



**REPUBLIC OF KENYA**

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

**E&L NO. 39 OF 2015**

**BARAKA LAND COMPANY LIMITED .....PLAINTIFF**

**VERSUS**

**LUCY WANJA MWANIKI.....DEFENDANT**

**JUDGEMENT**

By a plaint dated 7<sup>th</sup> February 2015 the plaintiff herein filed this suit against the defendant seeking for the following orders:

- a) A declaration that the plaintiff is the absolute registered owner of all that parcel of land known as Pioneer/Ngeria Block 1 (EATEC)6386.
- b) An order of eviction against the defendant to remove herself, her developments and possessions from land parcel No. Pioneer/Ngeria Block 1 (EATEC)6386
- c) Mesne profits
- d) Costs of the suit plus interest.

The plaintiff filed an application for injunction contemporaneously with the plaint under certificate of urgency which order was granted against the defendant on 19<sup>th</sup> March 2015.

The defendant was served with summons to enter appearance but she never filed any response to the suit. The matter therefore proceeded by way of formal proof though the defendant was served with a hearing notice.

It was the plaintiff's evidence that he is a director of the plaintiff company which deals with buying and selling of land and property. He produced a certificate of incorporation and minutes of the company resolution allowing him to file the current suit.

PW1 Mr. Ngumbao stated that they started selling plots nos 17 and 18 to the defendant which was a subdivision of plot no Pioneer/Ngeria Block 1 (EATEC) 1210. It was his evidence that the defendant came to their office in 2003 and had an interest in purchasing two parcels of land known as pioneer/Ngeria Block 1 (EATEC) 6385 and 6386 which had provisional Nos 17 and 18 respectively. He stated that on 3/4/03 the defendant signed a debit note for the purchase of the two plots which he produced as exhibit 4. That the defendant made payment totaling Kshs. 123,500/ but she was supposed to pay Kshs. 166,000/ He stated that the defendant only paid for one plot namely Pioneer/Ngeria Block 1(EATEC)6386 which she acknowledged receipt on 23/2/05.

It was the plaintiff's evidence that the defendant went ahead to occupy the land parcel that she had not paid for namely plot no. 6385 and developed it. The plaintiff also testified that they have issued several demand notices for the defendant to vacate the suit land but she has been adamant. The plaintiff produced the title to prove that they are the absolute registered owners of the suit land.

PW1 further testified that the defendant was in breach of the agreement as she did not pay the full purchase price but took illegal possession of the suit land thereby prompting the plaintiff to revoke the agreement vide a letter dated 26/4/06.

**Plaintiff's Counsel's Submission**

Counsel filed written submissions on behalf of the plaintiff and reiterated the plaintiff's evidence. Counsel cited the case of **Joseph Njuguna Maina and 3 others Vs Daniel Mbugua Mari and another , Nairobi ELC No 239 of 2014** where the plaintiffs were registered proprietors of land title No. Nairobi/Block 26/363 and the defendants took possession of the land before completing the purchase price and the transaction failed as a result of breach on the part of the defendants, the Hon. Judge ordered that the plaintiff should refund the amount the defendant had paid.

Mr. Magare also submitted that the defendant was in breach of the sale agreement by failing to complete the purchase price of kshs. 42,500/ and that the agreement was validly rescinded by the plaintiff as per the letter dated 26/4/06.

Counsel submitted that the parties be returned to the positions they were in before entering into the sale agreement in view of the fundamental breach. He cited the case of **Edward Mugambi Vs Jason Mathiu Civil Appeal no 286 of 2002 (2007)eKLR** where the court held that the rescission of a contract to sell land can only arise where the party in default has been notified of the default and given an opportunity to rectify the same. He also cited other cases which are relevant to this case.

### **Analysis and determination**

The main issue for determination is whether the defendant breached a fundamental term of the agreement between her and the plaintiff. It is not in doubt that the plaintiff and the defendant entered into a land sale agreement. It is also not in dispute that the defendant was interested in two plots nos 17 and 18 which were later renamed as pioneer/Ngeria Block 1 (EATEC) 6385 and 6386.

It is further not disputed that the defendant only paid for one plot and not for the second plot but went ahead and took occupation of the plot that belongs to the plaintiff.

From the plaintiff's evidence and the exhibits produced, it is evident that the plaintiff is the registered owner of the suit plot which the defendant is occupying unlawfully. The defendant was duly notified of the rescission of the agreement due to non-payment of the complete purchase price as required by law but the defendant has been adamant.

The authorities cited by the plaintiff's counsel are relevant to the current case on rescission of contracts for sale of land and where the purchase price has not been paid in full and a party has taken possession. The only remedy would be to refund the purchase price if there is no claim of adverse possession.

The plaintiff's evidence was uncontroverted as the defendant did not file any defence to the plaintiff's claim. This does not mean that if evidence is uncontroverted the claim must succeed, the plaintiff still has an obligation to prove his or her case on a balance of convenience. If this is not done the case can still be dismissed.

On the issue of mesne profits, this limb of the plaintiff's claim fails because it was not specifically pleaded and no evidence was led in that respect. Mesne profits are special damages which must be specifically pleaded and specifically proved. The court cannot be left to guess what special damage it should award if it is not pleaded.

I have considered the plaintiff's pleadings, supporting documentation, evidence, submissions and the authorities cited and I have come to the conclusion that the plaintiff has proved his case against the defendant. I therefore make the following orders.

- a) That the plaintiff is hereby declared the absolute registered owner of all that parcel of land known as Pioneer/Ngeria Block 1 (EATEC)6386.
- b) That the defendant do give vacant possession of parcel of land known as Pioneer/Ngeria Block 1 (EATEC)6386 within 30 days in default an eviction order against the defendant to remove herself, her developments and possessions from land parcel No. Pioneer/Ngeria Block 1 (EATEC)6386 be issued.
- c) The plaintiff do refund Kshs 40,500/ being the amount paid for the plot.
- d) Costs of the suit plus interest

**Dated and delivered at Eldoret this 8<sup>th</sup> day of February, 2018.**

**M.A ODENY**

**JUDGE**

Judgment read in open court in the presence of Mrs. Khayo holding brief Mr. Magare for Plaintiff and in the absence of the defendant.

Mr. Koech – Court assistant.