



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC NO. 240 OF 2010**

**LUCY NYAMBURA GITONGA.....PLAINTIFF**

**VERSUS**

**NGECHA MBARI YA THARA COMPANY LTD.....DEFENDANT**

**JUDGMENT**

The plaintiff brought this suit against the defendant seeking specific performance of the agreement for sale of land known as LR. No. Ruiru/Kiu/Block3/22("the suit property") which the two parties had entered into on 1<sup>st</sup> April 2003. The defendant filed a defence and counter-claim. In its counter-claim, the defendant sought vacant possession of the suit property from the plaintiff. In her plaint dated 11<sup>th</sup> April 2005, the plaintiff claimed that the defendant breached the said agreement for sale by refusing to transfer to her the suit property after she had paid the purchase price in full for the same. In its defence and counter-claim, the defendant contended that it was the plaintiff who breached the said agreement for sale by failing to pay the balance of the purchase price within the time that had been agreed upon. The defendant contended further that the plaintiff proceeded to take possession of the suit property before paying the balance of the purchase price contrary to the express terms of the agreement for sale. The defendant averred that on account of the plaintiff's breach of the terms of the said agreement, it rescinded the same and offered to refund to the plaintiff the amount that the plaintiff had already paid as a deposit towards the purchase price for the suit property.

I have carefully considered the pleadings filed herein and the evidence on record. I am satisfied that the plaintiff has proved her case against the defendant on a balance of probabilities. On the other hand, I find no merit in the defendant's counter-claim against the plaintiff. It is common ground that the plaintiff and the defendant entered into an agreement for sale of all that parcel of land known as LR. No. Ruiru/Kiu/Block3/22("the suit property"). The plaintiff was the purchaser while the defendant was the vendor under the Agreement for Sale dated 1<sup>st</sup> April, 2003("hereinafter referred to only as "the agreement"). The agreement was produced in evidence by the plaintiff as Plaintiff's Exhibit 2. The agreement provided among others that the purchase price for the suit property which was agreed at Ksh.1,100,000/= was to be paid in two installments of various amounts. The sum of Ksh.1,000,000/= was to be paid on the execution of the agreement. Of the said sum, Ksh.900,000/= was to be paid by way of a banker's cheque while the sum of Ksh.100,000/= was to be paid in cash. The balance of the purchase price in the sum of Ksh.100,000/= was to be paid within sixty(60) days of the date of the agreement.

The agreement provided further that the defendant was to execute the instrument of transfer of the suit property in favour of Brian Gitonga and Anthony Mwangi on whose behalf the plaintiff had purchased the property and was to deposit the same together with the title of the suit property with the firm of

Ndungu Githuka & Company Advocates which was acting for both parties in the transaction. The said law firm was to keep the said documents in trust pending the payment by the plaintiff of the balance of the purchase price as aforesaid after which he was to proceed with the registration of the transfer of the suit property in favour of the persons named above. The completion date of the agreement was to be on 30<sup>th</sup> June 2003. The agreement provided further that the Law Society Conditions of Sale were to apply to the agreement in so far as the same were not inconsistent with the provisions thereof.

When the suit came up for hearing on 8<sup>th</sup> December 2015, Mr. Kinyua advocate who held brief for Mr. Ndungu applied for adjournment of the case. He was granted an adjournment until 2.30 pm on the same day. When the court resumed in the afternoon, neither Mr. Ndungu nor Mr. Kinyua showed up. In the absence of any good reason to adjourn the matter, the court allowed the plaintiff to proceed with the case in the absence of the defendant and its advocate notwithstanding. In her evidence, the plaintiff told the court that upon execution of the agreement, she paid to the defendant a sum of Ksh.,1000,000/= in accordance with the terms of the said agreement. The plaintiff testified that the balance of the purchase price was paid to the defendant on 23<sup>rd</sup> January 2004. She stated that after the payment of the balance of the purchase price, the firm of advocates which was acting for both parties prepared the instrument of transfer of the suit property for execution by the defendant. The defendant executed the said instrument of transfer save that it failed to append its seal on the same as a consequence of which the transfer could not be registered.

The plaintiff stated that the defendant has since then refused and/or declined to transfer the suit property to her. She stated that the defendant's allegation that she had breached the terms of the agreement had no basis in that if that was the case, the defendant couldn't have received the payment of the balance of the purchase price from her. The plaintiff stated that she was never served with any notice of rescission of the agreement by the defendant. The plaintiff produced in addition to the agreement, copies of a certificate of official search showing that the defendant is the registered owner of the suit property, copies of bankers cheques totaling Ksh.1,000,000 which were made in favour of the defendant and the instrument of transfer of lease executed by the defendant but not sealed.

As I have stated at the beginning of this judgment, the defendant entered appearance and filed a statement of defence and counter-claim. The defendant however did not appear at the trial and as such did not tender any evidence in its defence and in proof of its counter claim. The effect of this is that the evidence that was tendered by the plaintiff was not controverted. The fact that the plaintiff had entered into an agreement for sale of the suit property with the defendant was not disputed. The terms of the said agreement were also not disputed. What was disputed by the defendant in its statement of defence was the plaintiff's claim that it is the defendant who had breached the terms of the said agreement for sale.

What I need to determine is whether it is the defendant or the plaintiff who breached the terms of the agreement and whether judgment should be entered for the plaintiff for the reliefs sought in the plaint or for the defendant for the reliefs sought in the counter-claim. The plaintiff adduced uncontroverted evidence that she fulfilled her part of the agreement that she entered into with the defendant by paying the purchase price for the suit property in full. Although the defendant claimed that the plaintiff breached the agreement for sale, it did not tender any evidence to show the court in what manner the said agreement was breached. The evidence before the court shows that all payments that were made by the plaintiff to the defendant on account of the purchase price of the suit property were received unconditionally even the last payment of the balance of the purchase price which no doubt was paid out of time. Again, the defendant did not adduce any evidence that following the alleged breach of the agreement by the plaintiff, it indeed rescinded the agreement. Under the agreement, time was not made of essence. The agreement as I have stated above was subject to the Law Society Conditions of Sale. Condition 4(7) of the Law Society Conditions of Sale provides as follows;

**“This sub-condition applies unless a Special Condition provides that time is of the essence in respect of the completion date:**

**(a) In this condition “completion notice” means a notice served in accordance with this sub-condition;**

**(b) If the sale shall not be completed on the completion date, either party (being then himself ready, able and willing to complete) may after that date serve on the other party notice to complete the transaction in accordance with this sub-condition. A party shall be deemed to be ready, able and willing to complete:**

**(i) If he could be so but for some default or omission of the other party;**

**(ii) notwithstanding that any mortgage on the property is unredeemed when the completion notice is served, if the aggregate of all sums necessary to redeem all such mortgages (to the extent that they relate to the property) does not exceed the sum payable on completion.**

**(c) Upon service of a completion notice it shall become a term of the contract that the transaction shall be completed within Twenty-One (21) days of service and, in respect of such period, time shall be of the essence of the contract.**

**(d) If the purchaser does not comply with a completion notice:**

**(i) the purchaser shall forthwith return all documents delivered to him by the vendor and at his own expense procure the cancellation of any entry relating to the contract in any register;**

**(ii) without prejudice to any other rights or remedies available to him, the vendor may forfeit and retain any deposit paid and/or resell the property by auction, tender or private treaty.**

**(e) If on any such re-sale contracted within Six (6) months after the completion date the vendor incurs a loss, the purchaser shall pay to the vendor liquidated damages. The amount payable shall be the aggregate of such loss, all costs and expenses reasonably incurred in any such re-sale and any attempted re-sale and interest at the contract rate on such part of the purchase money as is from time to time outstanding (giving credit for the amount of the forfeited deposit (if any) and for all sums received under any re-sale contract on account of the re-sale price) after the completion date;**

**(f) If the vendor does not comply with a completion notice, the purchaser, without prejudice to any other rights or remedies available to him, may give notice to the vendor forthwith to pay to the purchaser any sums paid by way of deposit or otherwise under the contract and interest on such sums at the contract rate from Four (4) working days after service of the notice until payment. On compliance with such notice, the purchaser shall not be entitled to specific performance of the contract but shall forthwith return all documents delivered to him by the vendor and, at the expense of the vendor, procure the cancellation, of any entry relating to the contract in any register;**

**(g) Where, after service of a completion notice, the time for completion shall have been extended by agreement or implication, either party may again invoke the provisions of this condition which shall then take effect with the substitution of “ten (10) days” for “twenty-one (21) days” in paragraph (c) of this sub-condition”**

It is clear from the foregoing that for the defendant to have lawfully rescinded the agreement on account of breach by the plaintiff for none payment of the balance of the purchase price, a completion notice had to be given. Although the defendant has claimed in its defence that she did serve the plaintiff with such notice, none was tendered in evidence in proof of that fact which was contested by the plaintiff. In the case of *Njamunyu vs. Nyaga*[1983] KLR 282 which concerned an agreement for sale of land in which time had not been made of essence, it was held that;

**“Before an agreement such as this can be rescinded the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given failure to rectify will result in the rescission of the contract”.**

In the case before me, the defendant had an obligation under the terms of the Law Society Conditions of Sale which were incorporated into the agreement to serve the plaintiff with 21 days notice to rectify the alleged default to pay the balance of the purchase price. In the absence of evidence that the plaintiff breached the agreement and that the contractual notice was given to her before the alleged rescission of the agreement, I am in agreement with the plaintiff's contention that the defendant's defence and counter-claim are ill founded.

It is therefore my finding that it is the defendant who breached the agreement by refusing without any lawful cause to transfer the suit property to the plaintiff after receiving the payment of the purchase price in full. It is my further finding that the defendant's counter-claim is not proved. Whether or not the plaintiff is entitled to the order of specific performance sought, I am alive to the fact that specific performance is a discretionary remedy. In the case before me, no evidence has been tendered to show that the defendant would have any difficulty in performing the agreement that it entered into with the plaintiff. There are therefore no factors that would militate against the granting of an order of specific performance. In the book, **CHITTY'S TREATISE ON THE LAW OF CONTRACT, 20<sup>th</sup> Edition, page 390** that was cited by the plaintiff, the authors stated that;

**“Land has a special value, the loss of which by the party entitled to it cannot be measured by money, so specific performance of a contract either to buy land or to hire it on lease will almost invariably be enforced”.**

In conclusion, I am satisfied that the plaintiff has made out a case for the grant of the relief sought. Consequently, I hereby enter judgment for the plaintiff against the defendant as prayed for in paragraph (i) of the plaint

dated 11<sup>th</sup> April 2005. The defendant's counter-claim is dismissed. The plaintiff shall have the costs of the suit and the counter-claim.

**Delivered and Dated at Nairobi this 4<sup>th</sup> Day of November, 2016**

**S. OKONG'O**

**JUDGE**

**In the presence of**

**Mr. Moindi h/b for Oyugi for Plaintiff**

**Mr. Mwangi h/b for Ndungu for Defendant**

**Kajuju Court Assistant**