



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 56 OF 2017

ESTHER KURIA.....PLAINTIFF

VERSUS

ROSELINE CHEMUKUN KEMELI.....DEFENDANT

JUDGMENT

INTRODUCTION

1. In her plaint dated 27/2/2017 and filed in this suit on the 21st March, 2017 the plaintiff seeks the following prayers:-

(a) A declaration that the agreement of sale dated 18th September, 2015 has been repudiated and is rescinded for breach of a fundamental terms of the agreement by the defendant.

(b) A declaration that the defendant, whether by herself or her servants or agents or any person claiming through her or otherwise howsoever, is wrongfully in occupation of the suit property and is accordingly trespasser on the same and not entitled to remain on the suit property.

(c) General damages for breach of the agreement.

(d) Costs of this suit together with interest thereon at such rate and for such period of time as this honourable court may deem fit to grant.

THE PLEADINGS

The Plaint

2. The plaintiff's case is that on the 18/8/2015 the plaintiff entered into a written agreement whereby the plaintiff sold to the defendant part of that piece of land known as **Kelchinet Farm LR. No. 2/39/19** measuring five (5) acres, having acquired the same by way of purchase through registration of a transfer instrument in favour of the plaintiff had not been done; that the agreed purchase price between the plaintiff and the defendant was **Kshs.4,000,000/=** (Four Million Shillings Only); that on or before the signing of the agreement, the sum of **Kshs.2,600,000/=** would be paid by the purchaser to the vendor; that the balance of the purchase price would be paid by the purchaser to the vendor on or before **1st March, 2016** and that the parties would value the development at a later date and that the purchaser would take possession of the said property upon the signing of the agreement.

3. The plaintiff states that pursuant to the terms and conditions of the agreement in question, the parties verbally agreed that the value of the developments was **Kshs.200,000/=** which sum of money was to be paid to the plaintiff by the defendant in addition to the agreed purchase price.

4. The plaintiff further states that out of the total balance of **Kshs.1,600,000/=** the defendant has only paid **Kshs.1,050,000/=** in instalments of **Kshs.600,000/=** in **January,2016**, **Kshs.400,000/=** in **March,2016** and **Kshs.50,000/=** in **August, 2016** leaving a balance of **Kshs.550,000/=** due and owing to the plaintiff.

The Statement of Defence

5. The defendant filed his written statement of defence dated 4/5/2017 on the same date. In that statement of defence the defendant admitted the agreement but averred that the only remaining balance due to the plaintiff is **Kshs.150,000/=** which sum the plaintiff has always declined to be paid. Further she pleaded that the valuation of the developments was to be conducted after the final payment was made. The defendant

prays that this suit be dismissed with costs.

The Reply to Defence

6. In her reply to the defendant's statement of defence the plaintiff avers that it was a term of the agreement that the developments were to be valued at later date and denies that the developments were to be agreed upon after payment of the sale of the land; that the plaintiff denied the balance due is **Kshs.150,000/=**; that the defendant offered to pay the same or any other sum and that the defendant's statements of defence consists of nothing but mere denials hence does not raise any triable issues and as such should be dismissed and judgment be entered in her favour as prayed for in the plaint.

Hearing

7. The hearing of the suit took place on the **3/10/2018** when the plaintiff testified. The defendant never appearing in court during the hearing date despite being served by post with Hearing Notice dated **25/5/2018** on the **3/10/2018** as evidenced by the affidavit of service sworn by one **David Ingosi Advocate** filed on **3/10/2018**. A certificate of posting stamped with the date **25/5/2018** and the hearing notice served through it are exhibited. I have perused through the file record and found no final submissions on the suit filed on behalf of any of the parties.

The Plaintiff's Evidence

8. She produced the original agreement between her and the defendant which is dated **18th September 2015** as **PEXh 1**. She also produced another original agreement between her and one **Kipsang Arap Ruto** dated **13th January 2004** as **PEXh 3**; in the latter agreement she is named as the buyer of the plot which she subsequently sold to the defendant vide the agreement dated **18th September 2015**. However it is noted that there is what may be called an error in that the land she is selling is referred to as **LR No 2/39/19** while the land she bought vide **P.Exh 3** is referred to as "**LR No 2139/19, previously 2139/8/6.**" However **P.Exh 1** is signed by both parties and witnessed by three persons in the presence of an advocate. The terms of the agreement are as pleaded in the plaint. The disputed clause on valuation of developments reads as follows:

"3. The parties have mutually agreed to value the developments hereon at a later date."

9. A copy of a demand letter from David Ingosi & Co Advocates dated **15th July 2016** was produced as **PEXh 2(b)**. It demands from the defendant the payment of the balance of **Kshs. 400,000/=** and interest at the rate of 14% per annum from the date of the demand letter in default of which the plaintiff would consider the agreement null and void and of no effect and that the defendant would have to vacate the suit land. The demand also notifies the defendant of an intended suit. Another demand letter from Tigogo & Co. advocates dated **15/6/2016** addressed to the defendant giving the defendant **7 days** to pay **Kshs. 400,000/=** plus collection charges of **Kshs. 10,000/=** was also produced in evidence by the plaintiff. No documents were filed into the record by the plaintiff or the defendant that could show if these demands were responded to.

10. The plaintiff's evidence shows that she has aggregated the Kshs. 200,000/- said to be the agreed value of the developments on the land and the balance of Kshs. 1,400,000/to make a total of Kshs. 1,600,000 out of which she acknowledges payment of only **Kshs. 1,050,000/=** leaving a final balance of **Kshs. 550,000/=**. This materially differs from the **Kshs. 400,000/=** sought in the demand notices dated **15/6/2016** and **15/7/2016**. The difference is not explained in any manner by the plaintiff. I am inclined to take the demanded amount as the sum owing in respect of the purchase price as at the date of the hearing.

11. From the documents filed in this suit I am satisfied that the plaintiff and the defendant entered into a binding agreement and that vacant possession of the suit land was given to the defendant. In the absence of any evidence from the defendant to controvert the evidence given by the plaintiff I am also satisfied the defendant is in breach of the agreement between her and the plaintiff dated **18/9/2015** and that the plaintiff has established her claim on a balance of probabilities.

12. I therefore enter judgment against the defendant and I hereby issue the following orders:

(a) A declaration that the agreement of sale dated 18th September, 2015 has been repudiated and is rescinded for breach of a fundamental term of the agreement by the defendant;

(b) A declaration that the defendant, whether by herself or her servants or agents or any person claiming through her or otherwise howsoever, is wrongfully in occupation of the suit property and is accordingly trespasser on the same and not entitled to remain on the suit property;

(c) The defendant shall meet the costs of this suit.

It is so ordered.

Dated, signed and delivered at Kitale on this 30th day of October, 2018.

MWANGI NJOROGE

JUDGE

30/10/2018

Coram:

Before Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the parties

COURT

Judgment read in open court.

MWANGI NJOROGE

JUDGE

30/10/2018