



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CASE NO. 333 OF 2010

TRUSTEES OF THE NATIONAL SECURITY

INTELLIGENCE STAFF SUPERANNUATION SCHEME.....PLAINTIFF

VERSUS

RUNDA GARDENS DEVELOPMENT LIMITED.....DEFENDANT

JUDGEMENT

1. Through the plaint dated 12th July, 2010, the Plaintiff seeks the following reliefs:

- a. a declaration that the Defendant is in breach of the terms of the sale agreement dated 26.09.2008 and the purported rescission is null and void;
- b. an order that the Defendant do deliver up a duly executed transfer over L.R. No. 2009 I.R. No. 66120 ("the Suit Property") and other necessary documents to facilitate a transfer to the Plaintiff within 21 days;
- c. alternatively, an order for the specific performance of the agreement dated 26.09.2008 within 45 days by handing over of original title, execution of transfer and procurement of rates and rent clearance certificates and consent to transfer.
- d. an order to empower the Deputy Registrar to execute the transfer if the Defendant fails to execute the transfer; and
- e. any other order the Court may deem appropriate to enforce the order for specific performance.

2. The Plaintiff is a retirement benefits scheme registered under the Retirements Act. The Defendant is a limited liability company incorporated in Kenya.

3. By a sale agreement dated 26th September 2008 the Defendant agreed to sell the Suit Property measuring 12.270 hectares or thereabouts to the Plaintiff for the sum of Kshs. 212,100,000. Pursuant to this agreement, the Plaintiff paid 10% of the purchase price to the Defendant as a deposit on 26th September 2008. The balance of the purchase price was to be paid on or before the completion date to the Defendant's advocates to hold as stakeholder.

4. The completion period under the sale agreement lapsed before the transaction was finalised.

5. There was a lot of correspondence exchanged between the vendor and purchaser's advocate regarding the completion of the sale transaction on diverse dates between October 2008 and December 2008.

6. The Plaintiff executed the transfer and forwarded it with all the documents necessary for the sale to the Defendant's advocate on 21st October, 2008.

7. The sale agreement stipulated that the validity of sale agreement was subject to the lands file being traced; a search on the land being done; and the search confirming that the Suit Property is free and unencumbered.

8. A third party known as Safenet Investments Limited caused a caveat to be registered against the Suit Property on 19th September 2008 claiming a purchaser's interest.

9. The Defendant failed to execute the transfer instrument and rescinded the sale agreement vide its Advocates' letter dated 14.1.2009. The Defendant refunded the 10% deposit to the Plaintiff's advocate together with interest calculated at 6% p.a. The Plaintiff's advocates accepted the refund by presenting the refund cheque for payment.

10. To secure its interest accruing out of the sale agreement, the Plaintiff lodged a caveat forbidding the registration of any transaction against the Suit Property.

11. The Plaintiff and the Defendant each called one witness to testify on its behalf. The witnesses adopted their witness statements and produced documents in court.

12. Parties filed nine agreed issues for determination. They can be condensed as follows: -

i. Did the Plaintiff discharge its obligations under the sale agreement dated 26th September, 2008?

ii. Did the registration of the caveat by Safenet Investments Limited invalidate the sale of the Suit Property? In other words, was the Defendant entitled to rescind the sale agreement?

iii. Did the Plaintiff accept the rescission?

iv. Was the Defendant discharged from its obligations under the sale agreement when the Plaintiff accepted the refund of the 10% deposit together with interest from the Defendant?

v. Is the Plaintiff entitled to the remedies it seeks in the plaint?

13. It is necessary to set out the salient parts of the sale agreement:

i. Clause 2 provided that the deposit of 10% was to be held by the vendor's advocates as stakeholder. The balance of the purchase price was to be paid to the Stakeholder on or before the completion date to hold pending registration of the transfer in favour of the purchaser.

ii. Clause 4 provided that the completion date was 30 days from the date of execution. The agreement was executed on 26th September 2008.

iii. Clause 8 set out the completion documents that were to be exchanged for the balance of the purchase price. The exchange was to be done on or before the completion date.

iv. Clause 9 (a) provided that the vendor would rescind the sale after giving 21 days' completion notice if the purchaser was unable to pay the balance of the purchase price or give a suitable professional undertaking.

v. Clause 9(b) set out the remedies available to the purchaser if the vendor was not able to complete the sale for reasons other than the purchaser's failure to pay the balance of the purchase price. These were:

a. Issue a completion notice of 21 days to the vendor to complete the sale; and/or

b., File suit for specific performance upon expiry of the completion notice; and/or

c. A refund of the amount paid with interest at 15% p.a. calculated from the date of receipt of payment to the date the refund is made.

vi. Clause 16 on survival stipulated as follows "save with regard to the matters which require to be fulfilled and are in fact fulfilled prior to or at the completion date, this agreement shall continue to be in full force and effect."

vii. Clause 21 hinged the validity of the sale agreement to the main file relating to the property being located at Lands, a search of the title being conducted, and the search indicating that the property was free and unencumbered.

14. It is not in dispute that the parties entered into the sale agreement dated 26th September, 2008 and that the Plaintiff paid the 10% purchase price to the Defendant. It is also not disputed that Safenet Investments Limited caused a caveat to be registered against the Suit Property before the transaction was concluded.

15. The Plaintiff paid the deposit. Its advocates forwarded the transfer which the Plaintiff had executed to the Defendant's advocates on 21.10.2008. The Plaintiff's advocates' letter of 5.11.2008 confirmed that the Plaintiff was ready and willing to pay the balance of the purchase price. The Plaintiff discharged most of its obligations under the sale agreement. It is also not disputed that the Plaintiff did not pay the balance of the purchase price and that it accepted a refund of the deposit with interest at 6% p.a.

16. The next issue for determination is whether the Defendant was entitled to rescind the sale agreement. The Plaintiff argues that there was no clause in the sale agreement which would entitle the Defendant to rescind the agreement upon the lodging of

a caveat on the Suit Property.

17. Clause 21 of the sale agreement is at the centre of this dispute. This clause set out three conditions for the validity of the agreement. Firstly, the lands office file in respect of the Suit Property had to be traced. Secondly, a search on the title was to be conducted and lastly, the search had to indicate that the Suit Property was free and unencumbered. The court finds that the first two conditions were met. The contention is over the third condition.

18. The Plaintiff maintains that clause 21 has to be read with clause 7 which provided that the Suit Property was sold free from adverse claims and was only subject to acts, covenants and encumbrances set out in the document of title. It conducted a search on 23rd September, 2008 which confirmed that the last entry made was number 5 being the transfer of the Suit Property to the Defendant on 23rd November, 2006. It later did a search which showed that the caveat lodged by Safenet Limited was registered against the title on 19th September 2008.

19. The Defendant's Advocates wrote to the Plaintiff's Advocates on 4th December 2008 advising it that a third party who had a dispute with the Defendant had lodged a caveat against the Suit Property and that attempts to resolve the dispute had been unsuccessful hence the transaction could not be completed. The Plaintiff takes issue with the Defendant for not informing it that a caveat had been lodged against the Suit Property as soon as the Defendant learnt of its existence.

20. The Defendant maintains that it was entitled to rescind the sale agreement due to the caveat lodged by Safenet Investment Ltd on the Suit Property and that it actually rescinded this agreement on 14th January, 2009 by refunding the deposit together with interest at 6% to the Plaintiff which the Plaintiff accepted unconditionally.

21. The Plaintiff stresses that the Defendant confirmed that it never entered into any sale agreement with Safenet Investments Ltd and that the Defendant confirmed in its letters of 2nd and 4th December 2008 that the dispute was between the Defendant's shareholder and Safenet Investments Ltd. It argues that it was preposterous for the Defendant to rely on the caveat lodged by Safenet Investments Ltd to rescind the sale agreement yet it had not entered into any agreement with this company over the Suit Property.

22. It was the Defendant's evidence that the caveat registered against the Suit Property on 19th September 2008 forbade any dealings on the Suit Property. The Defendant argues that it made diligent effort to have the caveat placed by Safenet Investment Ltd removed but did not succeed which made it impossible for it to complete the sale and transfer the Suit Property to the Plaintiff.

23. Under Section 57(4) of the Registration of Titles Act (now repealed), once a caveat is registered, it forbids the Registrar from registering a transfer or any other dealing on the land in question. The Defendant argues that the registration of the caveat lodged by Safenet Limited against the Suit Property constituted an encumbrance.

24. The relevant part of the caveat reads as follows;

*"This caveat claims over the above land a purchaser's interest pursuant to sale agreement and copies of payment receipts attached **and forbids the registration of any dealing with the land absolutely.**"*

25. The Court finds that the third condition under clause 21 of the sale agreement which would make the sale valid was not met. The Defendant was entitled to rescind the sale once the caveat was registered against the Suit Property since the effect of the caveat was to forbid registration of dealings on the land. It would not have been possible to register a transfer of the Suit Property to the Plaintiff with the caveat in place.

26. The Defendant argues that by accepting the refund of the deposit together with interest, the Plaintiff has no basis to seek to enforce an agreement that ceased to exist once the rescission was effected and accepted by both parties.

27. The Plaintiff accepted a refund of the 10% deposit of the purchase price it had paid together with 6% interest. The Plaintiff maintains that it accepted the refund of the deposit in an effort to mitigate its loss but did not accept the rescission of the contract. It argues that clause 9 (b) of the sale agreement provided for two remedies; filing suit for specific performance, or recovering the deposit paid plus interest at the rate of 15% p.a. The Plaintiff elected to sue for specific performance through this suit since the Defendant only remitted interest at 6%.

28. The Plaintiff argues that for there to be a valid rescission, the refund of the deposit had to come with interest calculated at 15% p.a. and not 6% p.a. which the Defendant paid. The court finds that the Plaintiff accepted the rescission of the contract when it accepted the refund of the deposit plus interest.

29. In determining whether the Plaintiff is entitled to the reliefs it seeks the court has to consider Clause 9(b) of the agreement which spells out the remedies available to the purchaser if the vendor was not able to complete the sale for reasons other than the purchaser's failure to pay the balance of the purchase price. These were; issue a completion notice of 21 days to the vendor to complete the sale, and/or file suit for specific performance upon expiry of the completion notice and/or a refund of the amount paid with interest at 15% p.a. calculated from the date of receipt of payment to the date the refund is made.

30. On 28th November 2008 the Plaintiff gave the Defendant 7 days to forward the completion documents failing which it would invoke the provisions of Clause 9(b). More letters were exchanged and parties even had a meeting on 2nd December 2008 to try

and resolve the impasse. The court finds that the Plaintiff did not issue the completion notice contemplated by this clause.

31. The court is of the view that the purchaser had to elect whether to sue for specific performance or seek a refund of the amount paid with interest under clause 9 (b) of the sale agreement. It would be unconscionable for the purchaser to accept a refund of the deposit then sue for specific performance thereafter.

32. In **Nabro Properties Limited v Sky Structures Ltd & 2 Others [2002] 2 KLR 299** the court found that a party seeking specific performance must show and satisfy the Court that it can comply and be ready and able to do so; a mere statement that the purchaser is ready to pay is not sufficient.

33. In **Gurdev Singh Birdi and Marinder Singh Gatora as Trustees of Ramgharia Institute of Mombasa v Abubakar Madhbuti [1997] eKLR** the Court of Appeal cited paragraph 487 of Volume 44 of **Halsbury's Laws of England**, Fourth Edition which states that a Plaintiff seeking specific performance of a contract:

“must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implication, and which he ought to have performed at the date of the writ in the action....”

Where a condition or essential term ought to have been performed by the Plaintiff at the date of the writ, the court does not accept his undertaking to perform in lieu of performance, but dismisses the claim.”

34. In that case, Gicheru JA found that when the appellants went to court seeking specific performance of the agreement they had not performed one essential part of the agreement, namely payment of the balance of the purchase price. Tunoi JA observed that the appellants' conduct rendered it inequitable for specific performance to be granted having accepted the respondent's rescission of the contract and a refund of Kshs. 700,000/=. The Court found that the contract became irrevocably and unequivocally rescinded at the instance of the appellants.

35. The court finds that the Plaintiff is not deserving of the order for specific performance having failed to prove that it was ready and willing to comply. The Defendant's witness stated during the hearing that he was seeing a copy of the cheque for Kshs. 190,890,000/= for the first time. The Plaintiff did not perform an essential part of the agreement, which is pay the purchase price. It accepted the refund of the deposit.

36. The Plaintiff relied on **Elijah Kipkorir Barmalel & Another v John Kiplagat Chemweno & 3 Others [2010] eKLR** in which the Court of Appeal upheld the decision of the trial Court that there had been no valid rescission of the sale agreement. That case involved a sale transaction in which the purchasers had taken possession of part of the land in dispute and tendered the balance of the purchase price which the vendor declined to accept forcing the advocate to put the money in an interest earning account. The court granted an order for specific performance.

37. The Plaintiff in this case accepted a refund of the deposit it had paid to the Defendant with interest at 6%. It did not pay the balance of the purchase price to the Defendant. The court finds that the Plaintiff ought to have sued the Defendant for the difference in interest between the 6% the Defendant paid to it and the 15% set by clause 9(b) of the sale agreement.

38. The Plaintiff also relies on **Rose Wambui Wahito v John Ian Maingey [2013] eKLR** in which the court declined to grant an order for specific performance citing delay in pursuing this equitable remedy and that the terms of the contract sought to be enforced were not certain and precise. The Plaintiff argues that it has not delayed in seeking the order of specific performance and that it took certain steps when the Defendant purported to rescind the sale. The Plaintiff filed this suit 18 months after the rescission. It ought to have sought specific performance, which is an equitable remedy soon after the Defendant rescinded the sale agreement.

39. The other case that the Plaintiff relies on is **Lucy Njeri Njoroge v Kaiyahe Njoroge [2015] eKLR** in which the Court of Appeal mentioned the factors to be considered for frustration to be held to exist. These include whether the frustration was caused by the default of the parties, whether an unforeseeable event occurred that led to the frustration of the agreement, and whether the intervening event resulted in something radically different from that originally contemplated by the parties. The sale agreement in this case was frustrated by Safenet's caveat which was not foreseeable at the time the agreement was executed. It was not caused by the Defendant's default since the Defendant made attempts to get the caveat removed.

40. For the reasons given above, the court dismisses the suit with costs to the Defendant.

Dated and delivered at Nairobi this 27th day of June 2017.

K. BOR

JUDGE

In the presence of: -

Mr. Obuya for the Plaintiff

Mr. Wara holding brief for Rugo for the Defendant

