



**Casucci v Bando Project (K) Limited (Environment & Land Case
232B of 2020) [2023] KEELC 16389 (KLR) (23 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16389 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 232B OF 2020**

**NA MATHEKA, J
MARCH 23, 2023**

BETWEEN

FATUMA KALTHUMA CASUCCI PLAINTIFF

AND

BANDO PROJECT (K) LIMITED DEFENDANT

JUDGMENT

- 1 The Plaintiff avers that on or about the 9th March, 2013, the Plaintiff entered into an Agreement for Sale with the Defendant herein for the purchase of an Apartment No. A1 on the first floor erected on a piece of land situate at Nyali in Mombasa Area and known as sub-division no.17466(original no.1169/2 MN (hereinafter referred to as "the suit property") for a consideration of Kenya Shillings Twelve Million (Kshs.12,000,000.00.) Pursuant to Clause 6 of the Agreement for Sale herein, the Plaintiff paid to the Defendant a sum of Kenya Shillings One Million Four Hundred Thousand (KShs.1,400,000.00) upon execution of the agreement for sale and paid a further sum of One Million Five Hundred Thousand (Kshs.1,500,000.00) on various dates and the balance of the purchase price was to be paid through a Housing Finance loan facility. Pursuant to Clause 6 of the aforementioned Agreement for Sale, the completion date of the construction was to be Twelve (12) months with effect from the date of execution or within 14 days upon the vendor obtaining a certificate of occupation from Municipal Council of Mombasa whichever is earlier with time being of essence.
- 2 That whereas the Plaintiff dutifully adhered to and/ or honored her obligation in the sale agreement but the Defendant has blatantly and/or continuously denied and/or neglected to complete the sale and deliver vacant possession of the property to the Plaintiff or refund the Plaintiff the monies already paid to the Defendant despite constant requests from the Plaintiff to act accordingly. Despite demand being made and notice of intention to sue having been given the Defendants have refused and/ or failed to deliver vacant possession of the property to the Plaintiff or refund the monies paid to the Defendant rendering this suit necessary. The Plaintiff prays for judgment against the Defendant for;



- a. A declaration that the Defendant was in breach of the Agreement for the Sale dated 9th March 2013.
- b. An order for refund of the sum of Kshs. 2,900,000.00 with interest at Commercial rates from 11th March 2013 until payment in full.
- c. Costs of the suit.
- d. Any other relief that this Honorable Court may deem fit and just to grant.

3 The Defendant avers that the said amounts were not paid in accordance with Clause 6 of the Agreement for sale. The Defendant puts the Plaintiff to strict proof regarding the mentioned paid amounts. The Defendant states that the Plaintiff did not pay the Purchase price amount in strict adherence to the conditions of the alleged Agreement for sale and was thus in breach of the Agreement for sale. For failure to adhere to the obligations and responsibilities as the Purchaser the Defendant had no obligation to deliver vacant possession to the Plaintiff. The Plaintiff is not entitled to any interests as she is and was in breach of the Agreement for sale which conditions included no interest is payable in the event of breach on the part of Purchaser; That all allegations made against the Defendant are in bad faith and seek to benefit the Plaintiff unfairly. The Defendant further reiterates that if there was any breach of the Sale Agreement by the Defendant, (which is denied) the same was caused by the Plaintiff actions and omissions of the Plaintiff. The Defendant prays for the Plaintiff's suit against it be dismissed with costs.

4 This court has considered the evidence and the submissions therein. PW1 testified that she entered into an Agreement for Sale with the Defendant herein for the purchase of an Apartment No. A1 on the first floor erected on a piece of land situate at Nyali in Mombasa Area and known as sub-division no.17466(original no.1169/2 for a consideration of Kenya Shillings Twelve Million (Kshs.12,000,000.00.) Pursuant to Clause 6 of the Agreement for Sale herein, the Plaintiff paid to the Defendant a sum of Kenya Shillings One Million Four Hundred Thousand (KShs.1,400,000.00) upon execution of the agreement for sale and paid a further sum of One Million Five Hundred Thousand (Kshs.1,500,000.00) on various dates and the balance of the purchase price was to be paid through a Housing Finance loan facility. Pursuant to Clause 6 of the aforementioned Agreement for Sale, the completion date of the construction was to be Twelve (12) months with effect from the date of execution or within 14 days upon the vendor obtaining a certificate of occupation from Municipal Council of Mombasa whichever is earlier with time being of essence. The Defendant testified that the said amounts were not paid in accordance with Clause 6 of the Agreement for sale. The Defendant states that the Plaintiff did not pay the purchase price amount in strict adherence to the conditions of the alleged Agreement for sale and was thus in breach of the Agreement for sale. It then follows that the Court must further interrogate whether there was breach of the said Contract. *Blacks Law Dictionary, 9th Edition*, page 213 defines a breach of Contract as;

“a violation of a contractual obligation by failing to perform one’s own promised, by repudiating, or by interfering with another parties performance. A breach may be one by non-performance or by repudiation or both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or unable to show such loss with sufficient certainty he has at least a claim for nominal damages”.

5 PW1 admitted that she paid by installments the sum of Kshs 2,900,000.00 and the Defendant accepted the same. The construction was to be completed within twelve months but by July 2015 when she



visited the site it was incomplete. Her application for a mortgage facility with Housing Finance did not materialize hence she went to Chase Bank. Her efforts to complete the transaction have been futile and she has never received any notice from the Defendant specifying her default. The Defendant in his further statement of defence stated that the agreement at clause 6 provided for the mode of payment of the purchase price as follows;

- i. A sum of Kenya shillings One Million Four Hundred Thousand (Kshs. 1,400,000/=) upon execution.
- ii. A sum of Kenya Shillings Six Hundred Thousand (Kshs. 600,000/=) on or before 9th June 2013;
- iii. The balance of the purchase price to be paid through a Housing Finance loan facility.

6 The Defendant states that the Plaintiff was in breach of clause 6 ii and iii as she did not pay the balance of the purchase price as required. He claims for loss of user and 10% of the deposit paid as liquidated damages.

7 It is not disputed that the Plaintiff paid the Defendant a total of Kshs. 2,900,000.00 in instalments towards the purchase price. It is also not disputed that the Defendant continued receiving the said balance long after the stipulated period in the contract. The Defendant never sent a demand to the Plaintiff neither did he repudiate the contract. I find that the Doctrine of estoppel kicks in in these circumstances. In the case of *Charles Rickards Ltd vs Oppenheim* (1950) 1 KB 616 the court held that;

“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.

8 In the English case, *Pickard v Sears* 112 E.R. 179 the court held that;

“The rule of law is clear that where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the time.”.

9 The Court of Appeal’s decision in *Serah Njeri Mwobi vs John Kimani Njoroge* (2013) eKLR, it was held that;

“The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”



10 In the case of *748 Air Services Limited vs Theuri Munyi* (2017) eKLR, the court explored the history of the doctrine, and cited Lord Denning in the case of *McLkenny vs Chief Constable of West Midlands* (1980) All ER 227, where he stated;

“We have so many rooms that we are apt to get confused between them. Estoppel per rem judicatum, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying estoppel is only a rule of evidence. If you go into another room you will find a different notice: estoppel can give rise to a cause of action’. Each room has its own separate notice. It is a mistake to suppose that what you find in one room, you will find in the others.” (Emphasis mine)

11 I find that the Defendant by excepting these numerous installments out of time had waived the application of certain parts of the contract specifically clause 6, through his conduct and acquiescence. In the case of *Sita steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd.* (2007) eKLR, the court stated that;

“A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right.”

12 Looking at the facts of this case, it is clear that both parties in the suit have breached the terms of the Agreement for Sale. Clearly, both parties to the Agreement for Sale are at fault in this matter. The Plaintiff did not pay on time and but the Defendant accepted payment and never repudiated the contract. The Defendant seeks in his further statement of defence loss of use and payment of 10% of the purchase price. These were never pleaded in the defence and never proved a party must stick to their pleadings and the same cannot be awarded. I find that the Defendant waived his rights under the contract. I find that the Plaintiff has proved her case on a balance of probabilities and I grant the following orders;

1. An order for refund of the sum of Kshs. 2,900,000.00 with interest at court rates from the date of filing this suit until payment in full.
2. Costs of the suit to the Plaintiff

13 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 23RD DAY OF MARCH 2023.

N.A. MATHEKA

JUDGE

