



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC CIVIL SUIT NO. 345 OF 2013(OS)**

**IN THE MATTER OF TITLE NOS. MAVOKO TOWN BLOCK 2/12462 AND 2/12463**

**PARADISE HOMES PROPERTIES LIMITED..... PLAINTIFF**

**-VERSUS-**

**STEVE WAMBUA MUSYIMI.....1<sup>ST</sup> DEFENDANT**

**MERCY MBULA NDAMBUKI.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

The Plaintiff filed an originating summons dated 25<sup>th</sup> October 2005 seeking a determination on the following questions:-

1. Whether the Plaintiff is entitled to rescind the agreement for sale entered into between the Plaintiff and the 1<sup>st</sup> Defendant on 14<sup>th</sup> October 2008 for failure on the part of the 1<sup>st</sup> Defendant to complete the transaction within the agreed time
2. Whether the Defendants can be ordered to sign transfer documents in respect of the two properties and obtain the necessary consents and clearance certificates for purposes of re-transferring the properties back to the Plaintiff
3. Whether in the event that the Defendants fail/ignore/neglect to sign the transfer forms, the Deputy Registrar of the High Court can be directed to sign the transfer forms and the application for consent of the Land Control Board and any other necessary instruments for purposes of effecting the transfer in the place of the defendants
4. Who should pay the costs of this application?

The grounds for the Plaintiff's suit are enumerated in an affidavit sworn by Meshack Mwaka Musyoki, a director of the Plaintiff on 19<sup>th</sup> February 2013. The Plaintiff's case is that in August 2008, the Plaintiff entered into negotiations for the purchase of all that parcel of land known as **Mavoko Town Block2/40, Katani Farm**, situate within **Mavoko municipality** with **David Musau Mumama** who was the then registered owner of the property after which an agreement dated 22<sup>nd</sup> August 2008 was executed.

The parties agreed that the originating summons do proceed and be determined on the basis of the affidavit evidence on record. The court gave directions to file written submissions.

The Plaintiff has averred that pursuant to the sale agreement, she subdivided the property into 50ft by 100ft plots which were offered for sale and the 1<sup>st</sup> Defendant expressed interests in plot NOs. 13 and 14.

The Plaintiff has exhibited a sale agreement dated 14<sup>th</sup> October 2008 entered into between it and the 1<sup>st</sup> Defendant and has averred that the consideration for the plots was at Kshs 150,000.00 each clause 2(a) and (b) of the said agreement provided that a deposit of Kshs 150,000/- would be paid to the Plaintiff by the 1<sup>st</sup> Defendant's advocate, and that the balance of Kshs 150,000/- was payable in five equal monthly instalments of Kshs 30,000/- each effective from 30<sup>th</sup> October 2008 and thereafter on the 30<sup>th</sup> day of each succeeding month till payment in full.

The Plaintiff states that the balance of the purchase price was payable to it upon providing the 1<sup>st</sup> Defendant with completion documents. The Plaintiff further states that upon the Plaintiff providing the 1<sup>st</sup> Defendant's advocate with completion documents, title documents whose copies have been annexed, were processed in the Defendants' names. The Plaintiff has contended that the 1<sup>st</sup> Defendant paid only a further Kshs 100,000/- leaving a balance of Kshs 50,000/- which he has refused to pay despite numerous requests by the Plaintiff.

The plaintiff has tendered a copy of a letter dated 9<sup>th</sup> August 2012, its lawyers **Mesers Alex Karanja & Company advocates** where the intention of the plaintiff to terminate/rescind the agreement. The Plaintiff contends that the 1<sup>st</sup> Defendant's failure to sign the transfer forms to revert the property back to the Plaintiff is unreasonable and illegal and that it is necessary for the court to direct the Defendant to execute the necessary documents to re-transfer the property to the Plaintiff failure to which the Deputy Registrar should be directed to sign all the necessary transfer documents to revert the property back to the Plaintiff.

In a supplementary affidavit sworn by Meshack Mwaka Musyoki on 14<sup>th</sup> August 2013, the Plaintiff has averred that the express provisions of a written contract cannot be varied or waived by a subsequent oral agreement between the parties. The Plaintiff has contended that a copy of the cheque allegedly issued by the Defendant in payment of the balance of the purchase price was not annexed and further that since the effective date for new generation cheques was September 2011, the cheque was withdrawn way after the completion date.

While contending that the issue of the 1<sup>st</sup> Defendant's father illness was not supported by any evidence, the Plaintiff has stated that it was extraneous to the Defendant's duty to perform his obligations under the contract. It was averred that titles having been issued on 22<sup>nd</sup> June 2010, the Defendants had no justification for waiting for two more years before taking any steps to settle the balance of the purchase price. According to the Plaintiff, any oral arrangement entered into between the Defendants and the former director is not supported by law and cannot operate to vary the written contract between the parties.

The plaintiff avers that since a director is under a fiduciary duty to act in the best interests of a company, the duty survives his resignation and therefore, the former director's affidavit in support of the Defendant's case is sworn in bad faith and should be expunged from the record. According to the Plaintiff, the Defendants failed to comply with their demand to sign over one parcel of land and that the company chose to invoke special condition F of the sale agreement which required a refund to the defaulting party of the sum paid less 20%.

While the plaintiff admits that the sale agreement allowed the Defendants to take up possession upon execution of the agreement, the Plaintiff avers that the Defendant has not taken up possession or carried out developments since no evidence to prove this allegation was furnished. Further, the Plaintiff contended that since special condition H of the agreement provided that time was of essence, there was no requirement for the issuance of a completion notice.

The Plaintiff averred that it would be an injustice to allow a party to evade the clear provisions of an agreement by claiming that they substantially performed and were now ready to complete performance and further, that the amount which was due then is not the same today taking into account inflation. It is the Plaintiff's contention that the current market rate for each of the plots is Kshs 800,000/- and that if allowed to keep the suit properties, the Defendants would be seeking to benefit from the appreciation at

the expense of the Plaintiff.

The Defendants entered appearance on 26<sup>th</sup> March 2013 and resisted the Plaintiff's suit through a replying affidavit sworn by the 1<sup>st</sup> Defendant on 19<sup>th</sup> April 2013. The Defendants admitted the Plaintiff's claim that a sale agreement for the purchase of Mavoko Town Block 2/40 was entered into by the parties and that a balance of Kshs 50,000/- on the purchase price was outstanding. The Defendants have however contended that they were dealing with a different director by the name of Paul Kanga Silas and further, that a cheque for Kshs 50,000/- issued by the 1<sup>st</sup> Defendant could not be accepted since the banks had migrated to the use of new generation cheques and the defendant's cheque was caught up during the transition period.

It is the Defendants' averment that they had agreed with the former director that the transfer of the plots in their favour would be effected and that the balance of the purchase price would have been exchanged with title documents in their name. The Defendants have stated that prior to securing the new generation cheques, the 1<sup>st</sup> Defendant lost his father in May 2010 after hospitalisation at Nairobi Hospital where a bill of Kshs 4,500,000/- was incurred. According to the Defendants, these circumstances were made known to the then director who agreed to indulge them so that they could sort out the issue. The former director Paul Kanga Sila has sworn an affidavit dated 17<sup>th</sup> April 2013 to verify these facts which the Defendants have tendered in evidence.

The Defendants have averred that prior to completion, Paul Kanga Sila resigned from the company and that Meshack Mwaka Musyoki who was the director demanded that the Defendants pay the current market price of the two plots at Kshs 600,000/- per plot. According to Defendants, meetings held with Meshack Mwaka Musyoki in a bid to resolve the issue have not yielded much as the director has refused to receive the balance of Kshs 50,000/- and instead, has demanded the current market price of the plot at Kshs 600,000/- or that the Defendants revert one plot back to the plaintiff in exchange for one title deed.

The Defendants claim that they took possession of the plots upon execution of the agreement and have carried out developments at an approximate costs of Kshs 120,000/-, the Defendants have contended that they shall suffer loss, damage and emotional agony if they lose the properties as they intend to put up a home on the suit parcels.

It is contended by the Defendants that since a completion notice was not issued in accordance with the Law Society Conditions of Sale which are applicable to the agreement the Plaintiff's act of rescinding the agreement is premature. The Defendants have averred that they are ready to complete the transaction by paying the outstanding balance and have urged the court to dismiss the originating summons with costs and direct that the balance of Kshs 50,000/- be paid and the title deeds to the suit properties being held by the Plaintiff be released to the Defendants unconditionally.

The Originating Summons was canvassed by way of written submissions and the parties filed submissions as directed by the court. The Plaintiff filed its submissions on 5<sup>th</sup> November 2013 where it reiterated the facts of the case as set out in the supporting and supplementary affidavits. The Plaintiff made reference to the treatise **Cheshire & Fifoot Law of Contract 9<sup>th</sup> Ed, page 577** for the submission that breach of a contract makes it voidable at the instance of the innocent party whose decision to discharge once made known to the defaulting party is final and cannot be retracted.

The Plaintiff relied on the case of **David George Bell & anor -vs- Ashotosh Bhasin(2009)eKLR, Francis Wahiu Theuri -vs- Wawage Investment Company & 2 others(2012)eKLR, Wambugu -vs- Njuguna(1983)KLR 172** and **Fatuma Abdalla Ahmed -vs- Kahiro Kimani (2013)eKLR** where contracts were repudiated for failure to pay the balance of the purchase price.

It was submitted for the Plaintiff that according to special condition H of the agreement, time was of essence. Counsel for the Plaintiff argued that the Plaintiff obtained title for the larger parcel which was Mavoko Block 2/40 in June 2010 but that the Defendants were unable to complete the transaction and continued in default until August 2012 when the Plaintiff opted to rescind the agreement.

It is the Plaintiff's submission that indulgences for extension of time were bare allegations not supported by evidence and further, that the Defendant's failure to complete within 2 years is unreasonable and cannot be excused to the Plaintiff's detriment. Counsel argued that the Defendant's failure to complete as agreed or within reasonable time amounts to failure to perform and entitled the Plaintiff to rescind the agreement.

In further submission, the Plaintiff averred that since the agreement expressly provided that time was of essence, the Law Society Conditions of sale which provides for issuance of a completion notice is not applicable to the agreement and therefore, that no completion notice was necessary. Counsel argued that by virtue of special condition F of the agreement, the Plaintiff was entitled to rescind the contract since the Defendant was in default, subject to a refund of the sum paid less 20%.

The Plaintiff submitted that since time was of essence, the failure to perform justified the rescission. Lastly, the Plaintiff submitted that the agreement leading to the transfer of the suit properties having been rescinded, any entries made pursuant thereto in the register become null and void and therefore, that it was necessary that the Defendants were ordered to re-transfer the suit properties in order to put the parties to their pre-contractual position.

The Defendants filed submissions dated 28<sup>th</sup> November 2013 where they enumerated the facts of the case and argued that the Plaintiff was equally in breach of the contract for failing to subdivide and transfer the property in their favour within the completion period as provided by special condition B and I of the agreement. Counsel for the Defendants submitted that both parties to the sale agreement had been in breach by failing to complete the sale within the completion period. It was submitted that both parties had offered excusable grounds beyond their control and the court was urged to find that the delay had been sufficiently explained and excusable.

While contending that a reasonable explanation for the delay in completion had been offered in the replying affidavit, Counsel for the Defendants also submitted that the contract had been performed since title to the suit properties had passed to them. It is submitted for the Defendants that the agreement cannot be rescinded as it was overtaken by events upon successful transfer of the properties. It is the Defendants' submission that pursuant to sections 25 and 26 of the Land Registration Act they have proprietary rights to the suit properties and accordingly, that their title cannot be defeated unless on the ground of fraud or misrepresentation to which they are a party or where the certificate has been acquired illegally, unprocedurally or through a corrupt scheme.

In further submission, the Defendants relied on section 80 of the Land Registration Act and submitted that cancellation or amendment of the register was only on the grounds of fraud or mistake. It is the Defendants' submission that the Plaintiff solely effected the transfer unaided by the Defendant and further, the Plaintiff had not pleaded or demonstrated any fraud, mistake or corrupt scheme to warrant the court to order rectification of the land register or interfere with the Defendants' registration. For this submission, the court was referred to the case of **Ahmed Ibrahim Suleiman & anor -vs- Noor Khamsi Suru ELC No. 501 of 2013** where the court held that the Plaintiffs title could only be challenged on the limited grounds set out in section 26(1)(a) and (b) of the Land Registration Act.

While submitting that the Plaintiff's contention that they were holding title as licensees cannot hold, the Defendants argued that the Plaintiff had voluntarily passed title and proprietary interest to them. Counsel for the Defendants submitted that the Plaintiff was estopped from demanding consideration of Kshs 600,000/- which was outside the agreement. Lastly, it was submitted that the Defendants had been willing to complete the sale and that in the interest of justice and fairness, they be directed to pay the balance of Kshs 50,000/- to the plaintiff who should be directed to release the original titles to the suit properties to the Defendants.

## **Issues and Determination**

### **Whether the Plaintiff is entitled to rescind the sale agreement**

I have perused and considered the pleadings and the evidence adduced through the filed affidavits and the parties submissions and the issues that stand to be determined are firstly, whether the plaintiff is entitled to rescind the sale agreement entered into with the 1<sup>st</sup> Defendant on 14<sup>th</sup> October 2008 and secondly, whether the plaintiff is entitled to the orders sought.

The Plaintiff has alleged that the Defendant breached the sale agreement dated 14<sup>th</sup> October 2008 by failure to pay the full purchase price of Kshs 300,000/-. The Plaintiff has averred that under clause 2 (a) and (b) of the sale agreement, the Defendant was supposed to pay a deposit of Kshs 150,000/- and that the balance of the purchase price being Kshs 150,000/- was to be paid in 5 equal monthly instalments of Kshs 30,000/- effective from the 30<sup>th</sup> day of October 2008 and on every 30<sup>th</sup> day of each succeeding month until payment in full.

Special Condition A of the agreement provided that completion was to take place within 150 days or any other date as the parties may by consent agree. According to Special Condition B of the sale agreement, the balance of the purchase price of Kshs 150,000/- would be paid to the vendor upon the vendor obtaining and availing to the purchaser (if any) the completion documents being consent of the Land Control Board, duly undated transfer forms, copy of certificate of incorporation, copy of pin certificate and three copies of passport size photos of directors executing transfer.

While admitting that Kshs 50,000/- on the balance of the purchase price remains outstanding, the 1<sup>st</sup> Defendant contended that the Plaintiff was also in breach for having failed to subdivide and transfer the property in his favour within the completion period as provided by special condition B and I of the sale agreement. This allegation was not controverted by the Plaintiff. It therefore follows that notwithstanding the lapse of 150 days within which completion was to take place under clause A, the Defendant reserved the right to pay the balance of the purchase price once completion documents specified under clause B were availed to him.

The Defendants have argued that the Plaintiff's suit is premature since no completion notice has been served upon them to date. Clause 3 of the sale agreement provided that the sale was subject to the Law Society Conditions of Sale (1989) insofar as they were not inconsistent with the sale agreement.

The Plaintiff has contended that there was no requirement for issuance of a completion notice since Special Condition H of the agreement provided that time was of essence. In my view, this argument cannot hold since the Plaintiff appears to have waived completion within 150 days of execution of the sale agreement when it failed to subdivide and transfer the property to the Defendant within the completion period and further, when the Plaintiff transferred the suit property to the Defendant despite non payment of the balance on the purchase price. Under the agreement for sale the 150 days provided for completion from the date of execution of the agreement would have lapsed on or about 14<sup>th</sup> March 2009.

Since completion did not take place as intended by the parties, the Plaintiff who avers that it was subjected to unreasonable delay ought to have issued a completion notice. This was the finding of the court of appeal in the case of Njamunyu -vs- Nyaga (1983)KLR 282 where the court stated:-

**"The principle to be acted upon in such a case is stated in Halsbury's Laws (4th edn) p 338, para 482, ie: "Apart from express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this would fulfill the intention of the parties." Completion not having taken place upon consent as intended by the parties the issue between them then was when thereafter. In a case of this type a party who has been subjected to unreasonable delay may give notice to the party in default making time of the essence. The return of the money by the defendant was notice to the plaintiff that the defendant had made time of the essence and rescinded the agreement. Ordinarily before an agreement of this nature is rescinded the party in default should be notified of the default and given reasonable time within which to rectify**

A similar finding was arrived at in the case of **Sagoo -vs-Dourado (1983)KLR 365** where the court cited with approval Halsbury's Laws of England, 4<sup>th</sup> Edition, paragraph 481 as follows;

**“The modern law in the case of contracts of all types, may be summarized as follows. Time will not be considered to be of essence unless:**

- 1. The parties expressly stipulate that conditions as to time must be strictly complied with;**
- 2. The nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or;**
- 3. A party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence”.**

Thus in the circumstances of this case, the plaintiff cannot rely on special condition 'H' of the agreement for sale to assert that time was of the essence as it is quite clear that the parties by their conduct waived this condition and it became imperative for either party to the agreement to henceforth serve a completion notice under the provisions of the Law society conditions of sale to reinstate the provision of the agreement for sale making time of the essence.

### **Whether the Plaintiff is entitled to the remedies sought.**

The Plaintiff has sought a determination on whether the Defendants should be ordered to sign transfer documents to re-transfer the suit properties back to the Plaintiff and in default, whether the Deputy Registrar of the High Court can be directed to sign the transfer forms instead.

The Plaintiff voluntarily agreed to transfer title to the Defendant before payment of the full purchase price. The Registered Land Act (repealed) under which titles to the suit properties were issued provides circumstances which a title may be cancelled or rectified by the court. Under section 143, the court may order rectification of the register by directing that any registration be cancelled or amended where it is satisfied that any registration (other than a first registration) has been obtained, made or omitted by fraud or mistake. No allegations of fraud or mistake on the part of the Defendants have been pleaded or proved. In the case of **Kilifi Resorts Limited -vs- Northern Lights Limited(2013)eKLR**, the court held that non payment of the purchase price on the due date is not one of the circumstances that the law allows for the cancellation of a title.

Since rectification of title is not available for the Plaintiff, its only recourse is to pursue the Defendants for the balance of the purchase with interest from the date when the said balance fell due. In the case of **Kilifi Resorts Limited -vs- Northern Lights Limited(2013)eKLR**, the court held that condition 8(4) of the Law Society of Conditions of Sale contemplates a situation where parties complete a transaction pursuant to a sale agreement but where the purchase price is not paid in full.

Condition 8 (4) of the Law Society conditions of Sale provides as follows:

**“If any payment provided for in the special conditions is not paid on the date agreed, on completion the purchaser shall pay to the vendor interest on such payment from the date agreed until actual payment.”**

In **Kilifi Resorts Limited -vs- Northern Lights Limited(2013)eKLR**, the court found sub-condition 8 (4) of the Law Society Conditions of Sale to have been in conformity with the equitable doctrine of Specific Performance which compels parties to perform exactly what they had agreed to perform thereby achieving more complete and perfect justice. In the circumstances of the present case I find and hold that there can be no basis to require the Defendants to retransfer the suit properties to the plaintiff. The transfers of the suit properties were effected to the Defendants pursuant to the agreement for sale. The Defendants are obligated to pay the balance of the purchase price and as in the instant suit the Defendants ought to have paid the balance as at the date of completion it is my holding that the Defendants ought to pay the balance of the purchase price of Kshs.50,000/- together with interest as from 22nd June 2010 when they were registered as the owners of the suit properties.

In the premises while I find and hold that the plaintiff is not entitled to an order for a retransfer of the suit properties and notwithstanding that there is no prayer for the payment of the balance of the purchase price I in exercise of the inherent powers of the court and being guided by the overriding objective the Civil Procedure Act Cap 21 Laws of Kenya Section 1A and the duty of the court to render substantive justice as provided under section 1B of the Civil Procedure Act enter judgment in favour of the plaintiff as against the defendants in the following terms:-

- i. That the Defendants pay to the plaintiff the balance of Kshs.50,000/- forthwith,
- ii. That the Defendants pay interest at the rate of 14% p.a to the plaintiffs on (i) above from 22/6/2010 until payment is made in full.
- iii. That the Defendants do pay the plaintiffs the costs of the suit.

Judgment dated, signed and delivered at Nairobi this....**28th** .....day of...**October**.....2014.

**J. M. MUTUNGI**

**JUDGE**

**In presence of:**

..... For the Plaintiff

..... For the Defendant