



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

ELC NO. 1496 OF 2016

NANCY NDUTA KAMAU.....PLAINTIFF

VERSUS

LEONARD MUNGA KAMAU.....DEFENDANT

JUDGMENT

The initial plaint was filed on 30/11/2016. It was amended on 7/2/2017. Plaintiff's claim is for:-

- a) An order for specific performance compelling the Defendant to complete the sale agreement dated 15th march, 2015 and transfer of all that parcel of land known as **Kiambaa/Kihara/5304** in favour of the plaintiff: in default, the Deputy Registrar to be authorized to sign the relevant documents on behalf of the Defendant.
- b) In the alternative to (a), a refund of the deposit paid.
- c) Interest on (b) above at 3% above the maximum bank lending rate.
- d) Costs of the suit;
- e) Such further or order relief as the Honorable Court may deem fit, just and expedient to grant.

There is a Memorandum of Appearance dated 3/3/17. The same is not filed. No defence was filed either. The matter proceeded ex-parte on 25/5/17 after the court confirmed that Defendant had duly been served.

During the trial, plaintiff relied on her statement dated 23/11/16 as her evidence in chief. She also relied on the list of documents dated 23/11/16, which documents were produced as P Exhibit 1-9.

A summary of plaintiff's claim is that on 5.3.15 she entered into an agreement with defendant where by the later was to sell to her Land Parcel No. **Kiambaa/Kihara/5304**, at a price of Shs. 3,300,000.

Plaintiff paid the required deposit Shs.1, 000,000. Before she could pay the balance, the parties renegotiated their agreement leading to a second agreement dated 15/7/16. In the second agreement, a financier was being introduced (U.A.P). This financier was to pay the amount of Shs.2, 300,000 within 14 days of the Registration of the transfer in favour of the purchaser (plaintiff). Completion date was 60 days from date of execution of the second agreement. Clause 2.3 of this second document read as follows:

“At least forty five (45) days before the Completion Date, the Financiers or Financier's Advocates (as the case may be) shall issue to the Vendor's Advocates an acceptable irrevocable

professional Undertaking to pay the Balance within fourteen (14) days of registration of the Transfer in favour of the purchaser ... but in any event not later than the Completion Date. The Vendor's Advocate will subsequently deliver to the Financier's Advocates the following documents...:-“

Pursuant to this agreement, on 21/7/16 the advocate for the financier wrote the irrevocable professional undertaking to the advocates for the vendor. The advocate for the purchaser also wrote several emails to Vendor's advocates. However, the defendant and his advocate did not avail the completion documents to the advocates for the financier as agreed. On 5/10/16, plaintiff's advocates wrote a Demand Letter pursuant to a notification to complete dated 1/3/16.

I have weighed all the evidence adduced herein. I find that there is not the slightest explanation as to why Defendant failed to comply with his part of the agreement. His advocate also never responded to the Notification to complete as well as the Demand Letter. I therefore find that Defendant is in breach of the agreement.

Plaintiff has prayed for Specific Performance compelling the Defendant to complete the sale agreement or in the alternative to get a refund of her deposit with interest.

I find that the more practical relief for the plaintiff is to get a refund due to the following reasons:

1. Firstly, I find that the particulars of the aforementioned piece of land are not fully within the knowledge of this court. The only document available that tends to confirm the existence of the land is the search document dated 27/10/16. It shows that defendant got the title deed on 7/2/12. A historical search would perhaps have revealed more details regarding this land. For instance does this land fall under the requirement of the Land Control Board? Where is the copy of the title? In absence of tangible evidence to confirm the existence of this land, this court would be reluctant to grant orders of Specific Performance.
2. Secondly, it appears that via the demand letters of 5/10/16, plaintiff's demand was for "Refund of all sums paid by the purchaser ... If plaintiff had desired that the agreement be completed then this should have been intimated in the demand letter.

Clause 14 of Original agreement, provides for interest and hence the court will allow the claim on interest.

Conclusion;

I enter Judgment for the plaintiff against the defendant in the following terms:-

- i. Defendant is hereby ordered to refund to the plaintiff, the deposit paid, the sum being Ksh.1, 000,000 with interest at 3 % above maximum bank lending rates to be calculated from the date of the demand notice that is 5/10/16.**
- ii. Plaintiff is awarded costs of the suit.**

DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD DAY OF NOVEMBER, 2017

HON. L.N. MBUGUA

ELC JUDGE

IN THE PRESENCE OF:-

Aswani H/B for MR. Naminda for Plaintiff