



REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT MOMBASA
ELC CASE NO. 300 OF 2014
(FORMERLY HCCC NO. 137 OF 2014)

THALIA KATIA MARIA CASTANHA.....PLAINTIFF

-versus-

MIDDLE EAST BANK KENYA LIMITED.....DEFENDANT

JUDGEMENT

1. By way of a Complaint dated and filed on 7th November 2014, the Plaintiff pleaded that she purchased the property known as L.R No. 1581/I/MN (“the suit property”) on 24th February 2006 through a public auction conducted on behalf of the Defendant by M/s Thara Auctioneers (“the Auctioneer”). The Plaintiff averred that she paid a deposit of Kshs. 2,250,000/= being 25% of the purchase price of Kshs. 9 million which was the highest bid.

2. The Plaintiff stated that completion of the purchase of the suit property was thwarted by an order of injunction issued in **HCCC No. 40 of 2006** which prohibited further dealings in the suit property until final determination of the said case. That **HCCC No. 40 of 2006** was determined in favour of the 2nd, 4th and 5th Defendants in that case, the 5th Defendant being the Plaintiff herein. That the said case was determined by a ruling delivered on 13th June 2014 in which the suit was struck out as against the stated Defendants.

3. That upon determination of **HCCC No. 40 of 2006** as aforesaid, the Plaintiff sought to have the transaction completed but the Defendant demanded an interest of 18% on the purchase price citing delay on the part of the Plaintiff to settle the balance of the purchase price. The Plaintiff avers that the delay in settling the balance of the purchase price cannot be blamed on her because there was a court order barring any dealings with the suit property.

4. The Plaintiff prays for judgment against the Defendant for:

i. A declaration that the Defendant's action of demanding interest that accrued during the period when payment was suspended by operation of law/court order is unconstitutional, null and void for being in breach of the Rule of Law.

ii. An order for specific performance

iii. A mandatory injunction directing the Defendant to execute and provide a discharge of charge and transfer of the suit property L.R. 1581/I/MN in favour of the Plaintiff and

surrender of original title and deed plan for the same to facilitate registration.

iv. Costs of and incidentals to the suit.

5. The Defendant filed its Defence on 26th November 2014 and Amended Defence on 10th December 2014. The Defendant averred in its Defence that it did not sign the Memorandum of Sale (“Agreement”) and thus the Plaintiff cannot bring the suit against it having regard to the provisions of Section 3 (3) of the Law of Contract Act.

6. In the alternative, the Defendant pleaded that the Plaintiff failed to comply with her obligations under the Agreement by failing to pay the balance of the purchase price which was due on 24th April 2006. That the order issued by the court in **HCCC No. 40 of 2006** was not directed at the Plaintiff and did not restrain her from performing her obligations under the Agreement nor did the order restrain the Defendant from accepting the balance of the purchase price.

7. The Defendant contended that the said order was null, void and of no legal effect as it was made without jurisdiction and in gross violation of all applicable rules of procedure, and the same could not restrain the Plaintiff from performing her obligations under the Agreement.

8. Further, the Defendant stated that even if the said order was valid, the same ceased to have effect on 13th June 2014 yet it was not until July 2014 that the Plaintiff paid the balance of the purchase price. It is the Defendant's case that no consent of the Lessor was obtained as outlined in the Lease of the suit property registered as Number CR 13765/1 and therefore the sale to the Plaintiff was void *ab initio*. The Defendant also contends that by her advocate's letter dated 30th September 2014, the Plaintiff repudiated the Agreement by categorically stating that she was not going to comply with her obligations under it, which repudiation was accepted by the Defendant.

9. This case proceeded for hearing on 16th June 2015. Both parties agreed to adopt as part of the record, the Defendant's Bundle of Documents filed on 3rd December 2014. Only one witness, ANNE NJERI GATHOGO testified for the Plaintiff. The parties consented that the witness adopts her statement filed in court on 16th June 2015 as her evidence in chief. She was subsequently cross-examined by the Defendant's counsel. The Defendant, despite having filed a witness statement, did not call any witness. It was agreed between the parties' advocates that the witness statement filed by the Defendant did not form part of the evidence although the statement was merely to produce documents which were admitted in evidence by consent.

10. ANNE NJERI GATHOGO (also called “PW1”) stated in her statement that at the time of the auction of the suit property, she was working as an Accountant with Tradecon (Kenya) Limited in which the Plaintiff was and still is a Director. She stated that on 24th February 2006, the date when the subject public auction took place, she went to the Commercial Bank of Africa, Moi Avenue, Mombasa and prepared the Bankers Cheque of Kshs. 2,250,000.00 in favour of the Defendant and towards the payment of the 25% purchase price. That she handed over the cheque to ROSEMARY WAWERU, the Auctioneer in her office. That upon payment of the deposit, a Memorandum of Sale was prepared and executed by the Plaintiff with one Esther Gathoni and PW1 being witnesses to the Plaintiff's signature.

11. PW1 stated that the Auctioneer later informed the Plaintiff and herself (PW1) of **HCCC No. 40 of 2006** and that she subsequently saw the restraining order published in the daily newspapers. The witness stated that to protect her interest, the Plaintiff applied and was enjoined in **HCCC No. 40 of 2006** which was subsequently struck out as against the Plaintiff herein. That upon the striking out of the case, the Plaintiff notified the Defendant's Advocate that she was ready to complete the transaction by paying the balance of the purchase price of Kshs. 6,750,000.00 which payment was made on 28th July 2014. That despite the payment of the purchase price in full, the Defendant has not been willing to complete the transaction.

12. Both parties filed their written submissions on the case. The Plaintiff filed her written submissions on 8th July 2015 while the Defendant did so on 27th August 2015. The Plaintiff further filed Response to

Defendant's Written Submissions on 31st August 2015. In their submissions they quoted several cases which I will make references to as may be necessary in the body of this judgment. I have read through both the submissions and the cases cited.

13. From the evidence adduced, issues framed for determination and the bundles of documents admitted in evidence, I find the following issues arising for my determination :

a) Was there a sale by public auction ?

b) If answer to (a) is positive was the plaintiff to blame for default in completing the sale therefore should pay the balance with interest at 18% p.a ?

c) Is the defendant obligated to complete the transaction by releasing executed documents to the plaintiff ?

14. Was there a sale of the suit property by public auction ? The defendant has not denied that it gave instructions to Thara Auctioneers to advertise the property for sale by public auction. The defendant produced copies of newspaper cuttings advertising the auction at page 1 and 2 of their bundle of documents. In the advertisement, the auction was slated for 24th February 2006. The plaintiff avers that she attended the auction and was declared the highest bidder at a price of Kshs Nine (9) Million.

15. PW 1 gave oral evidence on their activities of 24th February 2006. It is this activities which the defendant has cast doubt on and urged the Court to find there was never a sale concluded on 24.2.2006 as alleged by the plaintiff. In the defendants documents filed, there is no specific document challenging the sale by auction took place. Instead the defendant has attempted to challenge the plaintiff's evidence as regards the auction through the written submissions. Submissions can only give a summary of evidence already adduced and not attempt to introduce new evidence which then amounts to giving evidence from the bar.

16. It is my view that once the defendant alleged that no auction was concluded on the 24.2.2006, the burden of proof shifted to him to prove this fact. In this instance, the auctioneer would have been a necessary witness to counter the facts put forth by the plaintiff yet the defendant did not call her. Further the plaintiff produced a copy of bankers cheque dated 24.2.2006 in favour of the defendant for the sum of Kshillings Two Million Two hundred Fifty Thousand (Kshs 2,250,000). This was stated to be for payment of the deposit of 25% of the purchase price.

17. In the correspondences exchanged between the advocates for the parties show clearly that this money was received by the defendant. In the amended defence at paragraph 2 A, the defendant pleaded that the agreement was not signed by the defendant and accordingly the plaintiff cannot bring this suit against it. In support of this averment, the defendant cited several cases inter alia **Silver bird vs Junction (2013) 2 EA 334, Maty vs Abdulla (2009) eKLR and Wanjao vs Andambi (2011) eKLR.**

18. These cases are distinguishable from the present case as none of them was in respect to disposition of an interest in land through a public auction. There is produced by consent a memorandum of sale signed by both the auctioneer and the plaintiff. As to whether the cheque was paid in the course of a public auction is a matter of semantics. The conditions of sale contained in the advertisement required the highest bidder to pay 25% of price by bankers cheque.

19. It would beat logic that a party carries a bankers' cheque to the auction before knowing if he/she would be declared the highest bidder and secondly what that highest bid would be. Once the highest bid is declared then you can prepare a bankers cheque which is issued by the bank. In my view this process of attaining the bankers cheque is part of the course of the public auction. The auctioneer endorsed on the copy of the cheque confirming receipt. I therefore find that in indeed an auction took place and was concluded on 24.2.2006 in favour of the plaintiff.

20. The sale was to be concluded within sixty (60) days from the date of the auction. The same was not

done. According to the plaintiff she could not pay the balance because the auctioneer informed her of an injunction order issued in HCCC No 40 of 2006. This order was subsequently published in the newspaper of March 2006. This order was issued on 17th March 2006.

21. The defendant on its part submit that this order was not directed at the plaintiff and therefore she should have gone ahead and paid the balance. That having failed to pay on time, she should now pay the balance with interest at 18% p.a from 24.4.2006 to the date payment was made in full.

22. Undeniably, the order in HCCC No 40 of 2006 was issued before the expiry of sixty (60) days as provided in the memorandum of sale. In that order, the 1st defendant (Middle East bank Limited – current defendant) and the 2nd defendant (Thaara Auctioneers) were restrained from advertising for sale, selling charging, disposing, alienating or further trespassing on L.R No 1581/1/MN – Nyali (suit property) until the hearing and determination of the suit.

23. The 1st and 2nd defendants in suit No HCCC 40 of 2006 are the persons the plaintiff was directly dealing with in the suit property. Should she have acted inspite of this order ? On 10th April 2006, the plaintiff's advocates wrote to the defendant asking what steps it was taking to protect her interest because the owner of that property wanted to rent it out to 3rd parties. In the letter of 10th May 2006, the plaintiff demanded for refund of the purchase price and indicated in paragraph 2 of that letter the plaintiff's willingness to finalize the transaction.

24. In response to the two letters, the advocate for the defendant on record stated that the contract has not been frustrated except *“there is only a temporary order which prohibits our client from completing the sale. There was no impediment to your client completing her part of the bargain. Had she tendered the balance, our client would have accepted the same subject to the consent of the Court and if necessary made an appropriate application to the Court”*.

25. In the letter of 25th August 2006, the plaintiff again enquired about payment of the balance and completion of the sale. The defendant's response was that it was willing to complete the sale but was waiting the ruling in the pending application. The correspondences went on and on the subject until 13th June 2014 when the suit was struck out. There is no indication in these correspondences where the defendant blames the plaintiff for default. Infact it says that had the plaintiff paid the balance, it would have conditionally accepted the payment. It says it would have asked the Court for consent to receive the money.

26. In the pleadings form HCC No 40 of 2006 annexed there is no application made by this defendant seeking such consent from the Court. The defendant merely protested the plaintiff's demand of the refund together with interest. Although the order issued on 17.3.2006 was not directed at the plaintiff, she could not complete the transaction since the defendant confirmed it could not proceed because of the existence of the injunctive orders. The plaintiff became aware of the order both from the auctioneer and publication in the newspaper. Prudence would be to await the ruling in such an instance. Default if any under clause 10 of the agreement would shift to the defendant.

27. The default is confirmed by the defendant's letters admitting their willingness to conclude the transaction save for the order in force and issued against them. Infact they only demanded for payment of the balance on 14th November 2011 on the basis of an application filed by the plaintiff to strike out the suit HCC No 40 of 2006. It is my finding that the plaintiff having been made aware of the temporary injunctive orders in HCCC No 40 of 2006 and the defendant confirming that it could not transact because of this order, the plaintiff cannot then be blamed for default of failing to pay the balance within 60 days as stipulated in the agreement and consequently she cannot be penalised to pay the balance with any interest at 18% p.a or any percentage. The plaintiff is therefore entitled to prayer (a) of the plaint.

28. Is the defendant obligated to complete the transaction by releasing the executed transfer and title documents ? By a letter dated 21.9.2014, the plaintiff's advocates wrote to the defendant's advocate detailing the manner in which the balance was paid. The payment was made by direct transfer of funds

on 28th July 2014 to the defendant's account provided by their letter of 11th July 2014. The defendant wrote a letter dated 22nd September 2014 demanding payment of the balance and other amounts due within 15 days of the date of the letter. This letter was overtaken by events as by this date the balance had already been paid. It is not clear which balance was being demanded.

29. Later the defendant acknowledged receipt of the sum of Kshs 4.5 Million but did not acknowledge receipt of 2,250,000= . Vide their letter of 17.10.2014 the defendant purported to cancel or rescind the agreement of sale because the plaintiff had failed to pay the interest due on the balance of the purchase price. Having found in paragraph 27 above that the default was not occasioned by the plaintiff, there was no interest payable to the defendant. Consequently, the defendant having received the entire purchase price of Kenya Shillings Nine (9) Million cannot purport to rescind the agreement.

30. Had it refunded the deposit when demanded then probably it would be exercising such right as cancellation. At this stage they are estopped from cancelling/rescinding the sale agreement. The cancellation is an afterthought. The defendant must therefore proceed to complete the transaction. To this end, I grant prayer (b) and (c) of the plaint. The defendant is hereby directed to execute a transfer and discharge of charge of the suit property L. R 1581/1/MN in favour of the plaintiff and surrender the original title documents to facilitate registration within 30 days of delivery of this judgement. Costs of the suit is also awarded to the plaintiff

Judgement dated and delivered in Mombasa this 19th day of February 2016

A. OMOLLO

JUDGE