



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC. CASE NO. 606 OF 2016

IN THE MATTER OF THE SALE OF UNIT NO. 2 ON L.R. NO. 3734/220

BETWEEN

ENG. JOHN OKUNA OGANGO.....PLAINTIFF

AND

DOLORES N. COLLINS.....1ST DEFENDANT

AND

IN THE MATTER OF IRREVOCABLE UNDERTAKING DATED 22/4/2015

BETWEEN

ENG. JOHN OKUNA OGANGO.....PLAINTIFF

AND

COLLINS PARK VILLAS LIMITED.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff entered into an agreement with the 1st Defendant for the purchase of Unit No. 2, a 5 bedroomed townhouse all ensuite with a servant quarter on Owashika Road Lavington (“the Suit Property”) on 16/7/2015 at an agreed price of Kshs. 52 Million. The letter of offer dated 2/2/2015 provided that the Plaintiff would pay 20% of the deposit of Kshs. 10,400,000 on execution of the letter of offer and the balance within 90 days or on transfer of the documents, whichever one came earlier.

2. The Plaintiff and 1st Defendant executed a sale agreement dated 16/7/2015 in which the 1st Defendant is described as the beneficial owner of the Suit Property. The agreement mentions that the 1st Defendant sold the Suit Property to Tofina Rom Builders (“the Developer”) on 2/8/2011 and that the Developer in turn transferred the Suit Property to the 2nd Defendant on 6/12/2011. The Developer undertook construction of the townhouses and was owed Kshs. 15,320,000/= by the 1st Defendant.

3. The Parties agreed that the Plaintiff would pay a deposit of Kshs. 15,320,000 for the Suit Property directly to the Developer to settle the sum the 1st Defendant owed the Developer. The 1st Defendant agreed to sell the Suit Property to the Plaintiff for the sum of Kshs. 52 Million upon the terms set out in

the agreement dated 16.8.2015.

4. The completion date is defined at clause 1.6 of the agreement as the date specified or ascertained in accordance with clause 6 and as being the date on which completion will take place. Clause 3 stipulated that the balance of the purchase price would be paid to the vendor's advocates subject to the provisions on completion. Clause 6 set the date of completion as 45 days from the date the Nairobi City Government issued a Certificate of Occupation for the property.

5. Page 10 of the sale agreement has a document referred to as "Consent" vide which Collins Park Villas Limited (the 2nd Defendant) states that as registered proprietor of L.R. No. 3734/220, it had given its consent for the transaction and adds that "it is understood that the registered proprietor is not a party to this agreement". That consent was witnessed by the 2nd Defendant's advocates on 22/4/2015. The Developer also gives its consent at page 11 of the agreement in similar terms stating that it is not a party to the sale agreement.

6. A document titled "Irrevocable Undertaking" is at page 12 of the Agreement. The 2nd Defendant gives its irrevocable undertaking to the purchaser's advocates, that is, the Plaintiff's advocates to directly transfer the Property to the Plaintiff by way of a long term lease and to furnish the purchaser's advocates with the completion documents listed in clause 9 of the agreement within 45 days of completing construction of the property. The 2nd Defendant's advocate witnessed the irrevocable undertaking on 22/4/2015.

7. The Developer also gave an irrevocable undertaking to the purchaser's advocates, a copy of which was annexed at page 13 of the agreement vide which it undertook to finish construction of the Suit Property within 90 days of receipt of Kshs. 15,320,000/= being the sum the 1st Defendant owed it on account of construction of her two units. The irrevocable undertaking was also witnessed by the 2nd Defendant's advocate on 22/4/2015.

8. The Plaintiff paid the deposit of Kshs. 15,320,000/= to the 2nd Defendant's account on 8/6/2015 and 16/7/2015. He paid a further sum of Kshs. 500,000/= on 30/9/2015 and 5/10/2015 at the request of the 1st Defendant who indicated that this sum would be deducted from the balance of the purchase price on completion of the transaction.

9. The 1st Defendant's advocates on record, M/s Ochieng Ogutu & Company Advocates drew the sale agreement. The Developer and the 2nd Defendant were represented by the firm of Were Oonge & Company Advocates while Oduk & Company Advocates represented the Plaintiff in the sale transaction.

10. The 1st Defendant's advocates forwarded the Certificate of Practical Completion to the Plaintiff's advocates vide its letter of 6/1/2016. The letter stated that the 1st Defendant had completed her part of the agreement and demanded payment of the balance of the purchase price while referring to the undertaking at page 12 of the agreement. The Certificate of Practical Completion is dated 1/12/2015 and confirms that the construction of the Suit Property was completed on 30/11/2015.

11. The 1st Defendant's Advocates wrote to the 2nd Defendant's Advocates on 6/1/2016 notifying them that they were required to release the completion documents to the Plaintiff's Advocates within 45 days of practical completion of construction.

12. On 19/1/2016 the 1st Defendant's advocates gave the Plaintiff's advocates 21 days' notice to complete the sale transaction by paying the balance of the purchase price of Kshs. 36,680,000/=. They threatened to rescind the agreement if payment was not made within that period while stating that the Plaintiff would forfeit 10% of the purchase price and the 1st Defendant would be at liberty to sell the Suit Property to another buyer.

13. On 29/2/2016, the 1st Defendant's Advocates informed the Plaintiff's Advocates that the sale had been rescinded. The Plaintiff's advocates protested about the 1st Defendant's actions by the letters dated 2/2/2016, 9/2/2016, 12/2/2016, 24/2/2016, 2/3/2016, 16/3/2016 resting with the letter of 13/4/2016.

14. The 2nd Defendant's Advocates informed the Plaintiff's advocates through its letter of 10/3/2016 that the 2nd Defendant had no interest in the Suit property and that all it was required to do is sign the lease agreement.

15. The Plaintiff took out the Originating Summons dated 3/6/2016 asking the court to determine the following questions:

- a) Whether the 1st Defendant is entitled to rescind the sale agreement without complying with the provisions of the sale agreement;
- b) Whether the Plaintiff is entitled to receive the Certificate of Occupation from Nairobi City County so as to complete payment of the purchase price;
- c) Whether the 1st Defendant is entitled to forfeit 10% of the purchase price;
- d) Whether the 1st Defendant waived her right to rescind the contract when she failed to refund the deposit of Kshs. 15,320,000/= within 7 days of the forfeiture;
- e) Is the 2nd Defendant in breach of its irrevocable undertaking issued under the sale agreement?
- f) Should the court issue an order to compel the 2nd Defendant to honour the terms of the irrevocable undertaking?
- g) Is the 1st Defendant entitled to payment of the balance of the purchase price? When and following which event under the sale agreement?
- h) Are damages payable to the Plaintiff? If yes, what quantum and by whom? and
- i) Who should pay the costs of this suit?

16. The 2nd Defendant's director in his Replying Affidavit filed in court on 16/3/2016 confirms that the Plaintiff paid the deposit of Kshs. 15,320,000/= to it and that he was entitled to a town house. The director admits at paragraph 8 of her affidavit that it was a condition of the sale agreement that the 2nd Defendant would give the undertaking to transfer the Suit Property directly to the Plaintiff and that the 1st Defendant's advocates asked the 2nd Defendant to release the completion documents to the Plaintiff's advocates through their letter of 6/1/2016.

17. She states that the 2nd Defendant's advocates could not prepare the lease since the issue of its fees had not been addressed. This fact was never communicated to the Plaintiff's advocates. The court notes that the sale agreement does not mention the issue of payment of the 2nd Defendant's fees.

18. In any event, clause 15 of the agreement stipulated that each party would bear its own advocates charges and that the vendor would meet the cost of obtaining all the completion documents. A duly executed long term lease is among the completion documents listed at clause 9 of the agreement which the 2nd Defendant was to provide to the Plaintiff. It was not the Plaintiff's duty to pay the 2nd Defendant's advocates fees for the preparation of the lease. Therefore, the 2nd Defendant could not make the payment of its advocates fees a condition precedent for it to prepare the Plaintiff's long lease as this was a matter that should have been sorted out between the Defendants.

19. She also states that on 29/2/2016 the 1st Defendant's advocates informed them that the sale had been rescinded and they were now required to forward the completion documents to the 1st Defendant's advocates. The 2nd Defendant's position is that it was only a contractor and not a party to the sale agreement and that whatever dispute was there had to be resolved between the Plaintiff and the 1st Defendant.

20. The court does not agree with this position. The 2nd Defendant is the registered proprietor of L.R. No. 3734/220 and it gave its consent for the sale of the Suit Property which was to be erected on its land. The Developer and 2nd Defendant received payment of the deposit of Kshs. 15,320,000/= from the Plaintiff. The 2nd Defendant gave an irrevocable undertaking to the Plaintiff's advocates to directly transfer the Suit Property to the Plaintiff by way of a long lease and to furnish the completion documents to the Plaintiff's advocates but failed to discharge its undertaking.

21. As the registered proprietor, clause 9 of the sale agreement enjoined the 2nd Defendant to provide the Plaintiff the completion documents which included the certified copy of occupation certificate. This and the other completion documents were never supplied by the 2nd Defendant in spite of its irrevocable undertaking. The 2nd Defendant is in breach of its irrevocable undertaking.

22. The 1st Defendant in its Replying Affidavit filed on 20/4/2016 admits the sale agreement and payment of the deposit and other monies totaling Kshs. 15,320,000/=. She argues that according to clause 9 of the agreement the Plaintiff was required to pay the balance of the purchase price once she had secured the 2nd Defendant's irrevocable undertaking. She also argues that the 2nd Defendant was to be discharged from its undertaking within 45 days of completion of construction only if the Plaintiff paid the balance of the purchase price.

23. The court notes that the 1st Defendant's advocates forwarded the certificate of completion of the construction on 6/1/2015 yet it was issued on 30/11/2015. No explanation is given for the delay of over a month in forwarding the certificate even though the 1st Defendant knew that the Developer had given an undertaking to complete construction within 90 days of receipt of the deposit from the Plaintiff which did not happen. In any event this is not the certificate contemplated by clause 6 of the sale agreement.

24. Clause 6 of the sale agreement states that the completion date would be 45 days from the date the Nairobi City County issued a Certificate of Occupation for the Suit Property. Neither of the Defendants discloses whether this was ever issued yet it was the responsibility of the 2nd Defendant to procure this under clause 9. The court finds that the Plaintiff was entitled to receive the Certificate of Occupation issued by Nairobi City County together with all the completion documents listed at clause 9 of the agreement.

25. The 1st Defendant entered into the sale agreement with the Plaintiff after she had transferred the land to the 2nd Defendant to undertake the construction of the town houses. She could not be discharged from her obligations under the sale agreement until she had furnished the completion documents listed at clause 9 to the Plaintiff. The sale agreement which was prepared by her advocates expressly stated that the Developer was not a party to the agreement even though it was undertaking the construction of the townhouses and had had the title over the Suit Property transferred to it before it transferred it to its nominee.

26. The court finds that the Plaintiff was not entitled to rescind the sale agreement as she purported to do. It was not enough for the Plaintiff to merely secure a suitable irrevocable undertaking from the 2nd Defendant to transfer the Suit Property directly to the Plaintiff. Clause 9 placed the responsibility of providing completion documents on the 1st Defendant.

27. Clause 11 addressed default on the part of the purchaser including the obligation to pay the purchase price and provided that the vendor would give the purchaser 21 days to remedy the specified default while

confirming the vendor's readiness to complete the sale in all respects. The 1st Defendant's notice dated 19th January 2016 does not comply with clause 11 of the agreement as the 1st Defendant had not completed her part of the agreement. This clause provided that the vendor would refund monies paid over and above the 10% deposit to the purchaser. The Plaintiff paid 20% of the deposit which the 1st Defendant did not refund seven days after the purported termination notice. The 1st Defendant merely states at paragraph 19 of her affidavit that the Plaintiff can sue for recovery of the balance of the purchase price yet this is not what the parties agreed upon.

28. The court finds that the Plaintiff is entitled to liquidated damages assessed at 10% of the purchase price from the 1st Defendant pursuant to clause 11 (b) of the sale agreement.

29. Having found that the 2nd Defendant is in breach of its irrevocable undertaking, the court directs the 2nd Defendant to transfer the Suit Property to the Plaintiff by way of a long lease and furnish the completion documents listed at clause 9 the sale agreement, including the Certificate of Occupation to the Plaintiff within 30 days of the date of this judgment.

30. The Plaintiff will pay the balance of the purchase price to the 1st Defendant within three days of receiving the lease and all the completion documents from the 2nd Defendant.

31. The Plaintiff will have the costs of this suit which will be borne by the 1st Defendant.

Dated and delivered at Nairobi this 18th day of September 2017.

K. BOR

JUDGE

In the presence of: -

No appearance for the Plaintiff

Ms. Busima holding brief for the 1st Defendant

Mr. Muriungi holding brief for the 2nd Defendant

Mr. V. Owuor- Court Assistant