



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

E.L.C. CASE NO. 1047 OF 2013

DEBORAH ACHIENG ADUDA.....1ST PLAINTIFF

RENE JOHN DIERKX.....2ND PLAINTIFF

VERSUS

FLORENCE SEYANOI KIBERA also known as

DOROTHY SEYANOI MOSCHION.....DEFENDANT

JUDGEMENT

1. The Plaintiffs are husband and wife living in Kenya. They decided to look for land to purchase and construct their matrimonial home. They approached the Defendant who is the registered proprietor of L.R. No. 5892/22 measuring approximately 10 acres. The land is situated in Karen area of Nairobi County. This parcel of land was created after L.R. No. 5892 measuring approximately 35.5 acres was subdivided into many portions most of which the Defendant transferred to third Parties while she retained L.R. No. 5892/22.

2. The Plaintiffs entered into a sale agreement with the Defendant on 16/2/2012 for the sale of sub-plot B measuring approximately 1 acre which was to be hived off L.R. No. 5892/22 ("the Suit Property") at the agreed consideration of Kshs. 28 million. The Plaintiffs paid a deposit of Kshs 10 million on the execution of the agreement. The Plaintiffs were to take possession of the plot upon execution of the sale agreement and payment of the deposit of the purchase price. The agreement set out the mode of payment for the balance of the purchase price.

3. The Defendant never gave the Plaintiffs possession. The Plaintiffs later learnt that the Defendant had entered into a lease agreement with a third party for the entire L.R. No. 5892/22 including the Suit Property that she was selling to the Plaintiffs. The Defendant failed to provide the completion documents to the Plaintiffs.

4. One of the conditions of the sale was that the Suit Property was sold free from any mortgage, charge, lien, encumbrance or adverse claim. The Plaintiffs later discovered that there was a mortgage subsisting over L.R. No. 5892/22 at the time the Defendant entered into the agreement with them.

5. Despite numerous requests from the Plaintiffs to complete the transaction, the Defendant has failed to do so. Even when the Plaintiffs demanded a refund of the deposit they had paid the Defendant failed to refund the deposit that she was paid.

6. The Plaintiffs filed suit on 30/8/2013. They seek a permanent injunction to restrain the Defendant from selling, leasing, occupying, interfering or dealing in any manner with the Suit Property situated in Karen area of Nairobi County. They also seek an order of specific performance to compel the Defendant to transfer that land to them and an order to compel the Defendant to perform and complete her obligations under the sale agreement by subdividing and transferring the Suit Property to the Plaintiffs.

7. In the event that the Defendant fails to comply with the orders sought against her, the Plaintiffs want the Director of Surveys and the Registrar of Titles ordered to execute all the necessary documents to effect and register the transfer of the Suit Property in the joint names of the Plaintiffs. Alternatively, the Plaintiffs seek judgment in the sum of Kshs. 10 million being the deposit of the purchase price they paid together with interest and costs.

8. Both Plaintiffs testified at the hearing of this case. The Plaintiffs adopted their witness statement filed in court on 30/8/2013. They produced the documents in support of their claim. They stated that they paid the deposit of Kshs. 10 million when they

signed the agreement for sale. The balance of Kshs. 18 million was to be paid in USD in monthly instalments of USD 1750 until payment in full.

9. The Plaintiffs were to be given possession on execution of agreement but the seller later refused to allow them access to the Suit Property. The Plaintiffs learnt that after executing the sale agreement on 26/2/2012 that the Defendant entered into an agreement for lease with Constantine George Sphikas on 5/3/2012 for the whole L.R. No. 5892/22 which includes the Suit Property for a period of 10 years from 1/4/2012.

10. When the Plaintiffs learnt about the lease the Defendant secretly executed and registered they reported the matter to the police and lodged a complaint with the Lands Plot Section of the Criminal Investigations Department. After investigations were carried out, the Defendant was arrested and charged with the offense of conspiracy to defraud contrary to Section 317 of the Penal Code in **Milimani Chief Magistrates Court Criminal Case No. 1134 of 2012**. The said Constantine George Sphikas lodged a similar complaint against the Defendant and she was charged also with the offense of fraud in **Criminal Case Number 1133 of 2012**.

11. The two criminal cases were pending at the time this suit was filed. Despite the existence of these criminal cases, the Defendant went ahead and entered into another lease agreement for the same property with one Fredrick Okiki Amayo for a period of 10 years from 1/4/2013.

12. The Plaintiffs demanded the completion documents vide the letter dated 19/3/2012. The Defendant failed to deliver the documents in accordance with clause 10 of the sale agreement.

13. The Defendant's lawyers wrote to the Plaintiffs' lawyers on 7/6/2012 stating there was need to amend clause 2.3 of the sale agreement for the Plaintiffs to settle the balance of purchase price within 90 days. The Plaintiffs advocates responded expressing their desire to complete the transaction in accordance with the sale agreement. It was also stated in the letter that if the Defendant was unable to complete the sale as per the agreement then she ought to refund the deposit of Kshs. 10 million to the Plaintiffs.

14. The Plaintiff's advocate's letter of 3/7/2012 gave the bank details for the refund of the deposit. The Defendant's lawyers wrote to the Plaintiffs lawyers on 20/7/2012 stating that the Defendant was insisting that the Plaintiffs had to forfeit 10% of the purchase price as a condition for the refund of the deposit and indicated that they were going to deposit Kshs. 7.2 million into the Plaintiffs' account once this was confirmed.

15. The Plaintiffs' lawyers responded on 26/7/2012 stating that they were not agreeable to any deductions of the deposit if the Defendant was unable to proceed with the transaction. The Plaintiffs indicated they were ready and able to complete the sale in line with the sale agreement dated 16/2/2012.

16. The Defendant's lawyers wrote back on 27/7/2012 stating that the Plaintiffs were in breach of clause 2 of the sale agreement and had to forfeit 10% of the purchase price. On 21/8/2013 the Defendants advocates wrote to the Plaintiffs' advocates stating that the agreement stood rescinded and all or any monies paid under that agreement were wholly forfeited.

17. The Plaintiffs caused a caveat to be registered against the Suit Property on 27/2/2013.

18. The issue for determination is whether the Plaintiffs are entitled to the reliefs they seek in the plaint.

19. The court has looked at the evidence produced in court which confirms that indeed the Plaintiffs entered into a sale agreement with the Defendant on 16/2/2012 for the purchase of one acre which was to be hived off L.R. No. 5892/22 situated in Karen within Nairobi County. The Plaintiffs produced evidence that they paid a deposit of Kshs. 10 million to the Defendant on various dates in January, 2012. This was in conformity with clause number 2.1 of the Sale Agreement.

20. Under clause 2.2 and 2.3 of the agreement the balance of the purchase price of Kshs. 18 million was to be paid in equal monthly instalments of USD 1750 from 10/6/2012 and thereafter on the 10th day of each subsequent month until payment in full. The clause stated that the payments could be fast tracked.

21. The vendor was required to open a USD account into which the balance of the purchase price would be paid. There is no evidence that the Defendant ever opened this account. Barely three weeks later, she entered into another agreement with the third party to lease the entire 10 acres including the one acre she was selling to the Plaintiff for a period of 10 years. The lease with the third party was to run from 1/4/2012.

22. The court has looked at all the documents including the charge sheets and finds that the Defendant fraudulently and misrepresented facts as the Plaintiffs aver in paragraph 16 of the plaint.

23. The court finds that the Defendant was in breach of the contract and issues an injunction to restrain the Defendant from selling, leasing, occupying or in any other manner dealing with the land described in the sale agreement dated 16/2/2012 as subplot B measuring 1 acre to be hived off L.R. No. 5892/22 situated in Karen Nairobi County.

24. An order of specific performance is issued to compel the Defendant to specifically perform and complete her obligations under the sale agreement dated 16/2/2012 by subdividing and excising 1 acre from L.R. No. 5898/22 and transferring the 1 acre to the Plaintiffs within 30 days of the date of this judgment failing which the Director of Surveys and the Registrar of Titles

are to execute all the necessary documents and undertake the subdivision and excision of 1 acre from L.R. No. 5898/22 which is to be transferred to the joint names of the Plaintiffs herein. The costs of this exercise will be deducted from the balance of the purchase price.

25. The Plaintiffs will pay the balance of the purchase price to the Defendant upon registration of the transfer of the 1 acre in the Plaintiffs' names.

26. The Plaintiffs are awarded the costs of this suit.

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

K. BOR

JUDGE

In the presence of: -

Mr. Oyomba for the Plaintiffs

No appearance for the Defendant

Mr. V. Owuor- Court Assistant