



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI
ELC SUIT NO. 110 OF 2012 (O.S)
IN THE MATTER OF SECTION 8(1) OF THE LAND CONTROL ACT
AND
IN THE MATTER OF L. R. NO. LIMURU/BIBIRIONI/T.993
BETWEEN
ESTHER NJERI KAMIRI.....PLAINTIFF
VERSUS
GEOFFREY KARU MBUGUA.....DEFENDANT
JUDGMENT

The Plaintiff's case

The Plaintiff through an originating summons dated 3rd March 2012, sued the Defendant seeking the following orders:-

That the court be pleased to extend time within which the parties may apply to and attend Limuru Land Control Board for the requisite consent to facilitate transfer of L.R. No. Limuru/Bibirioni/T. 993 (herein after referred to as the suit property) to the Plaintiff.

That the court does authorize its Deputy Registrar to sign the application forms to the Land Control Board and transfer and all other relevant documents to facilitate the transfer of the suit property to her as well as costs of the suit.

That costs of this application be borne by the Defendant.

The originating summons was supported by an affidavit sworn by the Plaintiff on 3rd March 2012. The Plaintiff has stated that the Defendant is the registered proprietor of the suit property, and has annexed as evidence a copy of a title deed dated 26th January 2010 issued in the Defendant's name as well as a certificate of official search dated 5th July 2011. The Plaintiff's case is that she entered into a sale agreement with the Defendant for the sale of the suit property on 21st October 2009 at a consideration of Kshs 260,000/-. The Plaintiff has exhibited a copy of the sale agreement evidencing payment of Kshs 100,000/= as deposit as at the date of execution, and has also availed an acknowledgment of receipt of payment for Kshs 10,000/- dated 22nd December 2009, and a copy of cheque number 047014 for Kshs 150,000/- evidencing payment of the consideration.

The Plaintiff has alleged that unknown to her, the Defendant entered into another sale agreement on 3rd November 2009 with John Ngigi Kirobi for the sale of the suit property and a copy of the sale agreement has been annexed as evidence. According to the Plaintiff, her request to have the Defendant apply to the Limuru Land Control Board for the consent to transfer the suit property have been declined.

While stating that she has placed a caveat on the suit property in order to protect her interest in the suit property, the Plaintiff has contended that unless the time within which to apply and attend Limuru Land Control Board is extended, her sale agreement with the Defendant is not enforceable. Lastly, the Plaintiff averred that the Defendant was being fraudulent/dishonest by refusing to make the necessary application to the Land Control Board yet he had received the full purchase price.

Through a further replying affidavit sworn on 25th July 2014, the Plaintiff averred that the cheque for Kshs 150,000/- was drawn in the name of the Defendant on 2nd March 2012 and forwarded to the Defendant thereafter. It is the Plaintiff's contention that the Defendant's bank statement annexed to the replying affidavit covers the period from 24th April 2009 up to 9th February 2012 and does not cover the month of March 2012 when the cheque was forwarded to the Defendant. While averring that she is a resident of the United States of America, the Plaintiff has stated that cheque no. 047014 for Kshs 150,000/- was purchased on her behalf by her mother, Margaret W. Karanja.

The Plaintiff has annexed as evidence a copy of her mother's bank statement dated 22nd July 2014 showing that the sum of Kshs 150,000/- was credited in her account on 2nd March 2012 and contends that she had paid the full purchase price as agreed in the sale agreement dated 21st October 2009. Lastly, the Plaintiff averred that the court has powers to extend time within which parties can attend the relevant Land Control Board and to enforce specific performance where it is evident that one party is being dishonest and had received the full purchase price for the property sold.

The Plaintiff filed submissions dated 11th June 2013 wherein she reiterated the facts of her case as pleaded. Counsel submitted that the Plaintiff who had entered into a sale agreement with the Defendant at a purchase price of Kshs 260,000/- had paid the amount in full and had therefore performed her obligation under the agreement. It was also submitted that the Defendant had not performed his part of the agreement and intended to defraud the Plaintiff by disposing off the suit property to a third party.

It was further submitted for the Plaintiff that the court was empowered under section 8(1) of the Land Control Act to enforce specific performance of the agreement by extending time within which the parties can attend the relevant Land Control Board and obtain the requisite consent.

The Defendants' Case

The Defendant entered appearance on 19th June 2012 and opposed the suit through his replying affidavit sworn on 18th October 2013. The Defendant admitted to having entered into a sale agreement with the Plaintiff and acknowledged having received Kshs 100,000/- from the Plaintiff at the time of execution of the sale agreement. It is contended by the Defendant that in respect to clause 2 of the agreement, the parties agreed that the Plaintiff would inform him when she was ready with the balance of the purchase price in the sum of Kshs 160,000/- to enable him facilitate the application for consent to transfer from Limuru Land Control Board and also issue a notice to the tenant on the suit property to vacate.

It is the Defendant's case that the Plaintiff did not inform him that she was ready with the balance of the purchase price until 6 months expired from the date of the agreement and the transaction became void and unenforceable. While denying that he had received the balance of the purchase price, the Defendant contended that since the transaction had become void within the provisions of the Land Control Act, he was ready and willing to refund the Plaintiff the deposit of Kshs 100,000/. Lastly, the Defendant averred that there was no provision in law enabling the court to extend the period for acquisition of consent to transfer by the Land Control Board as sought by the Plaintiff since the transaction has become void and cannot be revived.

The Defendant' counsel filed submissions dated 14th July 2014 where facts of the case were reiterated and Counsel contended that the bankers cheque produced in court by the Plaintiff as evidence of payment of the balance of the purchase price was a forgery for which the Defendant had lodged a criminal complaint against the Plaintiff at the CID headquarters, Nairobi.

Counsel submitted that according to the agreement, the Defendant was to handover the original title to the suit property and a duly executed transfer form to the Plaintiff after payment of the balance of the purchase price in full. It was submitted that in further breach of the agreement, the Plaintiff while in collusion with clerks at the Kiambu Lands Registry, unlawfully collected the original title to the property. It is the Defendant's submission that he only has one bank account with Equity Bank Ltd, Ngong' branch and further, that he had demonstrated that no transaction in relation to the Plaintiff's cheque was processed in his favour.

While submitting that the transaction became void due to the Plaintiff's breach of the contract, Counsel argued that the Defendant repudiated the contract and therefore, that the court cannot enforce a contract which has already been repudiated. Lastly, the Defendant submitted that he has been ready and willing to refund the deposit of the purchase price already paid.

The Issues and Determination

Arising from the evidence and submissions made in the foregoing, this Court finds that there is no dispute that the Plaintiff and Defendant entered into a sale agreement for the purchase of the suit property. Further, it is also not disputed that the Plaintiff made some payments towards the purchase of the suit property. What is disputed is whether the Plaintiff had completed payment of the said purchase price. There are thus three issues that require determination as follows:

Whether the Defendant is entitled to repudiate the sale agreement

Whether the the court should extend time to enable the Plaintiff obtain the requisite consent of the Land Control Board.

Whether the Plaintiff is entitled to the relief sought.

(a) Whether the Defendant was entitled to repudiate the contract

The Defendant averred that the balance of the purchase price has not been paid to date. The Plaintiff tendered evidence to show that on 2nd March 2012, a bankers cheque of Kshs 150,000/- was drawn in favour of the Defendant. The Plaintiff also annexed evidence of a copy of bank statement for her mother's account which shows that the cheque was drawn and an amount of Kshs 150,000/- was debited from the said account.

Save for stating that the he never received the balance of the purchase price and that the cheque issued by the Plaintiff was a forgery for which he had lodged a complaint with the Nairobi Criminal Investigations Department, the Defendant did not controvert these allegations. Besides, the contention that the cheque was a forgery was only raised in submissions and the Defendant did not bring any evidence of the report made to the Criminal Investigations Department as alleged, or of the outcome thereof. The Defendant in addition did not deny having received Kshs 10,000/- on 22nd December 2009 as shown by the Plaintiff through annexure ENK 3(a) to her Originating Summons, and admitted receiving the deposit of Kshs 100,000/=.

Clause 2 of the sale agreement dated 21st October 2009 entered into by the Plaintiff and Defendant states that "**...the balance of Kshs 160,000/- was to be paid on consent to transfer...**" In my view, this clause suggests that the Plaintiff was to pay the balance of the purchase price after consent to transfer was issued. The Defendant's averment that the Plaintiff was to inform him when she was ready with the balance of the purchase price to enable him facilitate the application for consent to transfer from Limuru

Land Control Board amounts to parole evidence which cannot be admitted to add to, vary or contradict a written instrument. In the case of Muthuuri vs National Industrial Credit Bank Ltd (2003) KLR 145 , it was held that no extrinsic evidence is admissible to contradict, vary, add to or subtract from the terms of the document.

The Defendant was thus not entitled to repudiate the contract alleging non performance by the Plaintiff. In addition the agreement for sale dated 21st October 2009 did not stipulate that time was of the essence and further, no notice was issued fixing a reasonable time for performance. In the case of Wambugu vs Njuguna (1983) KLR 172, the Court of Appeal held:-

“When an agreement does not state that time is of the essence (as was the case her) and neither does the vendor give notice for making time of essence, such a vendor having failed to take the necessary steps to make time of the essence could not repudiate the contract on the grounds of unreasonable delay by the purchaser to perform. In such a case the making of time of the essence had been waived, and time can only be made of the essence by fixing a reasonable time for performance.

The vendor is entitled to repudiate the contract of sale of the suit land for failure of performance. The purchaser had failed to pay the balance of the purchase price and could not demand performance by the appellant. In this case there was originally a contract of sale of the suit land and the contract was lawfully repudiated by the appellant for non-payment of the balance, and no specific performance thereof in favour of the respondent can be ordered. ”

A similar finding was arrived at in the case of Sagoo -vs-Dourado (1983) KLR 365 and Njamunyu -vs-Nyaga (1983) KLR 282 where the court held time will not be considered to be of essence unless by express agreement of the parties or notice making time of the essence. It is therefore the finding of the Court that the Defendant had no legal basis to repudiate the contract between him and the Plaintiff.

(b) Whether the court should extend time to enable the Plaintiff obtain the requisite consent of the Land Control Board.

The Plaintiff has relied on section 8(1) of the Land Control Act to argue that the court has powers to extend time within which a Land Control Board Consent can be obtained. Section 8(1) of the Act provides as follows:

"An application for consent in respect of a controlled transaction shall be made in a prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereof:

Provided that the High Court may notwithstanding that the period of six months may have expired, extend that period where it considers that there is sufficient reason so to do, upon such conditions, if any, as it may think fit”.

The Plaintiff has adduced evidence to demonstrate that she paid the full purchase price as per the subject sale agreement dated 21st October 2009. According to special condition 2 of the said sale agreement, the Defendant had the obligation to facilitate the issuance of the Land Control Board consent in favour of the Plaintiff and is therefore to blame for failure to obtain the consent. In my view, sufficient reasons as contemplated by the proviso to Section 8(1) of Land Control Act have been adduced to warrant the court to exercise its discretion in favour of the Plaintiff. The court in the cases of Re Enkasiti Flower Growers Limited (2006) eKLR, Stephen Mungai v Wilson Ndungu Ngugi (2008) eKLR and Francis John Kiarie Karungo v Morrison Waweru (2002) eKLR allowed applications seeking to extend time within which Land Control Board Consent could be sought after finding that sufficient reasons had been provided.

The Plaintiff has also brought evidence to show that the suit property is still registered in the Defendant's name, and that she has placed a caution preventing any further dealings with the same. It is therefore still

possible in the circumstances for the sale agreement between the Plaintiff and Defendant to be completed, and by granting the orders for extension of time to make an application for the Land Control Board consent, this Court will not be acting in vain.

(c) Whether the Plaintiff is entitled to the relief sought.

The effect of the findings in the foregoing is that the Plaintiff has proved her case on a balance of probabilities and that she is therefore entitled to the relief sought. However, this finding notwithstanding, this Court notes that it has no control over the nature of the decision of the Limuru Land Court Board, and therefore the orders sought by the Plaintiff as to the transfer of the suit property will have to await the decision of the said Land Control Board. Lastly, as the Plaintiff has been largely successful in her suit, and since the proceedings herein arose from the Defendant's failure to complete their sale agreement, the Court finds that the Plaintiff is entitled to the costs of the suit.

This Court accordingly orders as follows:

That the time within which the Plaintiff and Defendant may apply to and attend the Limuru Land Control Board for the requisite consent to facilitate transfer of L.R. No. Limuru/Bibirioni/T. 993 be and is hereby extended for one more year from the date of this judgment.

That the Deputy Registrar of the Nairobi Environment and Land Court to sign the application forms to the Land Control Board for the transfer of L.R. No. Limuru/Bibirioni/T. 993 on behalf of the Defendant.

The Plaintiff shall meet the costs of the application for consent of the Limuru Land Control Board for the transfer of L.R. No. Limuru/Bibirioni/T. 993.

The Plaintiff shall be at liberty to apply for the necessary consequential orders upon the application for consent to the Limuru Land Control Board.

The costs of this suit shall be borne by the Defendant.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this 17th day of November , 2014.

P. NYAMWEYA

JUDGE