



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
MILIMANI LAW COURTS
ELC NO. 356 OF 2011
FORMERLY CIVIL CASE NO. 186 OF 2011

ZIPPORAH WAMBUI NJENGA.....PLAINTIFF

VERSUS

ALICE WAKONYO KAHUHU.....1ST DEFENDANT

NELSON CHEGE KAHUHU.....2ND DEFENDANT

JUDGMENT

The Plaintiff instituted this suit against the Defendants vide a *Plaint* dated **20th May 2011**. The 1st and 2nd Defendants filed their separate Defences with Counter-claims dated **6th July 2011** and **12th September 2011** respectively. Together with the pleadings both parties filed bundles of supporting documents and complied with **Order 11** of the **Civil Procedure Rules**. The matter was set down for hearing on **13th February 2014**, when counsel for the Plaintiff sought an adjournment on grounds that he was indisposed. On **7th April 2014**, when the matter next came up for hearing, counsel sought an adjournment for reasons that the Plaintiff was indisposed and could not attend court. The court granted the last and final adjournment to **9th July 2014**. On the said date, counsel for the Plaintiff sought an adjournment on the basis that he had not been able to contact the Plaintiff. The court granted an adjournment to **1st October 2014**, when counsel for the Plaintiff failed to attend court. Upon an application by counsels for the Defendants, the Court dismissed the Plaintiff's suit for non-attendance and directed that the Defendants do proceed to prosecute their counter-claims.

In the Counter-Claim, the 1st Defendant averred that the Plaintiff fell into breach of the sale agreement entered into between the parties on 19th August 2010 by failing to pay the purchase price as agreed. Consequently, she rescinded the sale agreement and disposed off the property to the 2nd Defendant. It was her averment that she was entitled to withhold the sum of **Kshs.900,000/-** from the deposit paid as damages for the breach of contract. The 1st Defendant prayed that Judgment be entered against the Plaintiff for:

- a. *A declaration that the 1st Defendant is entitled to withhold the sum of Kshs. 900,000/- or such other sum as the Court may deem fit, as damages and costs for breach of contract.*

b. *Costs.*

The 2nd Defendant in his counter-claim prayed for Judgment to be entered against the Plaintiff for:

- a. *A declaration that the 2nd Defendant is validly registered as the proprietor of the properties known as known as **Kiambaa /Thimbigua/3137 and 2910.***
- b. *Costs of the suit; and*
- c. *Any other order that the court deems fit including damages.*

In evidence, DW1 testified that the completion date in accordance with the agreement was stated to be 90 days and that the deposit of **Kshs. 4 Million** was to be paid upon execution of the agreement on **19th August 2010** and the balance of **Kshs. 5 Million** was to be paid by **18th November 2010**. It was further agreed that she would surrender the completion documents and vacant possession to the Plaintiff upon payment of the balance of the purchase price. It was DW1's evidence that the Plaintiff failed to settle the balance of the purchase price despite repeated demands and she thus issued a notice to rescind dated **29th November 2010** to the Plaintiff's advocate. Failing to remedy the situation, DW1 testified that she rescinded the agreement and entered into another with the 2nd Defendant. DW1 testified that the Plaintiff paid a total of **Kshs. 4 Million** by **18th November 2010** contrary to the terms of the agreement and made no further payments. That she refunded the Plaintiff **Kshs. 3.1 Million** retaining the difference of **Kshs. 900,000/-** as damages for breach of the agreement.

The 2nd Defendant (DW2) testified that he entered into a sale agreement with DW1 and purchased the properties herein. It was his testimony that he sub-divided the properties, constructed 7 houses thereon and had already sold 6 houses. DW2 produced in evidence the sale agreement dated 13th January 2011 and the mutation forms. He prayed for damages having been restrained from further construction whereas he had purchased the property free from encumbrances.

Both Defendants filed written submission wherein they reiterated the contents of their evidence and urged the court to enter judgment as prayed in their counter-claims.

This Court has now considered the pleadings generally, the evidence on record and exhibits thereto and the written submissions and the Court makes the following findings;-The Plaintiffs suit stand dismissed with costs to the Defendants. The Court is now dealing with the Counter claims as filed by the Defendants herein.

There is no doubt that the 1st Defendant had entered into a sale agreement with the plaintiff herein on 19th August 2010. The agreement was for sale of the 1st Defendant parcels of land **Nos.Kiambaa/Thimbigua/3137 and Kiambaa/Thimbigua /2910** for a consideration of **Kshs.9000,000/=** . There is also no doubt that upon execution of the sale agreement, the plaintiff was to pay to the 1st Defendant **Kshs.4000,000/=** and the balance of the purchase price was to be paid within a period of 90 days after execution of the sale agreement ;- Further, it is evident that the completion date was 90 days of the date of the execution of the sale agreement that would therefore have been on **19th November, 2010**. From the available evidence and documents (letters exchanged between the advocates for the Plaintiff and 1st Defendants. It is evident that the Plaintiff did not pay the deposit of **4000,000/=** on **19th August 2010** as per the sale agreement . It is evident that Plaintiff made the first payment on **9th September, 2010** of **Kshs.3000,000/=** which was short of the agreed deposit of **Kshs.4000,000/=** and it was also made outside the time agreed on the sale agreement . The second payment of **Kshs1000,000/=** was made on **18th November 2010** on the supposed completion date. That payment was also short of the final balance of purchase price.

From the available documents, letter dated **29th November 2010**, by the 1st Defendants advocates

to the Plaintiff's advocates, it is evident that the 1st Defendant's advocate gave Notice of intention to rescind the sale agreement within a period of **7 days**, if the balance of the purchase price was not remitted. There is no evidence that such payment was ever made and therefore the sale agreement stood rescinded.

There is no doubt that after the 1st Defendants rescinded the sale agreement between herself and the Plaintiff, she entered into another sale agreement with the 2nd Defendant, on **13th January, 2011**. That was way after the completion date and also after the 1st Defendant had rescinded the sale agreement with the plaintiff. The plaintiff had by then paid only **Kshs.4000, 000/=** instead of **Kshs.9000, 000/=** full purchase price.

It is on the above background that the Plaintiff filed this suit against the Defendants herein. However, the Plaintiff's suit was dismissed for non-attendance. The defendants advanced their Counter Claims. The question for determination is whether the plaintiff breached the sale agreement between herself and the 1st Defendant and whether the Defendants are entitled to their counter claims.

The sale agreement between the Plaintiff herein and the 1st Defendant was very clear that the plaintiff was to pay a deposit of **Kshs.4000, 000/=** to the 1st Defendant upon execution of the sale agreement, that is on **19th August 2010**. It is evident that the Plaintiff did not make that deposit and several letters of reminder were sent to her through her advocates. The 1st such payment was made on **9th September, 2010** and 2nd payment on **18th November 2010**, which date was supposed to be the completion date. The plaintiff did not pay the balance of the purchase price. The plaintiff thereafter was therefore in breach of the sale agreement as she did not fulfil all the conditions of the sale agreement.

Furthermore, the 1st Defendant did give a **Notice** of intention to rescind the sale agreement on **29th November, 2010**. No evidence that the Plaintiff did anything to try and save the sale agreement. Therefore seven day after the **NOTICE** was issued by the 1st Defendant, the sale agreement stood rescinded or repudiated.

The parties to the sale agreement entered on **19th August 2010**, were bound by the terms of the said agreement. It is stipulated in clause **No.14:6** that **"time shall be of essence, in the said transaction"**. Furthermore the transaction was supposed to have been completed within a period of **90 days** from the date the said sale agreement was executed. It was not completed within that time due to the default by the Plaintiff herein.

Clause 8(a) of the said sale agreement stipulated what was to happen in the event the purchaser defaulted; it provided as follows;-

"if for any cause whatsoever other than none completion caused by the default of the vendor, the transaction shall not be completed on the completion date, then the purchaser shall forthwith pay to the vendor the balance of the purchase price with interest at the interest rate computed from the completion date until the date of payment of the purchase price in full, both days inclusive. The vendor shall have the option to have the sale agreement rescinded and payment of damages or to seek specific performance thereof with costs".

After the plaintiff defaulted, the 1st Defendant took the option of rescinding the sale agreement as per the terms of the said agreement. Since the agreement stood rescinded the 1st Defendant was also entitled to payment of damages. In that regard, the 1st Defendant has sought to keep to deposit of **Kshs.900, 000/=** as damages for breach of contract. The Court finds and holds that indeed the 1st Defendant is entitled to damages from the Plaintiff for breach of the sale agreement.

Consequently, the Court finds that the 1st Defendant prayer in the Counter claim is merited and the Court allows it entirely, as prayed in the **Plaint**. The 1st Defendant is also entitled to costs of the suit.

In regard to Counter claim by the 2nd Defendant, he has prayed for a declaration that he is validity registered as the proprietor of the suit properties herein and for any other relief that the Court may deem fit to grant.

It is evident that the 1st Defendant repudiated the sale agreement between herself and the Plaintiff **seven days** after the letter dated **29th November, 2010**. It is also evident that the 1st Defendant was justified in repudiating the sale agreement due to the breach by the Plaintiff herein. It is my finding that after the repudiation of the contract, the 1st Defendant was free to dispose of the suitland as she saw fit to do so. The 1st Defendant therefore sold the suit land to the 2nd Defendant on **13th January 2011**. I would therefore adopt the findings by **justice Ojwang (as here then was)** in the case of **Bernard Gathogo Kangoro Vs David M Muchemi & Another (2006) ekl that:-**

“the 1st Defendant properly passed to the 2nd Defendant the indicia of ownership of the suit land “.

Further in the case of **Wamwea Vs Catholic Diocese of Muranga, Registered Trustees (2003)KLR 389**, the Court held that:-

“the 2nd Defendant as entitled proprietor of the suit land has full rights of possession and occupation thereof and the law will protect him in enjoyment of his property”.

It is not in doubt that after the 2nd Defendant purchased the suit properties from the 1st Defendant herein, he substantially developed the said property by putting up residential houses for sale. The 2nd Defendant therefore rightly exercised his right of ownership by putting up major development. Therefore as held by **Ojwang J** in the **Bernard Gathogo Kangoro case (supra)**

“such legitimate interests also stand to be protected by virtue of the Court equitable jurisdiction”.

Having now carefully considered the available evidence, the Court finds that the 2nd Defendant herein is a bonafide purchaser of the suit properties for value and deserves all the protection under the law.

Consequently, the Court enters judgement for the 2nd Defendant against the Plaintiff as prayed in her Counter claim. 2nd Defendant is validly declared as the registered proprietor of the two parcels of land – **LR Nos. Kiambaa/ Thimbigua/3137 & Kiambaa/ Thimbigua/2910**. Further , the 2nd Defendant is entitled to general damages as the Plaintiff’s actions have caused great inconvenience to the 2nd Defendant given that at some time in the year **2011**, an injunction had been issued against him at the instance of the plaintiff herein. The court consequently, awards the 2nd Defendant general damages of **Kshs.500,000/=** to be paid by the Plaintiff herein. The 2nd Defendant is also entitled to costs of this suit.

In the nutshell, the Court enters judgement for the 1st and 2nd Defendants as follows:-

- i. *The 1st Defendant counter claim is allowed entirely with costs of the suit to be borne by the Plaintiff.*
- ii. *The 2nd Defendant counter claim is also allowed entirely and further awarded Kshs.500, 000/= as general damages to be paid by the Plaintiff .He is also entitled to costs of the suit to be borne by the Plaintiff herein.*

It is so ordered.

Dated, Signed and Delivered this **8th** day of **May, 2015**

28 days Right of Appeal

L.GACHERU

JUDGE

In the Presence of:-

None attendance for 1st, 2nd Defendants though notified.

Court:

Judgement read in open Court in the absence of the parties and their counsels, though notified on **24th April, 2015** when Judgement was reserved.

28 days Right of Appeal.

L GACHERU

JUDGE

8/5/2015