



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC CIVIL SUIT NO. 201 OF 2008**

**JANE MARETE.....PLAINTIFF**

**-VERSUS-**

**JOSEPH WAITKI NDEGWA**

**IRENE JULIET OTINGA**

**REGISTRAR OF TITLES, MOMBASA.....DEFENDANT**

**JUDGEMENT**

1. The plaintiff commenced this suit vide her plaint dated 7<sup>th</sup> August 2008 and subsequently amended on 22<sup>nd</sup> October 2008, and later re-amended. In the amended plaint, the plaintiff sought judgment against the defendants jointly and severally for: -

(a) A permanent injunction restraining the Defendants by themselves, their agents, assigns and/or employees or otherwise howsoever from selling or purporting to sell, charging, mortgaging, subdividing, pledging, entering, cancelling and/or rescinding the sale agreement, disposing or in any other manner interfering with the plaintiff's quiet possession and enjoyment of the said property known as LR. 5608 (Original Number 5203/22) Section I Mainland North.

(b) A declaration that the caveat lodged on 29<sup>th</sup> of January, 2007 was irregularly, unlawfully and illegally lifted thus the same stands valid and in force and should be reinstated and/or reregistered and/or restored forthwith and a declaration that the execution by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and registration by the 3<sup>rd</sup> Defendant of the transfer dated 22<sup>nd</sup> August 2007 over the property known as LR. 5608 (Original Number 5203/22 Section 1 Mainland North was fraudulently, unlawfully and illegally done and consequently an order directing the 3<sup>rd</sup> Defendant to cancel the said fraudulent, illegal and unlawful transfer with immediate effect.

(c) A declaration that the 1<sup>st</sup> Defendant was estopped from selling the suit property to any other person and/or purported Transfer dated the 22<sup>nd</sup> August, 2007 purportedly registered on the 24<sup>th</sup> July, 2007 over the suit property, to wit, LR No. 5608 (Original Number 5203/22) Section 1 Mainland North was fraudulent, illegal, unlawful and/or wrongful and void *ab initio* and a further Order that the same be cancelled and/or revoked and/or deregistered forthwith.

(d) An order compelling the First Defendant to forthwith surrender the original Certificate of Title Number CR. 19427 to the Plaintiff and to execute a Transfer in favour of the Plaintiff whereupon the balance of Kshs 3,000,000.00 shall be made to the Defendant in the ALTERNATIVE the Defendant do jointly and/or severally pay the Plaintiff the total amount expended in improving, reconstructing and renovating the suit premises in the sum of Kshs 7,150,075.00, amount paid to the First Defendant Kshs. 1,500,000.00 and Advocate's costs in the said transaction of Kshs 78,500.00 totalling to Kshs 8,728,575.00 plus damages for breach of contract.

(e) Costs of and incidental to this suit.

(f) Interest thereon at Court rates

2. The suit is defended separately by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The 2<sup>nd</sup> defendant filed a statement of defence on 20.8.2008 which was amended on 28.10.08 and later re-amended on 30.8.2012. The 2<sup>nd</sup> defendant denied the Plaintiff's claim in toto and proceeded to counter-claim seeking the following reliefs: -

**a) She acquired plot LR 5608 (Original 5203/22) Section 1 Mainland North (the suit plot) from the 1<sup>st</sup> defendant for a valuable consideration.**

**b) Prior to acquiring the suit property, the 2<sup>nd</sup> defendant had done a search and confirmed that the suit property was not encumbered.**

**c) The 2<sup>nd</sup> defendant paid the full consideration of Kshs. 5,000,000/= (read Kenya Shillings Five Million) which sum the 1<sup>st</sup> defendant duly acknowledged receipt of.**

**d) The 2<sup>nd</sup> defendant did not know the alleged sale agreement between the plaintiff and the 1<sup>st</sup> defendant and/or the existence of a caveat registered by the plaintiff.**

**e) The 2<sup>nd</sup> defendant further states that she did not know the alleged existence of unregistered interests of the plaintiff over the suit property.**

3. The 3<sup>rd</sup> defendant filed its defence on 3<sup>rd</sup> April 2009. The Registrar of titles also denied the plaintiffs claim and put the plaintiff to strict proof. The 1<sup>st</sup> defendant's defence dated 7.10.2008 filed in Court on the same date denied the Plaintiff's claim. The 1<sup>st</sup> defendant pleaded that the plaintiff had illegally advertised the sale of the suit property while knowing she had no title at all to the said property. The 1<sup>st</sup> defendant denied the particulars of illegalities and fraud pleaded against him and urged the Court to dismiss the plaintiff's suit with costs. Later HCC No 142 of 2008 was consolidated and head together with this case.

4. After the pleadings closed each of the parties called oral evidence of a single witness. The plaintiff presented her case on 1<sup>st</sup> September 2016. She said she lives in Nyalali and is self-employed. She got into a sale transaction over the title No 5608 (Original No 5203/22/MN/1) with the 1<sup>st</sup> defendant in October 2006 for a sum of Kshs 4.5 Million. The plaintiff stated that after she paid Kshs 1.5 Million she was put into possession. She produced the sale agreement dated 5.10.06 as Pex 1.

5. The plaintiff continued to state that the sale agreement provided for completion date of 60 days and payment of the balance in exchange of the completion documents listed under clause 7. It is her evidence that the house on the plot at the time of sale was incomplete i.e. without floor tiles, windows or doors. She produced copy of the title as Pex 2 and pictures of the house as it was then as Pex 3. She stated further that the 1<sup>st</sup> defendant also gave her the original building plans for the said house and she began completion of construction works. The building plans was produced as Pex 4 (a). That upon completion of the construction works, her relationship with the 1<sup>st</sup> defendant became sour since the 1<sup>st</sup> defendant was now demanding for more money.

6. The plaintiff said she spent Kshs 7 Million to complete the house. That she did not pay the balance of the purchase price because Mr Waweru advised her the completion documents had not been surrendered. That she was always ready to pay the balance. It is her evidence that instead the 1<sup>st</sup> defendant started posting adverts for sale of the suit property the suit property's perimeter wall. She produced photos of the posters as Pex 5. She also produced a letter dated 25.1.2007 from Kenya power written by the 1<sup>st</sup> defendant for the disconnection of electricity. For this reason she lodged a caveat on 30.1.2007 (Pex 7).

7. The plaintiff further produced pleadings in HCC 142 of 2007 (Pex 8) where the 1<sup>st</sup> defendant sued her. Later on she got a letter dated 31.07.2008 (Pex 9) asking her to hand over vacant possession of the suit premises. It is then she said she learnt that the 1<sup>st</sup> defendant had sold the house to the 2<sup>nd</sup> defendant. The transfer to the 2<sup>nd</sup> defendant is dated 27.8.2007 but lodged at the lands office on 24.7.07 (MFI 11). The plaintiff blamed the 1<sup>st</sup> defendant for selling the property one year after she had renovated it. That she has never been refunded the sum of Kshs 1.5 Million she paid for the plot. She asked the Court to order that they conclude the contract of 5.10.2006.

8. In cross – examination by Mr Maundu advocate for the 1<sup>st</sup> defendant, the plaintiff said she paid Kshs 1.5 million as evidenced in the plaint of case No HCC 142 of 2007. That Mr Waweru advocate acted for both of them in the transaction. The plaintiff admitted lack of written evidence of advice given to her that the completion documents had not been surrendered. That the notice of 7.12.06 was sent to Omondi Waweru on behalf of the 1<sup>st</sup> defendant and Mr Waweru responded vide his letter dated 8.1.07 asking for extension of time on the plaintiff's behalf. The extension was given by Kanyi J advocates conditionally and that the letter of 20.1.2007 cancelled the whole transaction.

9. That as at 20.1.2007 the plaintiff had not paid the balance nor deposited the money with her advocates. The documents given to her (building plans, photos & application for power) were not included in their agreement. She denied trying to sell this property. She said that she was not having any complaint against the 1<sup>st</sup> defendant over the non-registration of the caveat. She did not pay rents and rates because of this dispute.

10. Further cross – examination by Mr Mutugi advocate for the 2<sup>nd</sup> defendant the plaintiff answered that the 60<sup>th</sup> day was 5.12.2006. That Mr Waweru sought for extension of time by 45 days which was never granted. That the search dated 30.3.2007 confirms the 1<sup>st</sup> defendant as the registered owner and it does not show there is a caveat registered. That she assumed the building plan given to her was the original. The 2<sup>nd</sup> search dated 2<sup>nd</sup> August 2007 shows the land is still in the name of the 1<sup>st</sup> defendant. The plaintiff could not state that it is the 2<sup>nd</sup> defendant who removed the caveat. That the documents shown to her shows the suit property was registered in favour of the 2<sup>nd</sup> defendant on 24.8.2007. In cross – examination by the 3<sup>rd</sup> defendant, the witness could not confirm if she signed the caveat form. That the caveat was presented by her advocate. That there was no document presented to the 3<sup>rd</sup> defendant to register the suit title in her name.

11. In re – examination, the plaintiff said that she took possession as soon as she executed the agreement. That at page 4 of Pex 10, the 2<sup>nd</sup>

defendant ought to have inspected the property. The stamp Duty form is signed by the Registrar on 23.8.07 and payment for transfer to 2<sup>nd</sup> defendant is received by the bank on 24.8.07 while entry No 4 shows the 2<sup>nd</sup> defendant was registered as owner on 24.7.2007. The agreement between 1<sup>st</sup> & 2<sup>nd</sup> defendant is dated 22.7.2007. This marked the close of the plaintiff's case.

12. The 1<sup>st</sup> defendant gave his evidence on 4<sup>th</sup> May 2017. He adopted his statement filed in Court on 26<sup>th</sup> June 2012 together with the documents filed on 6<sup>th</sup> July 2012 and 7<sup>th</sup> October 2008 which he produced as Dex 1 – 12. The 1<sup>st</sup> defendant summarised his evidence as follows; that he entered into a sale agreement with the plaintiff on 5.10.2006 for sale of the suit plot. The plaintiff paid Kshs 1.5 Million leaving a balance of Kshs 3.5 Million. He went to his advocate to serve the plaintiff with a 21 days' notice to pay the balance but she never paid. That the plaintiff sought extension which she was given but she never complied with the condition therein. The 1<sup>st</sup> defendant stated that he decided to sell the house to another buyer who is the 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant further stated that the plaintiff demolished the servant quarter without his permission. He also denied giving the plaintiff permission to build as the house was ready for occupation. That no caveat was registered on the title. The 1<sup>st</sup> defendant proceeded to complete the transaction with 2<sup>nd</sup> defendant. The 1<sup>st</sup> defendant concluded his evidence by stating that he sued the plaintiff (HCC 142 of 2007) asking her to pay rent at Kshs 50,000= per month.

13. In cross – examination by Mr Mutugi advocate, the 1<sup>st</sup> defendant answered that the plaintiff failed to complete the agreement. He confirmed giving her notices through her advocate. That completion date provided in the agreement of 5.10.2006 was 60 days. That he handed over the original title documents to the 2<sup>nd</sup> defendant and that no caveat was registered on the title.

14. On cross – examination by Miss Chala for the plaintiff, the 1<sup>st</sup> defendant answered that the agreement did not provide for taking over possession on execution of the agreement but he allowed the plaintiff to take possession. That the house was complete and the plaintiff did not do any renovations. That he took the completion documents to Mr Waweru but did not take a signed transfer. That he sold the suit plot to the 2<sup>nd</sup> defendant on 22.8.07 when HCC 142 of 2007 was pending. The 1<sup>st</sup> defendant showed there was something fishy about Pex 11 (on difference of dates). That the plaintiff was not in occupation when he sold the house to 2<sup>nd</sup> defendant. According to the witness, it is the plaintiff who advertised the property for sale. The 1<sup>st</sup> defendant closed his case.

15. The 2<sup>nd</sup> defendant also opened her testimony on 4<sup>th</sup> May 2017. She adopted her statement filed in Court on 16.10.13. She also adopted as her exhibits the documents contained in her list filed on the same day (16.10.2013) produced as Dex 13 – 17 and supplementary list filed on 14.12.16 produced as Dex 18 – 24. That she saw the sale of the house in a newspaper advert. She called the number given on the advert. That the newspaper had given the sale price at Kshs 17 Million and on meeting the 1<sup>st</sup> defendant, they negotiated and agreed at a price of Kshs 5 Million. Subsequently an agreement was drawn by their advocates on record. She complied with the terms of that agreement as well as the 1<sup>st</sup> defendant.

16. The documents were presented to the lands office for registration and payment made in respect of the taxes. The 2<sup>nd</sup> defendant said she paid the agent who introduced her to the 1<sup>st</sup> defendant and was given a receipt. That upto now, she has not been able to get into possession of the suit property. She got surprised that another lady was claiming the house when she wanted to occupy it. She said that as a born again Christian, she is fighting for what is rightfully hers. She also prayed for compensation. That when she viewed the house it was fully finished with 5 bedrooms and a servant quarter. That the current monthly rent for a similar house is Kshs 120,000= per month. That the date of presentation of her documents is 24.7.2007 and she had not been summoned anywhere about the date. That the date of 24.8.2007 on the transfer form could be human error.

17. In cross – examination by plaintiff the 2<sup>nd</sup> defendant answered that she called the number in the advert and met the person who said they were agents of the owner. The agents took her to the 1<sup>st</sup> defendant. While viewing the house, the 2<sup>nd</sup> defendant confirmed it looked occupied but did not ask who was in occupation. She admitted there was a rubbing on page 1 & 2 of Dex 15. That the date on transfer form is different from date of registration. The S. D form was presented on 23.8.2007. That the 1<sup>st</sup> defendant never mentioned about a pending case or sale to the plaintiff. That after paying for the house she never went back because her husband was ill. This marked the close of 2<sup>nd</sup> defendant's case.

18. The 3<sup>rd</sup> defendant did not call any witnesses. Parties agreed to file closing written submissions which has been done. It is an accepted principle of law that Courts do not re-write contracts between parties (see decisions in the case of **National Bank of Kenya Ltd vs Pipeplastic Sam Solit (K) Ltd & Another (2002) 2 E A 503**. The long and short of this dispute is:

**(1) What was the terms of the contract between the plaintiff and the 1<sup>st</sup> defendant.**

**(2) Whether or not the contract terminated.**

**(3) Whether or not the suit property was available to be sold by the 1<sup>st</sup> defendant to a 3<sup>rd</sup> party and or the 2<sup>nd</sup> defendant.**

19. There is no dispute that a contract was executed between the plaintiff and the 1<sup>st</sup> defendant on 5.10.2006. It is also agreed that the purchase price was not paid at the expiry of the 60 days since time was made of essence in the contract. Vacant possession was given to the plaintiff after the execution of the agreement. What is missing from the plain reading of the contract of 5.10.2006 is the default clause. The parties agreed that their agreement was subject to the LSK conditions of sale (1989) edition with a variation only to interest rate under condition 2 (9). The submission by the plaintiff that time was not of essence in the contract dated 5.10.06 is inaccurate. The holding cited in the case of **Sisto Wambugu vs Kamau Njuguna (1983) eKLR** instead support the 1<sup>st</sup> defendant's case as shall be shown in the following paragraphs.

20. From the evidence on record, the 1<sup>st</sup> defendant avers that he did not present the completion documents to their mutual advocate because

he was told the plaintiff had not deposited the balance of the purchase price. The plaintiff also states she did not give out purchase price because she was advised that the completion documents had not been surrendered. It becomes an obvious case of blame game. So who succeeded in shifting the guilt? From the documents presented, I am of the view that the 1<sup>st</sup> defendant did.

21. By a letter dated 7<sup>th</sup> December 2006, the 1<sup>st</sup> defendant wrote to the plaintiff through Omondi Waweru & Co advocates stating his readiness to complete the transaction. In the same letter, the 1<sup>st</sup> defendant gave 21 days' notice to complete the transaction pursuant to clause 4 (7) of the LSK (1989) edition conditions of sale. In clause 4 (7) of the LSK conditions of sale, a party is obligated to serve completion notice on the **defaulting if the sale shall not be completed on the completion date.**

22. The 1<sup>st</sup> defendant's letter of 7.12.06 was responded to on 8.1.2007 by Omondi Waweru advocate indicating this reply as copied to the client (presumed as the plaintiff). In Mr Omondi's letter, a request was made for extension of time for a period of 45 days "*to facilitate completion of the security documentation of the loan*" applied for and which was to be used to settle the balance of the purchase price. The 1<sup>st</sup> defendant went further to write another letter dated 20.1.2007 pursuant to clause 7 (a) of the LSK conditions of sale by which he repudiated their agreement of 5<sup>th</sup> October 2006.

23. The plaintiff on her part has not demonstrated to this Court any steps she took against the 1<sup>st</sup> defendant after the expiry of the 60 days and upon advice by Mr Omondi advocate that the completion documents had not been surrendered. She said that she lodged a caveat on the title but which according to her was not registered. This is per the plaintiff's advocate's letters dated 30.1.2008 and 14.7.08 complaining on non-registration of the caveat. The plaintiff or her representative did not present a search subsequent to the presentation of the caveat forms on 30.1.2007 to verify that the same was or was not registered. Instead her correspondence on the unregistration of the caveat is made a year later. The decision in **Cassman vs Sachania (1982) eKLR** does not assist her for two reasons. First as stated above, she did not demand to be given a signed transfer on the expiry of the 60 days or immediately thereafter. Secondly her advocate's letter of 8.1.2007 clearly showed she was not ready with the balance. Thirdly they invited the application of LSK 1989 conditions of sale.

24. The parties having invited the application of the application of the LSK conditions of sale 1989 edition and the 1<sup>st</sup> defendant having duly served notice as evidenced by the correspondences exchanged and produced, I am satisfied that the sale agreement of 5<sup>th</sup> October 2006 was effectively terminated by the 1<sup>st</sup> defendant for non-payment of the balance of the purchase price. The plaintiff could not therefore rely on the non-delivery of the completion documents as the reason she did not pay the balance due to absence of evidence to demonstrate that indeed she had the money ready before the expiry of the 60 days or within the 21 days' notice period served on her via the letter of 7.12.2006.

25. Further the plaintiff pleaded that being apprehensive that the 1<sup>st</sup> defendant was going to sell the suit property to another party, she lodged a caveat. The plaintiff does not explain what she did after lodging the caveat to ensure the terms of the contract were fulfilled. In my view the plaintiff having failed to perform her obligations under the contract, she lost benefits accruing under the said contract. As a result of which the 1<sup>st</sup> defendant was free to sell the property to anyone who was ready to buy.

26. From the record, there is an affidavit sworn by the 1<sup>st</sup> defendant on 7<sup>th</sup> October 2008 opposing the plaintiff's Chamber Summons dated 7<sup>th</sup> August 2008 that annexed three key items that relates to the caveat placed by the plaintiff. The first is a letter dated 9<sup>th</sup> February 2007 issued by a Mr G. C. Gathathi who was the Land Registrar and addressed to the plaintiff giving her notice that the caveat would be removed unless the Registrar received a Court order extending the same (**JW 2**). The second is receipt for postage of this letter to the plaintiff also dated 9.2.2007 at an address given as P. O. Box 81434 Mombasa (**JW 3**). The 3<sup>rd</sup> is a letter by Omondi Waweru & Co dated 30.1.2007 addressed to Villa Care Limited stating they act for the plaintiff and instructing the said Villa Care Limited to sell the suit property L. R No 5608. The letter further advised the said company of other freelance agents who also had instructions to sell and that time was of essence. So besides the plaintiff being apprehensive of the defendant wanting to sell the suit property, she was also intent on selling the same. The address used to give her notice of lifting of the caveat is the same one she has used in these proceedings. These documents exempts the 3<sup>rd</sup> defendant of the allegations of fraud pleaded by the plaintiffs. The particulars of illegality or fraud levelled against the 1<sup>st</sup> defendant were also not proved and the same fails.

27. The plaintiff further alluded to fraud on the part of the 2<sup>nd</sup> defendant which allegations have not been supported by any evidence. This is so because the plaintiff admitted she did not know whether or not the caveat was registered on the suit title. She also conceded that she had no evidence that the 2<sup>nd</sup> defendant had any role to have the said caveat that was registered on the title lifted. The 1<sup>st</sup> defendant having admitted that he signed a transfer in favour of the 2<sup>nd</sup> defendant over the suit property, the implication is that there was a transfer capable of being registered by the 3<sup>rd</sup> defendant in favour of the 2<sup>nd</sup> defendant whether on the 24<sup>th</sup> July 2007 or 24<sup>th</sup> August 2007. The 2<sup>nd</sup> defendant did produce receipts confirming payment of stamp duty.

28. In light of the foregoing evidence, I safely come to the conclusion that:

**(i) The plaintiff's claim under prayer (a) – (c) of the plaint is lacking in merit and the same is hereby dismissed.**

**(ii) Under prayer (d) of plaint I make an order that the 1<sup>st</sup> defendant shall refund the plaintiff the sum of Kshs 1,500,000 being monies paid to him towards the purchase price with interest at Court rates from date of filing of the suit.**

**(iii) The claim for renovations undertaken amounting to Kshs 7,150,075 was not provided for in the agreement neither was the same proved. The same is dismissed.**

29. The 1<sup>st</sup> defendant claimed for rent from the plaintiff to be paid from October 2006 until 23.7.2007. There was no evidence adduced of landlord/tenant relationship and neither was provided for in the contract of 5<sup>th</sup> October 2006. The most the 1<sup>st</sup> defendant could have asked for is general damages for the period the plaintiff was in occupation until vacant possession is given. To give such an order would enable a

party benefit twice. However the 1<sup>st</sup> defendant having sold his interest over the suit property such benefit if at all can only accrue to the current title holder (2<sup>nd</sup> defendant) in the event particulars of loss is proved.

30. Under the earlier paragraphs, I have already answered the question positively that the 1<sup>st</sup> defendant had capacity to sell the property to the 2<sup>nd</sup> defendant. Therefore what remains to be answered is whether the 2<sup>nd</sup> defendant is entitled to judgment as prayed in her counter claim. In support of her claim, the 2<sup>nd</sup> defendant narrated how she saw an advertisement in the newspaper and later met the owner. She agreed that when she viewed the house it was occupied but did not enquire who was occupying the same.

31. The 1<sup>st</sup> defendant has admitted selling the suit property to the 2<sup>nd</sup> defendant. At the time of sale as per the sale agreement dated 22.8.2007, there was no caveat registered on the title going by the copies of searches produced in evidence. The 2<sup>nd</sup> defendant also produced the copy of the advertisement appearing on the daily nation of 19<sup>th</sup> June 2007. Other than physical occupation, the title was thus free to be sold. Once the property was registered into the name of the 2<sup>nd</sup> defendant and having served the plaintiff with notice to give vacant possession, the 2<sup>nd</sup> defendant became entitled to use the property from the date of expiry of her notice i.e. from 1<sup>st</sup> September 2007.

32. In the circumstances where the plaintiff failed to surrender vacant possession, the 2<sup>nd</sup> defendant is entitled to compensation for the period she has been unable to use the premises. To compensate the 2<sup>nd</sup> defendant, the Court does assess the damages payable at Kshs Five Hundred Thousand per year to be commensurate with the reasonable market rate of rent at approximately Kshs 40,000 per month from date of filing of this suit until the time when vacant possession is surrendered.

33. In conclusion, I enter judgment for the 2<sup>nd</sup> defendant as contained in the following paragraphs of her further amended statement of defence:

- (a) A declaration be & is hereby made that the agreement of sale dated 5.10.2006 did not confer title on the plaintiff.**
- (b) The 2<sup>nd</sup> defendant is the registered owner of L. R 5608 (original N0 5203/22) Section 1 Mainland North.**
- (c) General damages of Kshs 500,000 per year from date of filing the suit until vacant possession is obtained.**
- (d) An order for vacant possession of plot No L. R 5608 (Original 5203/22) Section 1/Mainland North within 45 days of the date of this judgment.**
- (e) Costs of the suit to be paid by the plaintiff and interest at Court rates.**

**Dated, signed & delivered at Mombasa this 25<sup>th</sup> October 2018**

**A. OMOLLO**

**JUDGE**