



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT OF KENYA

AT MILIMANI

ELC CASE NO. 816 OF 2015

BERNARD MACHEAH NGICURU.....PLAINTIFF

-VERSUS-

CAROLINE ATIENO OPAR.....1ST DEFENDANT

HARAMBEE CO-OPERATIVE SAVINGS &

CREDIT SOCIETY LIMITED.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed a suit against the defendants seeking the following reliefs:-

a) A declaration that the transfer of all that parcel of land known as LR No. Nairobi/Block 82/4839 is null and void.

b) An order that the certificate of lease dated 16th October 2006 for LR No. Nairobi/Block 82/4839 be cancelled.

c) Damages for breach of contract.

d) Costs of this suit.

2. That first defendant filed a defence and raised a counter-claim in which she seeks orders for specific performance of the agreement.

3. On 12th April 2017, when this case came up for hearing, the advocate for the Plaintiff and the second defendant agreed to rely on the witness statements and documents filed by their respective clients. They then agreed to file written submissions. The advocate for the first defendant who had been served was not in court. The plaintiff filed submissions on 4th May 2017. The second defendant filed their submissions on 22nd June 2017.

4. The Plaintiff had purchased a plot then known as plot A 960 from the second defendant. On 14th June 2006, the plaintiff entered into a sale agreement with the first defendant for sale of the plot at Kshs.583,500/=. It was mutually agreed between the parties that the plaintiff was to execute the agreement to enable the first defendant obtain a loan from the bank before she could pay the purchase

price to the plaintiff.

5. The Plaintiff then wrote a letter to the second defendant notifying them that he had sold the plot to the first defendant. The letter which the plaintiff wrote to the second defendant authorised the second defendant to write a letter to the first defendant's advocate authorising title to be processed in the first defendant's name. As per the plaintiff's instructions, title was processed in the first defendant's name. A cheque was drawn in favour of the plaintiff which cheque he refused to take contending that he had rescinded the agreement for breach on the part of the first defendant.

6. The first defendant in her defence, stated that after title was processed in her name, she made arrangements to pay the plaintiff. Her lawyer wrote a cheque which cheque was not accepted by the plaintiff. She contends that she is ready and willing to complete the transaction but that it is the plaintiff who has refused to accept payment.

7. The second defendant denied the plaintiff's claim against it. The Sacco stated that it had nothing to do with the agreement between the Plaintiff and the first defendant. The Sacco acted in accordance with instructions given by the plaintiff who wanted the title to be processed in the name of the first defendant.

8. I have considered the submissions by the plaintiff and those of the second defendant. The issues which emerge for determination are firstly, *whether the first defendant was in breach of the agreement*. Secondly, *was the registration of the title in first defendants name obtained fraudulently*. Thirdly, *is the first defendant entitled to an order of specific performance*.

9. I have looked at the agreement of 14th June 2006. Clause 2 of the agreement provided that the purchase price of Kshs.583,500/= was to be paid directly to the plaintiff on execution of the agreement . Though this was the case, the true position was that this agreement was signed to enable the first defendant to obtain a loan from Habib Bank Limited where the first defendant was working.

10. The Plaintiff stated that when he learnt that title had been processed in the first defendant's name, he wrote a letter dated 9th November 2006 cancelling the sale on grounds of breach of agreement. After he wrote this letter, he went out of the country for one year. When he came back, the first defendant forwarded a cheque to him through the firm of Amolo & Gachoka Advocate but this cheque was not accepted. The reason given for the cancellation is that the first defendant was in breach of the agreement.

11. As at the time the plaintiff was writing this letter, title had already been processed in the name of the first defendant. This title came in the name of the first defendant because the plaintiff had authorised the second defendant to write to the first defendant's lawyer advising them to process title in the first defendants' name. The Plaintiff's allegations that title in the name of the first defendant was procured through fraud has no basis. The plaintiff's letter authorising processing of title in the first defendant's name was received by the second defendant on 26th June 2006. Title in the first defendant's name was issued on 16th October 2006.

12. The understanding, between the plaintiff and the first defendant was that the first defendant was to obtain a loan from a bank. There was no time limit given within which the bank was to give a loan to the first defendant. When the first defendant got the money, a cheque was drawn in favour of the Plaintiff but the same was not accepted. The cheque which was not accepted was issued on 17th March 2008. This is after the plaintiff who had been out of the country came back. The plaintiff cannot therefore claim that the first defendant breached the agreement.

13. The registration of the land in the name of the first defendant was done with authority of the plaintiff. The second defendant having been authorised to ask the lawyer of the first defendant to process title in the first defendant's name had no obligation to again seek any clarification from the plaintiff. When the plaintiff purported to rescind the agreement on 9th November 2006, the title had already been processed in the first defendant's name. The particulars of fraud attributed to the defendants do not therefore have any basis.

14. The Plaintiff is accusing the first defendant for not paying the purchase price on execution of the agreement. It is clear that payment was to be made after the first defendant had obtained a loan from the bank. He has therefore no basis for basing his claim on clause 2 of the agreement. The first defendant has been ready and willing to perform her part of the bargain. It is the plaintiff who refused to take the purchase price. I find that the plaintiff has failed to prove his case against both defendants. The same is hereby dismissed with costs to the defendants. I enter judgement in favour of the first defendant in terms of the counter-claim. The plaintiff shall pay costs of the counter-claim as well.

Dated, Signed and delivered at **Nairobi** on this **10th** day of **October 2017**.

E.O.OBAGA

JUDGE

In the presence of :-

Mr Kimakia for Plaintiff

M/s Wachira for Mr Chege for 2nd defendant

Court Assistant : Hilda

E.O.OBAGA

JUDGE