



**REPUBLIC OF KENYA**

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

**ELC SUIT NO. 272 OF 2009**

**BEATRICE MUTHIO NZIOKA.....PLAINTIFF**

**VERSUS**

**CHARLES AKELO ONG'WEN.....DEFENDANT**

**JUDGMENT**

**The Plaintiff's Case**

The Plaintiff's case is outlined in her Complaint dated 11/6/2009 and in her Reply to Defence and Defence to Counterclaim dated 20/7/2009. The Plaintiff prays for judgment to be entered against the Defendant for:

- a. A declaration that the Defendant's purported rescission of Agreement for Sale dated 23/1/2008 was fatally un-procedural, irregular, unjustified, baseless, and in breach of contract, illegal, unlawful, invalid and null and void ab initio.
- b. A declaration that the Defendant's refusal to receive/accept payment of Kshs. 1,566,654/- and/or vacate the suit property comprised in Title No. Nairobi/Block 140/40/70 is in breach of the Agreement for Sale dated 23/1/2008 and in flagrant disregard of the Plaintiff's legitimate and indefeasible Title to the suit property.
- c. An order that the Plaintiff do forthwith deposit in court or otherwise as the court may order a cheque and/or cash payment for Kshs. 1,566,654/- being the net balance of the purchase price due to the Defendant, for the Defendant's collection at the Defendant's costs, if any.
- d. An order that the Defendant do in the first instance forthwith deliver up vacant possession of the suit property comprised in Title No. Nairobi/Block 140/40/70 to the Plaintiff in good and tenantable condition and repair, with liberty for the Plaintiff with the assistance from the Kenya Police to evict the Defendant from the suit property by himself and/or his servants, agents, family, tenants and/or employees.
- e. An order that the Defendant do pay to the Plaintiff by way of reimbursement for an alternative accommodation a monthly rent sum of Kshs. 22,000/- effective from 1/6/2009 and thereafter on the 1<sup>st</sup> day of every succeeding month until delivery of vacant possession of the suit property to the Plaintiff.
- f. Costs of the suit
- g. Interests on (e) and (f) above.

The Plaintiff avers that the Defendant entered into a Tenant Purchase agreement with National Social Security Fund (hereinafter referred to as "NSSF") dated 30/3/2000 for the purchase of Title No. Nairobi/Block 140/40/70 Unit 70 at Nyayo Estate, Embakasi (hereinafter referred to as "the suit property"). Further, that the consideration of Kshs. 2,250,000/-, and the Defendant was to pay it to NSSF by agreed instalments over a period of time. Subsequently, that the Plaintiff entered into an agreement with the Defendant on 23/1/2008 (hereinafter referred to as "the sale agreement") for the purchase of the suit property at an agreed price of Kshs. 3,525,000/-, out of which she paid a deposit of Kshs. 777,000/- upon executing the agreement. The Plaintiff outlines the following as the salient terms of the said sale agreement:

- The completion date was stated as 90 days from 23/1/2008 and the sale was to be governed by the Law Society Conditions of Sale.
- The balance of the purchase price of Kshs. 2,748,000/- would be paid by the Plaintiff by way of a loan borrowed from Barclays Bank of Kenya, which was approved on 1/2/2008.
- The Kshs. 2,748,000/- loan would be disbursed by Barclays Bank of Kenya after the registration of its charge over the suit property upon its transfer to the Plaintiff, and the proceeds thereof paid to the Defendant after deducting the outstanding debt owed to NSSF.
- After the execution of the suit agreement, the Defendant would execute and/or avail all necessary conveyance documents to facilitate the registration of the said transfer and charge in favour of Barclays Bank to facilitate the disbursement of the loan proceeds to the Defendant.
- The completion date would be mutually extended to enable the charge to Barclays Bank to be registered over the suit property and to facilitate the payment to the Defendant of the proceeds of the loan covering the balance of the purchase price.

The Plaintiff avers that both her Advocates and the Advocates for Barclays Bank of Kenya issued to NSSF and its advocates as well as to the Defendant various undertakings, to guarantee payment of the balance of the purchase price upon successful registration of the transfer and charge. The Plaintiff stated that following the said undertakings, the Defendant on 24/4/2008 executed with NSSF an Addendum to the Tenant Purchase Agreement which authorized NSSF to effect the transfer of the suit property to her, and facilitated the registration of the charge in favour of Barclays Bank as security for the loan.

It is the Plaintiff's averment that after signing the addendum and variation of the tenant purchase agreement, the Defendant unlawfully breached the terms of the agreement by refusing to co-operate with her Advocates so as to complete registration, and attempted to sabotage the conveyance by purporting to invalidly rescind the agreement thereby causing the delay in the finalization of the sale transaction. Further, that the Defendant unreasonably refused to receive the balance of the purchase price while at the same time holding on to the deposit thereof. The Plaintiff also claimed that the Defendant has neglected to vacate the suit property and surrender the keys thereof to enable her lawfully take occupation, and continues to illegally occupy, trespass or convert the suit property.

The Plaintiff further averred that despite the delay occasioned by the Defendant, she obtained the necessary completion documents from NSSF and presented the transfer of the suit property and the charge for registration on 11/12/2008 and received the duly registered documents on 6/3/2009. Subsequently, Barclays Bank of Kenya disbursed the proceeds of the loan to her Advocates who forwarded Kshs. 1,181,346/= to NSSF on 28/4/2009 being the debt owed by the Defendant, and still holds the amount of Kshs. 1,566,654/=, being the net balance. The Plaintiff contends that as a result of the Defendant's actions, she cannot occupy the suit property and had been forced to rent an alternative residence at Nyayo Embakasi (Court 41 Hse. 21) at a monthly rent of Kshs, 22,000/- whilst still required to repay her mortgage of Kshs. 40,000/- since May 2009 and thereby suffering irreparable loss.

The Plaintiff in her Reply to the Defence and Defence to Counter-claim further averred that time was extended by mutual conduct of both parties. Further, that the completion of the transaction was to take place on the registration of the transfer of the suit property in her name and of a charge in favour of Barclays Bank of Kenya, whereafter the loan would be disbursed to pay off NSSF and the balance paid to the Defendant. Additionally, that the Defendant neglected to pay his proportionate share of the outgoings such as rates and rent due to the property, which she was constrained to fully meet so as to complete the transaction. To that extent, the Plaintiff stated, the agreement stood varied by necessary implication and conduct of parties.

The Plaintiff also averred that the addendum and variation documents were signed by the Defendant at NSSF on 24/4/2008 well after the expiry of the 90 day completion period, and no other valid completion deadline was thereafter given. It was contended by the Plaintiff that in the event there was any irregularities on the addendum and variation signed by the Defendant, the same are now inconsequential and do not render the said documents unlawful, ineffective, invalid, or null and void as purported. Further, that the Defendant is legally estopped from belatedly seeking to benefit and/or unjustly enrich himself from his own illegal actions, omissions and mischief. The Plaintiff also denied allegations of any fraud and that she perpetrated any inordinate delay in the completion, or that there was any procedural impropriety, unlawful or irregular transfer and the registration of the charge.

On the defence to the counter-claim, the Plaintiff denied the contents therein stating that the counter-claim raises no reasonable cause of action, does not seek any meaningful reliefs in tandem with the serious allegations of fraud, irregularities, invalidity, nullities, misrepresentations, and rescission, and was thus wanting in seriousness. The Plaintiff contended that she is the *bona fide* purchaser for value without notice of alleged fraud and that the Defendant's remedies, if deserving, would lie only in damages. She averred further that the Defendant is not her tenant or her licensee, and continues to oppressively deprive her of the use and enjoyment of the suit property thus causing unmitigated loses.

The Plaintiff swore a witness statement on 28/3/2013 which she adopted as her evidence during her testimony at the hearing of the suit. She also produced a list and bundle of supporting documents dated 29/11/2010 as the Plaintiff's Exhibit.1. The Plaintiff referred to the Tenant Purchase Agreement testifying that the Defendant was still paying his mortgage with NSSF when she entered into an agreement with him on 23/1/2008. She referred to clause 2 of the said sale agreement which stated that the purchase price was agreed at Kshs. 3,525,000/- and that she paid Kshs. 777,000/- being 10% of the purchase price through 2 cheques dated 31/12/2007 and 9/1/2008.

It was the Plaintiff's evidence that the Defendant was aware she had received confirmation of the loan after valuation of the property was done. The Plaintiff stated that the Defendant's allegation that he was not aware that the suit property was going to be the security for the loan is false. It was her testimony that the Defendant was furnished with a copy of the letter from Barclays Bank of Kenya about the security even before they entered into the sale agreement, and that he even facilitated the valuation of the same since he was and still is in occupation of the suit property. The Plaintiff testified that the 90-day completion date expired 2 days before they signed the addendum and variation to the tenant purchase agreement, and the purpose of the addendum was to add and recognize her as a second purchaser and to enable the release of completion documents to her lawyer.

It was the Plaintiff's testimony that the signing of the addendum took a long time because of the Defendant's unwillingness to pay his portion for document preparation which, the Plaintiff states, she ended up meeting when they presented themselves at NSSF to sign the documents. The Plaintiff contended that the contract could not have been terminated on 22/4/2008 because the execution of the addendum and variation to the tenancy agreement was on 23/4/2008.

The Plaintiff referred to a series of correspondence annexed to her bundle of documents and testified that her efforts to fast track the transaction were frustrated and delayed by the Defendant, because of the delay in obtaining the requisite documents and making necessary payments. The Plaintiff testified that she sought an extension of the completion date from the Defendant on 8/5/2008 but did not get any response and she therefore proceeded on the assumption that the extension was granted.

Subsequently, the Plaintiff testified that she received a letter dated 8/5/2008 from the Defendant alleging irregular alteration of records at NSSF, and that the Defendant had not authorized the suit property as collateral for the Barclays Bank Loan. Further, that she also obtained a letter from the Defendant dated 20/6/2008 demanding for the outstanding amount by 23/6/2008 within 3 days by which time, she had not received the loan from Barclays Bank of Kenya as the Defendant had not availed the completion documents. It was the Plaintiff's contention that she did not take this as a completion notice as she was not given the required 21 days as stated in the Law Society Conditions of Sale.

The Plaintiff further testified that her lawyer called for a meeting scheduled for 21/7/2008 with the Defendant's lawyer and the NSSF lawyer with the aim of arriving at an amicable solution between the parties, but received no response from the Defendant's lawyer. Instead, the Defendant wrote on 24/7/2008 alleging breach of agreement and that the entire agreement was induced on fraudulent misrepresentation, non-disclosure and dishonesty on her part in dealing directly with NSSF and altering NSSF records to reflect her as the purchaser long before completion.

The Plaintiff testified that the process of transfer was necessary for her to secure the mortgage and in that regard, her lawyers wrote to NSSF's lawyers on 18/9/2008 requesting for the title and completion documents for purposes of registration. The Plaintiff referred to NSSF's response dated 26/9/2008 when they forwarded the duly executed transfer, and a subsequent letter dated 19/11/2008 forwarding rates and rent clearance certificates, and consent to transfer and charge.

The Plaintiff took the court through the series of correspondence leading to the registration of the transfer, obtaining of the title deed on 11/12/2008 and charging of the same in favour of Barclays Bank. The Plaintiff testified that the balance of the purchase price was released on 19/3/2009, the outstanding balance owed by the Defendant settled on 28/4/2009, and the Defendant informed vide a letter dated 15/5/2009 that the remainder of the purchase price was available for collection. It was her testimony that the Defendant's cheque remains uncollected and the Defendant has refused to give vacant possession. The Plaintiff urged the court to grant her the orders sought stating that she is forced to rent a house within the same estate at Kshs. 22,000/- as from 26/2/2009 whilst still servicing the loan at Kshs. 40,000/-.

The matter was mentioned on several occasions to allow counsel for the Defendant to cross-examine the Plaintiff but to no avail.

### **The Defendant's Case**

The Defendant filed a Defence and Counter-Claim dated 9/7/2009. The Defendant admitted averments made by the Plaintiff save that he is not aware that the Plaintiff's loan was approved as alleged. Further, that NSSF was to release the transfer documents and execute the transfer in favour of the Plaintiff upon the outstanding loan with the Defendant being cleared and therefore that before the said clearance, the Defendant had no right to seek the transfer documents. The Defendant denied to having entered into an agreement in relation to the extension of 90 days completion time stating that time was of essence in the sale agreement.

The Defendant also denied knowledge of any undertaking made by the Plaintiff through her advocates or the advocates of the Bank in respect of the payment of the balance of the purchase price. He further denied being in breach of the sale agreement as alleged and averred that the signing of the addendum on 24/4/2008 was at the instance of the advocates for NSSF, which advocates misrepresented the purpose of the addendum and the grounds upon which the same was to be executed by him. Further, that he co-operated with the Plaintiff and proceeded to execute the said addendum in good faith and trusted that the Plaintiff would perform her obligations.

It was the Defendant's averment that the Plaintiff acted fraudulently and procured the transfer of the suit property in her name on 28/4/2008 by causing NSSF to alter the computer details to have her name entered replacing his. Thus, that the Plaintiff obtained the requisite documents necessary for registration of the transfer and charge without delays in the finalization of the agreement. The Defendant states that he issued a notice of intention to rescind the agreement dated 8/5/2008 owing to failure by the Plaintiff to complete payment of the purchase price, and a subsequent 3-day notice on 20/6/2008 to perform which notices the Plaintiff neglected.

The Defendant admitted to having issued the notice to rescind the contract, but states that he did so owing to the fraudulent misrepresentation, non-disclosure, dishonesty and failure to perform on the part of the Plaintiff. The Defendant averred that the Plaintiff is estopped from contesting the termination of the sale agreement since it is her conduct that facilitated the inordinate and inexcusable delay in the discharge of obligations, in that she transferred the suit property to her name before settling the balance of the purchase price.

The Defendant made further averments that the registration of the transfer and charge was effected unprocedurally, unlawfully and irregularly since the executed addendum was not duly witnessed as required by law and that it had no indications as to where and by whom it was drawn. The Defendant maintained that transfer was effected on 11/12/2008 over 5 months after he had rescinded the sale agreement, and that he did not effect the discharge of title from NSSF for purposes of facilitating the charge and transfer to Barclays Bank of Kenya.

The Defendant also averred that if there were any monies disbursed to NSSF, the same was done after the contract was rescinded and therefore null and void. The same applied to the balance held by the Plaintiff's advocate which the Defendant claims that it cannot be collected and also that the said Advocate does not hold it as a stakeholder and/or agent. The Defendant denied that he was causing the Plaintiff any harms, suffering and irreparable loss, and contended that he is the *bona fide* owner of the property.

The Defendant in his Counterclaim averred that he holds the Plaintiff liable for frustrating the sale contract which caused him anguish and massive loss in that the value of Kshs. 785,400/- would have been payable to him as capital gain after investing the difference between the balance of the purchase price and credit of Kshs. 1,489,000/- in the stock market at the time of signing of the agreement. Further, that he was also claiming Kshs. 168,000/- being interest that he paid to NSSF for the loan for 4 months as a result of inordinate and excusable delay on the part of the Plaintiff.

It was the Defendant's averment that the transfer done to the Plaintiff by NSSF and subsequent charge to Barclays Bank of Kenya on 11/12/2008 is unlawful, illegal, and irregular, as was done without following the due process. Further that it was fraudulent, on the basis that the Plaintiff transferred the suit property to herself and charged the same to Barclays Bank of Kenya without any formal undertakings and without payment of the balance of the purchase price. Further that the Advocates for NSSF took advantage of the fiduciary relationship to influence him to execute the addendum of the agreement.

Additionally that NSSF admits the gross irregularity of deleting his name in the NSSF computer records and replacing the same with that of the Plaintiff and therefore as a result of the fraudulent transfer, the Plaintiff was threatening him with eviction. The Defendant thus prayed for the following relief in his counterclaim:

- a. Dismissal of the Plaintiff's case in toto;
- b. Costs of the suit
- c. Set off and payments made by the Defendant as against the Plaintiff in its counterclaim
- d. Interests on (b) and (c)
- e. Any other or further relief as this court may deem just and fit

The Defendant filed a witness statement sworn on 4/5/2013 but failed to attend the hearing of the suit and to give evidence. Consequently, since the Defendant did not confirm and adopt the contents in the said witness statement as his evidence in pen court, and as he did not present himself for cross-examination and verification of the same, this Court will not admit the said witness statement as evidence.

The parties were directed to file written submissions at the close of the hearing, and Adera & Co. Advocates for the Plaintiff filed submissions dated 14/7/2014 whereas Letangule & Co. Advocates for the Defendant filed submissions dated 14/7/2014.

### **The Issues and Determination**

It is not in dispute that the Plaintiff and Defendant entered into a sale agreement with respect to the suit property. It is also not in dispute that the Plaintiff is currently registered as owner of the suit property, and that the Defendant has possession thereof. The issues in dispute revolve around whether the said sale agreement between the Plaintiff and Defendant with respect to the suit property was validly rescinded, who is the rightful and legal owner of the suit property and whether the parties are entitled to the reliefs they seek.

#### **a. Whether the sale agreement between the Plaintiff and Defendant with respect to the suit property was validly rescinded**

It was submitted for the Plaintiff that the completion period had already lapsed when both parties unequivocally and willingly executed the addendum and variation deeds on 28/4/2008, and thus the date was mutually extended by implication, necessary inference and by conduct of the parties. Consequently, time was no longer of the essence. In support of this submission, counsel cited the case of **Charles Rickards Ltd v Oppenheim (1950) 1 KB 616** where the court held:

**'If the defendant, as he did, led the plaintiff to believe that he would not insist on the stipulation as to time and that if they carried out the work, he would accept it, and they did it, he could not afterwards set up the stipulation as to time against them. Whether it be called waiver or forbearance on his part or an agreed variation or substituted performance does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made in effect a promise not to insist upon his strict legal rights. That promise was intended to be acted upon and was in fact acted upon. He cannot afterwards go back on it.'** and **'It would be most unreasonable if the defendant having been lenient and waived the initial expressed time, should, by so doing, have prevented himself from ever thereafter insisting on reasonably quick delivery. In my judgment, he was entitled to give a reasonable notice making time of the essence of the matter.'** The reasonableness of the notice must be judged at the time at which it is given.

Counsel for the Plaintiff also submitted that a rescission was not available to the Defendant. Counsel referred to Clause 8(3) and (4) of the Law Society of Kenya Conditions of Sale, 1989 and submitted that the Defendant would only be entitled to interest on the balance of the purchase monies for delay in completion. Further, that the Defendant had failed to issue a 21 day or 10 day completion notice as provided for under clause 4(7)(c) or 4(2)(a) thereof.

The counsel for the Defendant on the other hand reiterated that upon signing the addendum and variation of the tenancy agreement, the Defendant discharged his obligations under the sale agreement. Further that completion dated was meant to be 22/4/2008 and that the Defendant did not expressly or by implication agree to extend the completion date. It was submitted that the Defendant finally rescinded the contract on 24/7/2008 after issuance of the 3- day notice to perform on 20/6/2008, both of which were issued past the completion date of 22/4/2008. Therefore, counsel submitted that the Defendant was entitled to terminate the sale agreement and that there was a legal rescission of the contract. In support of the submission, counsel referred to the decision of this Court in **Francis Wahiu Theuri vs Monica Njeri (2012) e KLR** where it was held that failure of the Defendant therein to pay the balance of the purchase price was conduct that indicated her intention not to perform her obligations under the contract.

It was further submitted for the Defendant that the Plaintiff's inordinate delay in performing her obligations under the sale contract was inexcusable. Counsel submitted that the execution of the addendum and variation of the tenant purchase agreement for purposes of including the Plaintiff to the agreement, was supposed to be done simultaneously with the payment of the balance of the purchase price to allow for NSSF to execute the transfer documents in her favour. Therefore, when the Plaintiff failed to settle the balance at execution, the transfer documents could not be executed in her favour. Counsel thus submitted that failure to perform an obligation under a contract constitutes a breach if it goes to the root of the contract. Counsel referred to the case of **Sagoo v Sagoo (1983) KLR 365** where the Court of Appeal held:

**“The Law Society Conditions of Sale provides that it is only upon the payment of the purchase price that the vendor could be required to execute a conveyance and deliver to a purchaser.....the appellants never became entitled to ask the respondents to execute the conveyance because they never proffered to the respondents the balance of the purchase money....”**

Counsel further submitted that the addendum and variation documents to the tenancy agreement dated 24/4/2008 are not valid in law and not binding to the parties, for want of attesting of the Plaintiff and Defendant's execution and NSSF's common seal in accordance with section 3(3) of the Law of Contract Act, section 9 of the NSSF Act and the repealed Registered Land Act. Consequently, that the said document are unenforceable.

This court is reminded that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract, and the parties can be restored to their former position. This position of law is provided in **Halsbury's Law of England Volume 42, 4<sup>th</sup> Edition** at paragraph 242.

I have perused the sale agreement entered into by the Plaintiff and Defendant dated 23<sup>rd</sup> January 2008. Clause 3 of the agreement provided that the completion of the sale and purchase was to take place within 90 days from the date of the agreement, while clause 11 stated that time would be of the essence in the agreement. The sale agreement between the Plaintiff and Defendant did not provide for rescission

but provided that the Law Society Conditions of Sale (1989 Edition) would apply, so far as they were not inconsistent with the conditions contained under the sale agreement.

The Law Society Conditions of Sale (1989 Edition) provided for rescission under Condition 11 as follows:

“Rescission

1. Where a purchaser makes an objection or a requisition under Condition 10 with which the vendor is unable to comply or with which he is unwilling to comply on reasonable grounds of difficulty, delay or unreasonable expense, the vendor may give to the purchaser written notice referring to this Conditions, specifying his grounds and requesting withdrawal of the objection or requisition within a specified period being not less than seven (7) days.
2. If the purchaser to withdraw the objection or requisition with the period specified by the notice, the vendor may by notice in writing to the purchaser rescind the contract.
3. On rescission the vendor shall repay to the purchaser his deposit and any payment of purchase price without interest and the purchaser shall return to the vendor all papers belonging to the vendor.
4. The purchaser has no claim against the vendor for costs, compensation or otherwise.
5. Where the contract becomes void under any law the provisions of sub-conditions (3) and (4) apply.”

The Plaintiff in this regard produced evidence of various correspondence between her advocate and NSSF and the Defendant. Three of these letters are instructive as to the Plaintiff's willingness to complete the sale. These are the undertakings by her advocate dated 13<sup>th</sup> February 2008 and 4<sup>th</sup> April 2008 to NSSF and its Advocates respectively to pay the balance of the purchase price and the one dated 16<sup>th</sup> April 2008 to the Defendant to pay to him the balance thereof. All these undertakings were given before the completion date of 23<sup>rd</sup> April 2008. The said letters also requested the Defendant to avail the completion documents.

It is not disputed that by the completion date on 23<sup>rd</sup> April 2008 the Defendant had not provided the completion documents and notice. He went ahead to sign an addendum and variation to the Tenant Purchase Agreement with NSSF on 24<sup>th</sup> April 2008 to include the Plaintiff in the said agreement as purchaser. He has disputed the validity of the said agreement, yet at the same time relied on it as evidence of completion on his part. The Defendant however did not join NSSF as a party to this suit to shed light on the effect and legality or otherwise of the said variation and addendum.

This Court also notes that the said variation and addendum despite the issues of its validity, is evidence of the intention by the Defendant to proceed with the sale transaction after the completion date, and an indication of waiver of the completion date on the part of the Defendant. Further evidence of waiver is in the letter produced by the Plaintiff from the Defendant's Advocate dated 20<sup>th</sup> June 2008 seeking payment of the purchase price by 23<sup>rd</sup> June 2008, after having purported to rescind the sale agreement in a letter dated 8<sup>th</sup> May 2008. The Defendant then purported to again rescind the sale agreement by way of a letter from his advocate dated 24<sup>th</sup> July 2008 citing breach of the sale agreement by the Plaintiff. I am guided in this respect by the Court of Appeal decision in **Njamunyu vs. Nyaga (1993) KLR 282** wherein the said Court stated the law on completion once time is made of essence to be as follows at page 287:

**“The principle to be acted in such a case is stated in 9 Halsbury's Laws (4<sup>th</sup> Edn) p. 338, para 482, i.e:**



**‘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 will fulfil the intention of the parties’**

The Defendant did not bring any evidence of the alleged breach by the Plaintiff, who has demonstrated the actions she undertook to complete the contract including the undertakings to pay the purchase price. The position alleged by the Defendant that he was to execute the transfer in favour of the Plaintiff upon his outstanding loan with NSSF being cleared and that before such clearance he had no right to seek the transfer documents is also not correct, as the sale agreement he entered into the Plaintiff clearly stated at clause 2 that the balance of the purchase price was to be obtained by way of a loan from Barclays Bank of Kenya which was to be done upon completion.

In addition, under clause 9 of the sale agreement the Defendant was to have obtained all the necessary consents and needed for the transfer of the suit property by the completion. In essence the breach was on the part of the Defendant for delaying in providing the necessary completion documents, even after having been severally requested to do so.

I am also of the view that the remedy of rescission as provided for in the Law Society Conditions of Sale (1989 Edition) was not available to the Defendant, as it could only arise upon objection or requisition by the Plaintiff after delivery of title by the Defendant, which was not done in this case. The Defendant could therefore not use rescission to cover up for his own breach. Lastly, the 3-days’ notice to complete given by the Defendant was neither provided for in the sale agreement, or in the Law Society Conditions of Sale (1989 Edition) which provide for 21 days completion notice for the first notice and 10 days’ notice for subsequent notices in clause 4(7). This court therefore finds that the sale agreement was not validly rescinded by the Defendant for the foregoing reasons.

#### **b. Who is the rightful and legal owner of the suit property**

The Plaintiff submitted in this respect that she through her counsel sought to mitigate the delay caused by the Defendant, and that in September and November 2008 the NSSF released the completion documents to her Advocates, whereupon the said Advocate then undertook the requisite procedures towards the transfer of title and registration of the charge of over the suit property. Further, that Barclays Bank of Kenya then disbursed the proceeds of the loan of Kshs 2,748,000/= to the Plaintiff’s Advocate, who paid the Defendant’s debt to NSSF of Kshs 1,181,346/= as per the sale agreement. However, that the Defendant has refused to take the net balance of Kshs 1,566,654/=.

The Plaintiff submitted that her title issued under the Sectional Properties Act and governed by the repealed Registered Land Act is final, conclusive and indefeasible in the circumstances, and that the Defendant has not sought cancellation of the Plaintiff’s title, rectification of the records at the lands office, and neither has he sought to join NSSF and/or its advocates or the Chargee in his counterclaim.

Counsel for the Defendant submitted that the Plaintiff acquired the title to the suit property fraudulently. This submission was on the basis that the Plaintiff sought to transfer the property to her name before paying the balance of the purchase price; presented the documents for registration on 11/12/2008 after the sale contract had been terminated; and completing the sale on 14/5/2009 one year after the completion date. Counsel urged the court to interpret and give effect the intention of the parties at the time of entering into the agreement, stating that the Plaintiff should not benefit at the detriment of the Defendant who performed his obligations.

Having found that the sale agreement was not validly rescinded by the Defendant, and that there was no

evidence brought of how the Plaintiff breached the said agreement, this Court has to determine who the legal owner of the suit property is. The Plaintiff has brought evidence to show the procedures she undertook to have the title issued to her with respect to the suit property on 11<sup>th</sup> December 2008 under the Sectional Properties Act . The effect of registration of a person as the proprietor of a leasehold interest under the Sectional Properties Act is provided under section 5(5) thereof, which provides that the title to a unit comprised in a sectional plan shall, with effect from the date of the registration of the sectional plan, be deemed to be issued under the repealed Registered Land Act.

The repealed Registered Land Act further provided in section 27(b) as follows:

**“The registration of a person as the proprietor of a lease shall vest in that person the leasehold interest described in the lease, together with all implied and expressed rights and privileges belonging or appurtenant thereto and subject to all implied and expressed agreements, liabilities and incidents of the lease.”**

Under section 28 of the repealed Registered Land Act, the rights acquired by a proprietor were only subject to any leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register, or the overriding interests that were provided in section 30 of the said Act.

Section 26(1) of the Land Registration Act now provides as follows in this respect:

**“The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except—**

**(a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or**

**(b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

The Defendant has not brought any evidence of his title to the suit property, of any overriding interest in his favour, of any misrepresentation, or fraudulent and illegal actions by the Plaintiff in her registration as owner of the suit property, save to argue that she was in breach of the sale agreement. He also faults the actions by NSSF in the issuance of the title, yet he did not join the NSSF as a party to this suit. In the circumstances, the only finding this Court can make is that the Plaintiff is the rightful and legal owner of the suit property, having demonstrated the processes of acquiring the title to the same, which processes have not been shown to the satisfaction of the Court to have been irregular or fraudulent.

**c. Whether the parties are entitled to the reliefs they seek.**

From the foregoing it is evident that the Plaintiff has proved her case on the balance of probabilities, and the findings of this Court support the declarations and mandatory injunctions she seeks including the orders that the Defendant vacates the suit property. This finding notwithstanding, this Court also notes that the Defendant and his family have been living on the suit property, and will therefore require adequate notice to remove their possessions from the suit property and secure alternative accommodation.

The Plaintiff in addition also seeks special damages. She brought evidence of the rent she had paid from 1<sup>st</sup> January 2009 until at the time of filing of this suit in October 2009 of Kshs 22,000/= per month, save for the month of January 2009 when it is shown by the receipt produced dated 3<sup>rd</sup> January 2009 that the rent paid was Kshs 17,000/=. She also brought evidence of a tenancy agreement she entered into dated 22<sup>nd</sup> February 2009 from 1<sup>st</sup> January 2009 until 1<sup>st</sup> January 2010. The Plaintiff has therefore met the requirement of proof of special damages sought, in light of the requirement stated by the Court of Appeal in **Hahn -vs- Singh , (1985) KLR 716**, that special damages must not only be pleaded but must also be strictly proved.

In addition, as it is not disputed that the Defendant has not given vacant possession of the suit property, the Plaintiff is entitled to the said special damages for the rent she has had to pay as a result of the Defendant failing to give vacant possession of the suit premises at the rates proved of Kshs 22,000/= per month until the date of vacant possession. The said special damages from the filing of this suit in June 2009 to 1<sup>st</sup> December 2014 amount to Kshs 1,474,000/=.

Since the Defendant did not bring any evidence to support his claims, he has not proved his counterclaim and is not entitled to the orders he seeks. I however note that since the Defendant had made a prayer for set off, and the Plaintiff admitted that her Advocate is holding the sum of Kshs 1,566,654/- being the balance of the purchase price which the Defendant refused to accept, this is a remedy that the Court can give. This Court has already found that the Defendant is liable to pay the Plaintiff special damages of Kshs 1,474,000/= and monthly payments of Kshs 22,000/= from the date of this judgment until giving of vacant possession of the suit property. This amount can therefore be set off as against the balance due to the Defendant that the Plaintiff is holding.

Arising from the foregoing, I accordingly order as follows:

1. That the Defendant's purported rescission of the agreement for sale dated 23/1/2008 entered into with the Plaintiff was unlawful, invalid and null and void.
2. The Plaintiff herein namely Beatrice Muthio Nzioka, is hereby declared the legal owner of, and entitled to possession of the property comprised in Title No. Nairobi/Block 140/40/70
3. That the Defendant herein namely Charles Akelo On'gwen, by himself, his licensees, servants, agents and/or employees is hereby ordered to vacate the property known as Title No. Nairobi/Block 140/40/70 within 60 days of the date of service by the Plaintiff of the orders given herein, failing which orders of eviction shall issue.
4. That in lieu of payment of special damages of Kshs 1,474,000/= and monthly payments of Kshs 22,000/= from the date of this judgment until giving of vacant possession of Title No. Nairobi/Block 140/40/70 that the Defendant is liable to pay the Plaintiff, the said amount shall be set off against the balance of the purchase price due to the Defendant from the Plaintiff of Kshs 1,566,654/=. Any balance outstanding after such set off shall be deposited in Court to the account of the Defendant.
5. The Plaintiff is awarded the costs of this suit.

Orders accordingly.

**Dated, signed and delivered in open court at Nairobi this 9<sup>th</sup> day of December, 2014.**

**P. NYAMWEYA**

**JUDGE**



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