



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO 67 OF 2011**

**NABHAN SWALEH SALIM.....PLAINTIFF**

**-VS-**

**RHODA NDIVO.....DEFENDANT**

**JUDGMENT**

1. By a plaint dated 13<sup>th</sup> June, 2011 and filed herein on 14<sup>th</sup> June, 2011, the Plaintiff prays for specific performance of the agreement for sale dated 14<sup>th</sup> June, 2007, damages and mesne profits for breach of contract and delay in completion of the sale and all necessary and consequential accounts, directions and compensation for loss plus costs of the suit.

2. The plaintiff's prayers are premised on the fact that by an agreement made on 14<sup>th</sup> June 2007 between the Plaintiff and the defendant, the defendant agreed to sell and the Plaintiff agreed to buy the leasehold property at Mombasa Island known as Mombasa/Block XI/613 at the price of Kshs.7,500,000/=. It is the Plaintiff's case that the said agreement provided inter alia, that the sale should be completed on the 90<sup>th</sup> day from the date of the sale agreement or earlier by agreement in writing of the parties; that the vendor would obtain all necessary consents and that the property was sold in vacant possession and free of squatters and encroachments. The plaintiff avers that he paid the purchase price of Kshs.7,500,000/= to Messrs. Omondi Waweru & Co. Advocates for the Defendant as per the said agreement. That in breach of the said agreement and notwithstanding several requests made by the Plaintiff and his counsel, the defendant has wrongfully failed and refused and continues to neglect and refuse to complete the said sale or take real steps towards such completion. The Plaintiff claims specific performance of the said agreement and damages for loss of use and/or mesne profits having been delayed in taking possession thereof from October 2007.

3. In her defence dated and filed on 14<sup>th</sup> July, 2011 the Defendant admits that the said agreement for sale was entered between them but avers that the sale agreement expressly provided that 10% of the purchase price would be paid to the defendant directly on or before the date of the agreement and that although the agreement was signed on 14<sup>th</sup> June, 2007 the 10% deposit has to date not been paid to the defendant. That there was no clause in the sale agreement that stipulates expressly or otherwise that the money be held on behalf of and/or for the defendant by any other person. The defendant states that if the agreed purchase price was paid to M/s Omondi Waweru & Co Advocates as claimed by the plaintiff, then the same was paid without the Defendant's instructions and to the said Advocates as agents/advocates of the Plaintiff. The Defendant avers that the said amount has to date not been remitted to her as alleged or at all.

4. In addition the defendant states that in the alternative and without prejudice to the foregoing, the Plaintiff was in flagrant breach of the contract having failed to honour some of the contractual terms. The defendant contends that by reason of the delay in remitting the payment to her, the agreed sale price has greatly been compromised by the subsequent rise of property value in the region and avers that the subject property is currently valued at over Kshs.20,000,000/= and further avers that in the event that the prayers sought by the Plaintiff are granted, she would be occasioned substantial loss for a mistake whose author is the Plaintiff and Omondi Waweru & Co. Advocates. The defendant states that in order to ventilate the issues relevant to the suit, she would seek to join Omondi Waweru & Co. Advocates as third parties in the suit. There is however no evidence that the defendant sought to join the said M/s Omond Waweru & Co. Advocates as third parties in the suit.

**THE PLAINTIFFS CASE**

5. At the trial which commenced before Honourable Justice Mukunya, the Plaintiff testified and called two witnesses.

PW 1- Nabhan Swaleh Salim, the Plaintiff told the court that they entered into a sale agreement with the defendant dated 15<sup>th</sup> June, 2007 in respect of the Suit Property. The defendant was represented by Omondi Waweru & Co Advocates while the Plaintiff, who is an advocate of the High Court of Kenya, represented himself. He produced Original Copy of the sale agreement as P.exh No.1. The Plaintiff was introduced to the Suit Property by a property agent called Lawrence Isika (PW3) in May 2007. He saw the Property and liked it. He received a letter dated 29<sup>th</sup> May, 2007 from Omondi Waweru & Co. Advocates intimating that the vendor wanted to sell the property to him for

Kshs.7,500,00/=. The original letter was produced as P.exh no.2. The Plaintiff received another letter dated 4<sup>th</sup> June, 2007 (Pexh No.3) from Omondi Waweru & Co. Advocates enclosing the agreement in triplicate urging the Plaintiff to execute the same and return the copies with 10% of the purchase price. On 13<sup>th</sup> June, 2007 the Plaintiff wrote to Omondi Waweru & Co. Advocates (Pexh No.4) enclosing the duly executed agreement for sale (P.exh No.5) together with a cheque of Kshs.750,000 being the 10% of the purchase price. He stated that he received the letter dated 16<sup>th</sup> August 2007 forwarding the transfer and copy of the title and he was asked to execute the transfer and return it with the balance of the purchase price. That he executed the transfer and returned it vide a letter dated 27<sup>th</sup> August 2007 (P.exh 7) to Omondi Waweru & Co. Advocate who acknowledged receipt and asked for the balance of the purchase price (P.exh 8). On 6<sup>th</sup> September 2007, he forwarded a cheque No.00084 for Kshs.6,750,000/= being the balance of the purchase price and asked for vacant possession. The Plaintiff did not receive the completion documents nor given vacant possession as the defendant on 8<sup>th</sup> October, 2007 wrote to him allegedly rescinding the contract, accusing the Plaintiff of being in breach of some clauses of the agreement by failing to release the full consideration within the agreed time.

6. According to PW1, he paid the purchase price in full before the completion date. PW1 stated that the defendant had an advocate who had authority to act for her and to whom he paid the full purchase price.

7. On his part, PW2 Major Retired Moses Waweru confirmed that he was a partner in the firm of Omondi Waweru & Co. Advocates. He told the Court that he drew the sale agreement between the Plaintiff and the defendant on the instructions of the vendor. He told the court that they received the full purchase price on behalf of the defendant well before the completion date.

8. PW3 Lawrence Musyoki Isika is a Land and Estate agent who together with one Kilele (deceased) made the vendor and purchaser meet over the sale of the suit property. He knew the defendant through her husband. He told the court that they were not paid their commission because the deal did not go through

### **DEFENDANT'S CASE**

9. On her part DW1 Rodha Ndivo told the court that she is the owner of the suit property. She testified that in 2007 they decided to sell the property and executed the agreement dated 14<sup>th</sup> June 2007 and told the court that she has not received any money from Mr. Waweru Advocates. That she went to Waweru's office to find out if money had been paid and was told by Kitei that 10% was paid in the second week of July. She confirmed that the balance was paid. She stated that if she was shown that money was paid, she would have signed the transfer. She told the court that they were selling the house for Kshs.7.5 million with a view to buy another house. That the house she sold at Kshs.7.5 million is now valued at between Kshs.35-40 million. She testified that she lives in the suit property with her children.

10. DW2, Sammy Mutisya Mwikya is the husband to the defendant. He testified that the defendant signed the sale agreement dated 24<sup>th</sup> June 2007 but was not paid the 10% deposit or any money from the Plaintiff or from Mr. Waweru Advocate who received the money and was the defendant's advocate.

### **ANALYSIS AND FINDINGS**

11. I have considered the evidence placed before me by both parties. I have equally considered the submissions and authorities to which I was referred by learned Counsel for the parties.

12. As a general rule, a purchaser is entitled to recover damages at large where a seller refuses to implement an agreement for any reason other than a defective title and compensation contemplated by the contract or which could reasonably have been in the contemplation of the parties as likely to be wasted if the contract is broken (**see Openda – v- Ann (1984) KLR208.**)

13. In **Rithos –v- Karithi and Another (1988) KLR 237**, the court of appeal held that a court has the power to award damages in lieu of specific performance in the following terms:

**“In all cases in which the court has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act, or for specific performance of any covenant, contract or agreement, it shall be lawful for the same court, if it thinks fit, to award damages to the party injured, either in addition to or in substitution for an injunction or specific performance and such damages may be assessed in such manner as the court shall direct.”**

14. In **Reliable Electrical Engineers Ltd –v- Mantrac Kenya Ltd (2006) eKLR**, the court held that:

**“The jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract valid or unenforceable. In this respect damages are considered to be an adequate remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damage are an inadequate remedy, specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.”**

15. In the matter before me the Plaintiff has urged the court to direct specific performance of the agreement executed by the parties and dated 14<sup>th</sup> June, 2007. The Plaintiff also prays for damages and mesne profits for breach of contract and loss as result of the delay in completion. The defendant does not deny the existence of the sale agreement. It is however the defendant's case that the plaintiff was in breach of the agreement by not paying to her the 10% deposit and failing to pay the balance of the purchase price within time. The defendant further contends that she has not been paid the purchase price although the same was paid to and received by her advocate.

16. The sale agreement executed by the parties on 14<sup>th</sup> June 2007 provides at the relevant part as follows: -

**IT IS HEREBY AGREED** as follows: -

1. The vendor agrees to sell and the purchaser agrees to purchase upon the Terms, Conditions and Special Conditions referred to hereafter all that piece of parcel of land known as MOMBASA/BLOCK XI/613 measuring.....hectares or thereabouts being the land comprised in the certificate of title dated 6<sup>th</sup> July 2004 and registered at Mombasa District Land Registry together with all the buildings improvements and structures thereon, if any (hereinafter called “the property”)

2. The interest sold is leasehold.

3. The purchase price is Kenya Shillings Seven Million five hundred thousand (Kshs.7,500,000/=) of which the sum of Kenya Shillings seven Hundred and fifty thousand (Kshs.750,000/=) shall be paid to the vendor as a deposit and part payment of the purchase price on or prior to the signing hereof.

4. The sale is subject to the Law Society conditions of sale (1989 Edition ) in so far as they are not inconsistent with the conditions contained in this Agreement or specifically hereby excluded.

5. The Law Society Conditions of Sale are hereby amended as follows:

Condition No.2 (9) relating to interest shall be deleted and substituted with the following: “interest means interest at the rate of 10% per annum”

6. The completion date shall be 90 days from the date hereof or earlier by agreement in writing by the parties.

7. Completion shall take place at the office of Omondi Waweru & Co. Advocates on the completion date or earlier whereupon the vendor’s advocates shall deliver to the purchaser’s Advocates:

i. Original Certificate of Title for the above property;

ii. A duly executed transfer of the property in favour of the purchaser;

iii. A valid rates clearance certificate from the municipal council of Mombasa;

iv. A duly completed valuation form for stamp duty purposes’ and

v. Land control Boards consent or such other consents and documents as may be necessary to procure registration of the transfer in favour of the purchaser.

8. The vendor’s Advocates are Omondi Waweru & Co Advocates of Post Office Box Number 1606 – 80100 Mombasa and purchaser’s Advocates are Nabhan Swaleh & Co. Advocates of P. O. Box 43 235 – 80100 Mombasa.

9. The property is sold free from all liens charges and mortgages (whether legal or equitable) and all other encumbrances.

10. The property is sold with vacant possession and free of squatters and encroachments.

#### SPECIAL CONDITIONS

1. The vendor shall obtain at this cost all relevant consents required to register the transfer in favour of the purchasers on or prior to completion.

2. The vendor shall obtain at his cost all relevant consents required to register the transfer in favour of the purchaser on or prior to completion.

3. The vendor shall provide a Rates Clearance Certificate from the Municipal Council of Mombasa on or prior to completion.

4. Each party shall bear their own Advocates fees save that the purchaser shall pay and discharge the stamp and the vendor shall pay the consent fees payable to the District Land Officer.

17. The evidence on record shows that the Plaintiff paid the deposit and the balance of the agreed purchase price to M/s Omondi Waweru & Co. Advocates who acknowledged receipt of the same. According to the plaintiff, he fully and timeously discharged his duty to pay the consideration. The defendant however does not believe this and maintains that she has not received any payments to date despite the money having been paid to M/s Omondi Waweru & Co. Advocates who acknowledged receipt.

18. Upon considering the matter, the court is of the view that the controversy herein can be resolved by determining the following issues: -

**i. Was the firm of Omondi Waweru & Co. Advocates the agents of the defendant?**

**ii. If yes, did that agency extend to authority to receive the consideration on behalf of the defendant?**

**iii. If the answer to (i) and (ii) above is in the affirmative, had the plaintiff paid the consideration to the said lawyers by 8<sup>th</sup> October 2007 when the notice to rescind was issued? If however the answer to (ii) is no, is the contract at an end caused by failure of the Plaintiff to pay the consideration sums directly to the defendant?**

19. The answer to the first two issues lies with the construction of the sale contract. The agreement in clause 4 makes the sale subject to the Law Society Conditions of Sale (1989 Edition) in so far as they are not inconsistent with or specifically excluded by the agreement. The law society conditions of sale are therefore an integral part of the contract.

20. Under condition 3 of the Law Society Conditions of sale the deposit is paid to the vendor as stakeholder. Again upon completion the purchase money is paid to the vendor's advocates. It is therefore evident that under the Law Society Conditions of Sale the vendor's Advocate is the agent of the vendor with express authority to receive both the deposit and the balance of the purchase price on behalf of the vendor. Clause 3 of the agreement is clear that the sum of Kshs. 750,000/= was to be paid to the defendant as deposit and part payment. This differs from the law society conditions of sale position in two respects –

**a. The deposit paid is part payment and not money to be held in stake holding.**

**b. The deposit (in this instance, also part payment) was to be paid directly to the defendant and not to her advocates. The agreement is however silent as to whom the balance of the purchase price was to be paid. One has turn to the Law Society Conditions of sale which provides that this shall be paid to the vendor's advocate. In my view clause 7 of the sale agreement supports this as completion was to take place at the offices of the defendant's advocate. This leads me to conclude that the firm of Omondi Waweru & Co. Advocates were the agents of the defendant with authority to receive the consideration sums other than the deposit and part payment. This was to be paid directly to the defendant as expressly stated in the sale agreement.**

21. It is common ground that the deposit was never paid directly to the defendant. The plaintiff says that this was paid via cheque to the defendant's advocates on 14<sup>th</sup> June 2007. There is also evidence that the plaintiff paid the balance of purchase price on time. PW2, who was the defendant's advocate confirmed having received both the deposit and the balance of the purchase price on time. It is the argument of the defendant that the Plaintiff breached the contract by paying the deposit to the advocate and not to the defendant. The Plaintiff however contends that even if it were admitted that he breached the agreement by paying the deposit to the defendant's lawyers instead of the defendant herself this breach is not substantial and cannot disentitle him to an order for specific performance. For this proposition the Plaintiff relied on the decisions in Bir Singh –v- Parmar (1971)EA 209 and Dyster –v- Randall & Sons (1926) Ch. Div. 932.

22. In the English decision it was the holding of the court that a trivial breach of a term of contract did not disentitle the plaintiff to specific performance while the Bir Singh case discussed the effect of non-payment of the deposit on a contract. Law J. A. had this to say: -

**“This appeal concerns an agreement for the sale of land, a condition of which was that a deposit was payable. The agreement did not specify that time was of the essence in connection with the payment of the deposit, and the judge refused to imply a stipulation making time of the essence. He preferred to apply the general rule as stated in 8 Halsbury's Laws 3<sup>rd</sup> edition, pp 164-165, and he held that in the absence of an express stipulation or clear implication that time in relation to the payment of the deposit was of the essence of the contract, failure to pay the deposit did not entitle the vendor unilaterally to avoid the contract. The position would of course have been different if the vendor had given notice making time for payment of deposit of the essence of the contract and specifying a reasonable period for payment, but this he did not do.”**

23. In my considered view, the contention of the Plaintiff is not without merit particularly when one also considers that the defendant attempted to exercise her right to call off the contract only after payment for the balance of the purchase price had been tendered. As it were there is no dispute that in this case, the deposit was paid on time, albeit to the defendant's advocate who was the defendant's authorized agent and not to the defendant in person. In my view, this was a non-essential or trivial breach that could not entitle the defendant to unilaterally avoid the contract. There is also evidence that the plaintiff paid the balance of the price on time. The defendant does not deny executing the sale agreement and that the purchase price was paid. Her claim that she has to date not received any payment does not in my humble view, hold water as the same was paid to her advocates within the time stipulated in the sale agreement. It was up to her to demand for release of the payment from her advocates.

24. At it were, I did not find anything in the agreement to show that the purchase price was to be used by the defendant to purchase another property. The defendant does not deny executing the sale agreement and her claim that the value of the property has now gone up is immaterial. As the court of appeal observed in National Bank of Kenya Ltd –v- Samcroft Ltd & Another (2002) EA 503:

**“A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the clause. As was stated by Shah JA in the case of Fina Bank Ltd –v- Spares and Industries Ltd (2000)IEA 52. It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain.”**

25. I did not hear the defendant to be saying that she was coerced, induced and or fraudulently made to sign the sale agreement. The language in the said agreement is plain and unambiguous.

26. In the circumstances, I am satisfied that the Plaintiff has proved his case to the required standard. The circumstances of this case entitles the plaintiff to an award of general damages.

Accordingly, I make the following orders:

- 1. An order of specific performance does hereby issue directed to the defendant to sign all the relevant transfer forms and to supply to the plaintiff completion documents to facilitate the transfer of all that property known as MOMBASA/BLOCK XI/613 MOMBASA ISLAND into the name of the plaintiff within 45 days from the date hereof.**
- 2. In default and in the alternative, upon expiry of the said 45 days, the Deputy Registrar of this court to execute all the relevant documents to facilitate the transfer and registration of all that parcel of land known as MOMBASA/BLOCK XI/613 MOMBASA ISLAND into the name of the plaintiff.**
- 3. The plaintiff is awarded the sum of kshs.1,000,000/= as general damages.**
- 4. The defendant shall pay the costs of this suit.**

Delivered, signed and dated at Mombasa this 25<sup>th</sup> September, 2018.

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C. YANO

JUDGE