/6/2015 and produced 19 Documents. He testified that the 2nd defendant is his wife and a sister to the deceased vendor.

14. DW 1 stated that they signed the agreement dated 14/7/2004 as attorneys of the deceased vendor. The completion period for the sale contract was 90 days. The purchase price was Kshs 6,700,000 and the 10% deposit was paid as agreed by the parties. After signing the agreement, they realized that there was a caveat and they put measures in place to remove the caveat because they knew they could not transfer the property without removing the caveat. He could not remember the exact date and year when the caveat was removed.

15. DW 1 further testified that under Clause 4 of the agreement for sale, if the purchaser were unable to secure a loan, the deposit was to be refunded to the purchaser. He added that nothing was brought to their attention to the effect that the purchaser was unable to secure a loan. He further testified that in 2005, their advocate, Mr Kisebu, called them to sign what turned out to be another agreement for sale incorporating the plaintiff's husband. They were however not given a copy of the subsequent agreement incorporating the plaintiff's husband. He added that they did not authorize the plaintiff to enter the house. He further stated that they did not authorize the plaintiff to incur expenses. He confirmed that together with the 2nd defendant, they are administrators of the estate of the deceased vendor and they caused the suit property to be transferred into their names as trustee.

16. In cross-examination, he stated that at the time of signing the agreement for sale, the property was registered in the name of Josphine Nthambo Kioko who died two days after execution of the agreement. He did not know if the purchaser was informed about the demise of the vendor. He confirmed that the defendants appointed, M/s A F Kisebu & Associates Advocates to act for the vendor. He further testified that they executed the 2nd agreement to assist the purchaser obtain a loan. He added that the agreement for sale dated 14/7/2004 was not formally rescinded but it was his understanding that it stood terminated after expiry of the 90 days.

17. DW1 further testified in cross-examination that by the end of the 90 days completion period, they had not provided the completion documents. He explained that they were unable to provide completion documents because, following the death of the vendor, the validity of the power of attorney lapsed and they had to undertake succession. He added that they encountered many obstacles in their endeavor to obtain completion documents. Firstly, the title was held by M/s A H Malik Advocates on behalf of the Ntutus. Secondly, there was a caveat on the Title. Thirdly, the removal of the caveat required an indemnity. Fourthly, following the death of the vendor, succession had to be done before the contract could be completed. They eventually got the Grant of Letters of Administration in January 2007.

18. DW1 testified further that after they got the Grant of Letters of Administration, they requested their advocate to expedite completion of the sale. He added that the transmission of the property into their joint names was meant to enable them complete the sale to the plaintiff.

19. DW 1 added that their new advocates' letter dated 28/2/2012 advising that the contract was no longer valid and binding was the first communication from them to the purchaser following obtention of the Grant of Letters of Administration. He also confirmed that in February 2010 their advocate, Mr Kisebu, wrote to the purchaser's lender's advocates advising them that they were drawing relevant documents to facilitate transfer of the property to the purchaser.

20. He added that he gave the keys to the advocate and he got to learn that the plaintiff had been given possession of the house in 2005. He confirmed that they have never paid rates for the house since 2004. He further confirmed that their advocate had informed them that he authorized the plaintiff to pay land rates.

21. DW1 further testified that the plaintiff's advocates asked for completion documents severally but they were unable to avail them because of the cited challenges. He confirmed that they did not issue a completion or rescission notice to the purchaser and that the agreement incorporated the 1989 Law Society of Kenya Standard Terms and Conditions of Sale. He stated that he did not know that consent given by their advocate would be construed as consent by them. He added that he was still willing to complete the sale save that the value of the property has since changed.

Plaintiff's Submissions

22. Mr L M Ombete, counsel for the plaintiff submitted that possession before completion was given by the defendants' lawyer under Clause 11(ii) (b) of the agreement for sale which incorporated the Law Society of Kenya Terms and Conditions of Sale 1989 Edition which allows for possession before completion. Counsel contended that there was no lease or tenancy before the sale contract and that the defendants through their lawyer gave the plaintiff possession of the property before completion to occupy as a licensee of the vendor and not as a tenant of the vendor.

23. On money expended by the purchaser on the property, counsel submitted that DW1 admitted that the property was in an inhabitable state and that as a purchaser who was ready to complete the purchase, she spruced up the property to facilitate valuation and habitation. He added that the defendants had conceded that since 2004 they had never bothered to pay land rates.

24. On delay to complete the purchase, counsel submitted that the party in default was the vendor. He added that to date, the defendants have not provided the plaintiff with completion documents despite numerous requests by the plaintiff's advocates. He stated that DW1 testified that they were not able to avail completion documents because, firstly, the title was held by M/s A H Malik & Co Advocates and was released on 25/2/2010; secondly Mr & Mrs Ntutu had lodged a caveat against the Title; and thirdly, the vendor died on 16/4/2004 and succession had to be undertaken.

25. On the validity of the agreement, counsel submitted that an agreement for sale of real property does not come to an end by affluxion of time. Equally, it does not come to an end by being "overtaken by events" as contended by the defendants. He contended that a land sale agreement is terminated in accordance with its terms and conditions. Counsel added that time was not expressed to be of the essence in the material agreement for sale.

26. Counsel further submitted that although the plaintiff had made a plea for an alternative prayer, the remedy which the plaintiff seeks is an order of specific performance to compel the defendants to transfer the property to her. He added that there is in existence a valid and enforceable contract and the plaintiff has been in possession of the suit property since 2004 and has expended considerable amounts of money to improve the property. He contended that in the circumstances, the remedy of specific performance was the most appropriate.

27. On the alternative prayer of special damages, he submitted that were the court to decline to grant an order of specific performance, the plaintiff would be entitled to Kshs 8,748,571 made up of the special damages specifically pleaded and proved, together with interest from the date of filing suit. The plaintiff would also be entitled to interest on the deposit of Kshs 670,000 at 30% p. a from 3/7/2004 when it was paid.

28. Counsel further submitted that the plaintiff is entitled to general damages for breach of contract to be assessed based on the current market price of the suit property less what she would have paid in the year 2004. He assessed the general damages at Kshs 80,300,000.

29. On the defendants' counterclaim, counsel submitted that the defendants had not led evidence to establish a cause of action against the plaintiff. He contended that the plaintiff did not breach the sale contract in any way and that she was put in possession as licensee by the defendants through their advocate. He added that a court cannot declare that a contract lapsed or that it is null and void and of no effect unless a proper cause of action is pleaded and evidence to that effect is adduced to prove it. He urged the court to dismiss the counterclaim.

Submissions by the Defendants

30. Mr Mutua, counsel for the defendants, submitted that the defendants did not renege on the sale agreement, and that both parties had able counsel to guide them on the way forward following the death of the vendor. He added that soon after the vendor died, the defendants initiated succession proceedings with a view to completing the sale to the plaintiff. He further submitted that the caveat which was on the Title was removed in September 2004.

31. Counsel further submitted that although the defendant's advocate put the plaintiff in possession, there was no agreement between the parties allowing the plaintiff to take possession. He contended that the plaintiff had not proved that she had funds to complete the sale by 13/10/2004 when the 90 days period ended.

32. Counsel for the defendants faulted the plaintiff for procuring the execution of a second agreement by the defendants to bring her husband on board and contended that the defendants did not have capacity to execute a binding agreement in 2005 because the donor of the power of attorney had already died. Counsel further submitted that execution of the invalid second agreement was proof that the plaintiff did not have funds to complete the purchase. Counsel added that by executing the second agreement, the plaintiff by her own hand and deed confirmed termination of the first agreement.

33. Regarding the letter dated 2/9/2004 from Standard Chartered Bank to the plaintiff and her husband, confirming that the Bank was ready to advance them a loan, counsel dismissed the letter as personal to the parties it was addressed to. Regarding receipts produced as exhibits in support of the claim for special damages, Mr Mutua submitted that the plaintiff had not laid a basis for the receipts and contended that the plaintiff's claim for special damages is a scheme geared towards illegal profiteering.

Issues and Determination

34. The court has carefully considered the parties' pleadings, evidence and submissions. The court has also considered the relevant law and jurisprudence on the key issues falling for determination. Eight key issues emerge for determination, namely: (i) whether the agreement dated 14/7/2004 executed between the defendants herein as attorneys of the late Josephine Nthambi Kioko (vendor) and the plaintiff herein stands terminated or rescinded; (ii) whether any other valid and binding variation agreement was created by the parties herein subsequent to the death of Josephine Nthambi Kioko; (iii) whether the agreement dated 14/7/2004 is statute barred and unenforceable under the Limitation of Actions Act; (iv) whether the agreement dated 14/7/2004 binds the estate of the late Josephine Nthambi Kioko; (v) whether the plaintiff herein breached the agreement dated 14/7/2004 in any way; (vi) whether the defendants are entitled to the counterclaim pleaded; (vii) whether the plaintiff is entitled to general and special damages against the estate of the late Josephine Nthambi Kioko; (viii) who should bear costs of this suit. I will deal with the eight issues in the order in which they are itemized.

35. The first issue is whether the agreement dated 14/7/2004 stands terminated or rescinded in any way. The defendants contend that the material agreement was overtaken by events and is no longer binding on the estate of the late Josephine Nthambi Kioko because the sale was not completed within the completion period of 90 days.

36. Two days after the material agreement was executed, the vendor died. The completion period under Clause 4 of the agreement was 90 days. The defendants to whom the vendor had donated a power of attorney happened to also be her personal representatives. They have contended that following the demise of the vendor, they put in motion proceedings to obtain a Grant of Letters of Administration. The Grant was eventually obtained in 2007. After they obtained the grant, they did not complete the contract. They caused the suit property to be

transferred into their names and they are holding it in trust. They contend that in their view, the sale contract had been overtaken by events in that the 90 days period had lapsed.

37. At law, the demise of the vendor only terminated the powers which the defendants had hitherto exercised as attorneys of the deceased vendor. The death of the vendor did not terminate the contract which the defendants had executed on behalf of the deceased vendor. The contract remained binding on the estate of the vendor, and the personal representatives of the vendor were, by law, required to initiate succession proceedings and discharge the vendor's obligations under the contract.

38. Secondly, if the estate of the deceased vendor wished to terminate or rescind the contract for any valid reason, they were required to terminate or rescind the contract in accordance with the law. What was the law? The law was and still is that, the party exercising the option to terminate or rescind the contract was required to do so in accordance with the terms spelt out in the contract. The material contract did not have an express clause on termination or rescission. It however incorporated the Law Society Conditions of Sale (1989 Edition). Under Clause 4(7) of the Law Society of Kenya Conditions of Sale, a vendor who is ready, able and willing to complete the sale and is aggrieved by the purchaser's default to complete the contract within the completion period is required to issue a twenty one days' notice requiring the purchaser to complete the contract. Clause 4(7) provides thus.

4(7) This sub-condition applies unless a special condition provides that time is of the essence in respect of the completion date:

a. In this condition "completion notice" means a notice served in accordance with this sub-condition;

b. If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition. A party shall be deemed to be ready, able and willing to complete:

i. If he could be so but for some default or omission of the other party;

ii. Notwithstanding that any mortgage on the property is unredeemed when the completion notice is served, if the aggregate of all sums necessary to redeem all such mortgages (to the extent that they relate to the property) does not exceed the sum payable on completion.

c. Upon service of the completion notice it shall become a term of the contract that the transaction shall be completed within twenty-one (21) days of service and, in respect of such period, time shall be of the essence of the contract.

d. If the purchaser does not comply with a completion notice:

i. The purchaser shall forthwith return all documents delivered to him by the vendor and at his own expense procure the cancellation of any entry relating to the contract in any register;

ii. Without prejudice to any other rights or remedies available to him, the vendor may forfeit and retain any deposit paid and/or resell the property by auction, tender or private treaty.

e. If on any such re-sale contracted within six (6) months after the completion date the vendor incurs a loss, the purchaser shall pay to the vendor liquidated damages. The amount payable shall be the aggregate of such loss, all costs and expenses reasonably incurred in any such re-sale and any attempted re-sale and interest at the contract rate on such part of the purchase money as is from time to time outstanding (giving credit for the amount of the forfeited deposit (if any) and for all sums received under any re-sale contract on account of the re-sale price) after the completion date;

f. If the vendor does not comply with a completion notice, the purchaser, without prejudice to any other rights or remedies available to him, may give notice to the vendor forthwith to pay to the purchaser any sums paid by way of deposit or otherwise under the contract and interest on such sums at the contract rate from four (4) working days after service of the notice until payment. On compliance with such notice, the purchaser shall not be entitled to specific performance of the contract but shall forthwith return all documents delivered to him by the vendor and, at the expense of the vendor, procure the cancellation of any entry relating to the contract in any register;

g. Where, after service of a completion notice, the time for completion shall have been extended by agreement or implication, either party may again invoke the provisions of this condition which shall then take effect with the substitution of "ten (10) days" for "twenty-one (21) days" in paragraph (c) of this sub-condition.

In summary Clause 4(7) stipulates the procedure to be followed in terminating or rescinding an agreement for sale of land on account of non-completion by a party to the agreement.

39. DW1 conceded that they did not serve any completion/termination/rescission notice. In my view, in the absence of a completion/termination/rescission notice in the manner stipulated, the material contract remained in force and is enforceable subject to the law of limitation of actions. Secondly, failure to complete the contract in 90 days did not terminate the contract because time was not expressed to be of essence in the material contract. Neither did the parties agree that the contract would stand terminated if there was no completion within 90 days. The court finding on this issue therefore is that the contract dated 14/7/2004 was not in any way terminated or rescinded by any of the parties and the contract is enforceable by either party to it.

40. The second issue is whether any other valid and binding land sale agreement was executed by the parties herein in 2005 subsequent to the death of the vendor. All the parties admit that in 2005, the plaintiff desired to bring her husband on board as a co-purchaser. The parties' advocates prepared an agreement which was executed and back-dated. The defendants contend that they did not know what they were signing at that time and argue that the particular document is null and void. On her part, the plaintiff contends that the agreement of 2005 did not crystalize and the only binding agreement is the one dated 14/7/2004. I have stated that the defendants' powers as attorneys of the vendor ceased the moment the vendor was pronounced dead. The defendants did not have powers to create any other binding agreement on behalf of the deceased vendor in 2005. They only acquired powers to act on behalf of the estate of the deceased vendor in 2007 when they were appointed as administrators of her estate. They did not therefore have *locus standi* to create another valid contract on behalf of the deceased vendor or on behalf of the deceased vendor's estate in 2005. Consequently, the court's finding on this issue is that no other valid contract was created by the parties hereto in 2005 in relation to the suit property.

41. The third issue is whether the agreement dated 14/7/2007 is statute-barred and unenforceable under the Limitation of Actions Act. At paragraph 13 of the defendants' statement of defence and counterclaim, the defendants have contended that the agreement which the plaintiff seeks to enforce is statute-barred under the Limitation of Actions Act. The material agreement constitutes an action to enforce a land sale contract. It similarly constitutes an action to recover land. Under Section 4(1) (e) of the Limitation of Actions Act, the limitation period for an action to enforce a land sale contract is six years. Under Section 7 of the Limitation of Actions Act, the limitation period for an action to recover land is twelve years.

42. The material contract was executed on 14/7/2004. The six year period for enforcement of a land sale contract lapsed in July 2010 and the twelve year period for an action to recover land lapsed in July 2016. The present suit was instituted on 21/5/2012 through a plaint dated 21/5/2012. If one were to treat the plaintiff's claim as wholly an action to recover land, the claim would be within the twelve year bracket.

43. However, the question is whether the plaintiff's claim is tenable in so far as it seeks to enforce a land sale contract. Based on the evidential material placed before the court and the relevant provisions of the Limitation of Actions Act, the answer to the above question is in the affirmative. I say so because DW1 confirmed in his evidence that they became administrators of the estate of the deceased vendor in 2007 and they acknowledged the validity and enforceability of the material contract and put in place measures to complete the contract. He contended that had their then advocate, Mr Kisebu, not died in 2011, they were on course to complete the contract.

44. Secondly, on 25/2/2010, the defendants' advocates M/s A F Kisebu wrote to the plaintiff's financiers and advocates stating as follows:

Our Ref: KACO/1426/JNK/MFK

Your Ref: S20/269/V/05M

25th February 2010

M/S Mohammed/Muigai Advocates

MM Chambers

K Rep Center

4th Floor

Wood Avenue

NAIROBI

ATT: M Maundu, Esq

RE: TRANSFER AND CHARGE OVER L R 330/403

ESTATE OF JOSPHINE NTHAMBI KIKO

Refer to the various correspondence in this matter, the last being your letter received by us on the 22nd February 2010.

We have now received the original title documents for this property from the advocates who have been keeping the same.

We are now drawing the appropriate documents for lodging with the land registrar to facilitate the transfer of the property to the purchasers.

Please bear with us.

Yours faithfully,

For: A F KISEBU & CO ADVOCATES

Cc M/S L M Ombete & Co. Advocates

Hughes Building

5th Floor

Kenyatta Avenue

NAIROBI

45. In my view, DW1's evidence and the above letter constitute unequivocal acknowledgements within the meaning of Section 23 of the Limitation of Actions Act. Each of the acknowledgments constitutes an accrual of fresh right of action in favour of the plaintiff in relation to the contract. If I were to be wrong on my interpretation of Section 23 of the Limitation of Actions Act, the plaintiff's right of action would still stand preserved under Section 20 of the Act which contains limitation framework in respect of trust property. In my view, upon the demise of the vendor, the administrators of her estate held and still hold the suit property in trust for the two parties to the sale agreement dated 14/7/2004. They cannot therefore raise a legitimate defence of limitation against one of the parties in whose trust they hold the suit property.

46. The fourth issue is whether the agreement dated 14/7/2004 binds the estate of the late Josephine Nthambi Kioko. Having found that the material agreement was not in any way terminated or rescinded, it follows that the agreement is operational and enforceable by and against the respective parties to it. The vendor having died in 2004, the agreement is binding and enforceable by and against her estate. The administrators of her estate are the parties liable to complete the agreement and to receive balance of the purchase price on behalf of the estate.

47. The fifth issue is whether the plaintiff breached the agreement dated 14/7/2004 in any way. No evidence was tendered to suggest that the plaintiff breached any term of the agreement for sale. The deposit was paid at the time of signing the agreement. Balance of the purchase price was to be paid upon the vendor's delivery of completion documents and registration of the charge in favour of the plaintiff's financiers. There is no evidence that completion documents were delivered. DW1 confirmed that they faced challenges which led to the delay. The first challenge was the death of the vendor, necessitating succession proceedings. The second challenge was the fact that the title was held by M/s A H Malik Advocates and the Ntutus had placed a caveat against the title. I therefore find that there was no breach on part of the plaintiff.

48. The sixth issue is whether the defendants are entitled to the counterclaim pleaded. The defendants sought a declaration that the agreement dated 14/7/2004 lapsed, is null and void, and is of no effect. They also sought a declaration that the plaintiff's possession of the suit property is illegal and unlawful. Further they sought *mesne profits* and general, aggravated and exemplary damages. I have already made a finding that the agreement dated 14/7/2004 is valid and enforceable. I have similarly made a finding that the plaintiff did not breach the agreement of 14/7/2004 in any way. It therefore follows that prayers (a) and (d) of the Counterclaim are unmerited.

49. I will make brief pronouncements on prayers (b) and (c) of the Counterclaim. Both of them relate to the plaintiff's occupation of the suit property. Evidence was tendered by both the plaintiff and the 1st defendant to the effect that the vendor's agent gave possession of the suit property to the plaintiff. Between 2004 and 2012, no single notice was issued to the plaintiff requiring her to either complete the sale contract or vacate the suit property. Similarly, no notification was made to the plaintiff advising that administrators to the estate had been appointed. The two communications from the defendants were; the letter of October 2010 advising the financiers that the conveyance was on course, and the letter of February 2012 by the defendants through their new advocates advising that the agreement had been overtaken by events. The latter communication is what triggered the present suit.

50. The plaintiff contends that she is a licensee protected within the framework of Condition 6(1) of the Law Society Conditions of Sale (1989 Edition). The said condition provides thus:

6(1) Possession before Completion

Where the purchaser takes possession of the property before completion other than under a lease or tenancy entered into before the contract, the purchaser occupies the property as licensee of the vendor and not as tenant and the taking of possession is not an acceptance of the vendor's title or a waiver of the purchaser's right to make requisitions or objections to title.

51. Parties to the material agreement voluntarily incorporated the above clause in the agreement. In my view the court has no basis to vary the clause, however harsh it may be. Secondly, it is not lost to the court that the estate delayed to complete the sale and did not deem it necessary to revoke the licence in any way. It is clear from DW1's evidence that the vendor's personal representatives were not diligent in dealing with the vendor's estate. They took inordinately long to process the Grant. Even after they obtained the Grant in 2007, they did nothing in relation to the contract and the plaintiff's possession of the suit property. Consequently, the court's finding on this issue is that the estate of the deceased vendor was the author of the predicament it finds itself in. Its Counterclaim is therefore wholly unmerited.

52. I have deeply reflected on the question as to whether the plaintiff should be awarded general and special damages in the circumstances of this suit. The reason why the sale contract was not completed within the 90 days period is that two days after the agreement was signed, the vendor passed on. It is apparent from the evidence on record that succession proceedings were not initiated promptly. To mitigate against damages which the plaintiff stood exposed to as a result of the delay, the vendor's agent gave the plaintiff vacant possession of the suit property and the plaintiff has occupied the suit property since then as a licensee without paying any licence fee. Secondly, the special damages demanded by the plaintiff relate to renovation expenses and outgoings relating to the period the plaintiff has been in possession of the suit property and are pleaded as an alternative remedy. In my view, it would be unjust and inequitable to award the plaintiff any form of

damages against the deceased's estate in the circumstances of this case and taking into account the fact that the court has found that the estate is bound to perform the contract.

53. Consequently, I hold that any hardship or damage suffered by the plaintiff as a result of the inordinate delay by the estate has been adequately ameliorated by the possession she enjoyed over the period. The court declines to give her more.

54. Before I make disposal orders, it is important I make some pronouncements on the principal remedy sought by the plaintiff. She makes a principal plea for an order of specific performance. She also made an alternative plea for special damages. 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 the effect 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.

55. In the present suit, the plaintiff was given vacant possession of the suit property in 2004. She has been in occupation since then. She has paid rates and other outgoings since then. She has renovated the suit property which the defendants conceded was in an inhabitable state at the time of sale. The entire balance of the purchase price was remitted by the plaintiff and is held by the parties' respective advocates in a joint interest earning account. In my view, the circumstances of this case commend to an order of specific performance as opposed to an award of damages.

Disposal Orders

56. In light of the above findings, the court makes the following disposal orders on the plaintiff's suit and the defendants' counterclaim:

- a. An order of specific performance hereby issues compelling the defendants to transfer Land Reference Number 330/403 to the plaintiff within 60 days from today.**
- b. In default of transfer by the defendants, the Deputy Registrar of this Court shall execute all documents necessary for transfer of the suit property to the plaintiff.**
- c. The plaintiff shall bear stamp duty and registration fees on the transfer.**
- d. An injunction hereby issues restraining the defendants whether by themselves, their servants and/or agents or howsoever from ejecting the plaintiff from the suit property.**
- e. The defendants' counterclaim is dismissed.**
- f. Within 14 day following the transfer of the suit property to the plaintiff, the balance of the purchase price, together with the accrued interest, shall be released to the estate of the Late Josephine Nthambi Kioko through its advocates on record herein.**
- g. For the reasons outlined in declining to grant the plaintiff damages, I direct that each party bears own costs of this suit.**

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 11TH DAY OF JULY 2018.

B M EBOSO

JUDGE

In the presence of:-

Mr L M Ombete for the Plaintiff

Ms Halima Abdi - Court Clerk