



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT OF KENYA**

**AT MILIMANI**

**ELC CASE NO. 434 OF 2012**

**JAPETH ANAMI NGAIRA.....PLAINTIFF**

**=VERSUS=**

**CATHERINE KHAKASA CHENG'OLI.....DEFENDANT**

**JUDGEMENT**

**BACKGROUND.**

1. The defendant had entered into a sale agreement with National Housing Corporation (N.H.C) for the purpose of flat number E. On 2<sup>nd</sup> floor of Block MF-2 on LR No. 25980 at Madaraka Estate Nairobi. The agreement was signed on 9<sup>th</sup> November 2009. The purchase price was Ksh.1,600,000/=. The Defendant was required to make a deposit of 10% and clear the balance by 30<sup>th</sup> November 2009.
2. The Defendant had applied for a mortgage facility of Kshs.1,440,000/= from savings and loan(k) limited for the purpose of purchase of the two bedroom flat. The defendant's facility was approved and a letter of offer was given but the defendant did not sign the same and therefore there was no facility extended to her. The defendant later on entered into an agreement for the sale of the property to the plaintiff at a consideration of Kshs.3,800,000/=. This was wide agreement for sale dated 26<sup>th</sup> August 2010.

**PLAINTIFF'S CASE**

3. It is the Plaintiff's case that he paid Kshs.1,440,000/= directly to NHC on behalf of the defendant as per the agreement. The balance of Kshs.2,360,000/= was to be paid to the defendant. It is the Plaintiff's evidence that he cleared the purchase price. On 29<sup>th</sup> August 2011, he sought vacant possession but the defendant declined to do so arguing that the plaintiff was in breach of the agreement in that he had not, cleared paying the purchase price. This is what prompted the plaintiff to file a suit in which he seeks orders for specific performance of the agreement, eviction and mesne profits at the rate of kshs.20,000/=per month until vacant possession is given.

**DEFENDANT'S CASE**

4. The defendant's case is that the plaintiff was in breach of the terms of the agreement in that he did not complete payment by 31<sup>st</sup> January 2011 which was the completion date. The defendant further states that there was a meeting held between her and the plaintiff and a third party in which it was agreed that in view of the fact that the plaintiff was in breach of the terms of the agreement, he was to pay an additional

sum of Kshs.400,000/= which was to be paid by 31<sup>st</sup> December 2011. The defendant contends that the plaintiff did not pay this amount and that therefore he is not entitled to the house. The defendant stated that she is willing to refund the purchase price.

### **ANALYSIS OF EVIDENCE AND ISSUES FOR DETERMINATION.**

5. I have gone through the Plaintiff's evidence and the evidence of the defendant as well as the documents relied by both parties. There is no contention that the parties entered into an agreement for the purchase of the suit property. It was a term of the agreement that the plaintiff was to pay kshs.1,440,000/= directly to N.H.C. The plaintiff produced a copy of banker's cheque in favour of N.H.C for Kshs.700,000/= and an original receipt issued by N.H.C as plaintiff exhibit 2(a) and 2(b) respectively. The Plaintiff also produced a copy of a banker's cheque for Kshs.740,000/= in favour of N.H.C exhibit 3(a) and an original receipt issued by N.H.C exhibit 3 (b).

6. According to clause 4 of the agreement, the balance of Kshs.2,360,000/= was to be paid to the defendant. The Plaintiff produced four copies of banker's cheques in favour of the defendant. Each cheque was for Kshs.500,000/= dated 10.1.2011, 27.1.2011, 11.2.2011 and 18.2.2011. The four copies of cheques were produced as exhibits 4,5,6 and 7 respectively. The last banker's cheque issued in favour of the defendant was for Kshs.320,000/= dated 29<sup>th</sup> August 2011 which was produced as exhibit 8 (a).

7. The main issue for determination in this case is whether there was breach of the agreement of 26<sup>th</sup> August 2010. Another issue for determination is whether there was any agreement increasing the purchase price by Kshs.400,000/=.The agreement was clear that the plaintiff was to pay kshs.2,360,000/=to the defendant. The documents produced by the plaintiff show that he paid kshs.2,320,000/= to the plaintiff leaving a balance of kshs.40,000/=. The plaintiff's evidence is that he made the last payment on 29<sup>th</sup> August 2011. The plaintiff produced two receipts for Kshs.20,000/= each. The receipts are dated 7/9/2010 and 1/10/2010. The two receipts were issued by the plaintiff's advocate on account of deposit of legal fees. This cannot be said to be payment to the defendant as per the agreement. It is therefore clear that the plaintiff did not clear the balance of the purchase price and cannot therefore seek specific performance of the agreement. In the case of **Wambugu Vs Njuguna(1983) KLR 172**, the appellant had filed a suit against the respondent for removal of a caution which had been lodged on the suitland by the respondent, an order of eviction and perpetual injunction restraining the respondent from trespassing to the suitland. The respondent counter-claimed for transfer and registration of the suitland in his name by virtue of a sale agreement and also by virtue of adverse possession. The purchase price was Kshs.2,485/= and the respondent had paid Kshs.2,300/=. The High Court found in favour of the respondent and entered judgement in his favour. The appellant appealed to the Court of Appeal. The court of Appeal in allowing the appeal inter-alia held that as the appellant had not paid the balance of the purchase price, no order of specific performance could be made in favour of the respondent.

8. While the plaintiff was being cross-examined by the defendant's lawyer, he conceded that he was in breach of the agreement by not paying the purchase price within the set timelines. The plaintiff however stated that he had a reason for this and that this was because he did not want to complete payment before the defendant cleared the amount she owed N.H.C. The amount owed by the defendant to N.H.C in rates and rent was in the region of 435,803/=. The defendant later cleared the amount owed to N.H.C by paying Kshs.440,000/= on 18/6/2012. Despite the Defendant clearing the amount owed to N.H.C albeit late, the plaintiff has not performed his part of the agreement by paying the balance of Kshs.40,000/=. He cannot therefore seek any orders when he is in breach of the terms of the agreement.

9. The defendant alleged that there was a meeting held between her, the plaintiff and a third party in which the purchase price was increased by Kshs.400,000/=. There is no credible evidence produced to show that such a meeting was held. What the defendant produced were unsigned minutes of the alleged meeting. If there was any such meeting and agreement as alleged, then there should have been a deed of variation to the earlier agreement signed. As that was not done, I find that there was no such agreement and the purchase price was not increased.

### **CONCLUSION**

10. It is clear that the plaintiff did not meet his part of the bargain. He cannot therefore seek specific performance of the agreement. The plaintiff's case fails and the same is hereby dismissed with costs to the defendant.

Dated, Signed and delivered at **Nairobi** on this **28<sup>th</sup>** day of **September, 2017**.

**E.O.OBAGA**

**JUDGE**

In the presence of :

Mr Ochieng for M/s Morara for defendant

Court Assistant: Hilda

**E.O.OBAGA**

**JUDGE**