



**Nguta t/a Archetype Consultants v Shady Acres Ltd (Commercial Suit E842 of 2021)
[2024] KEHC 14824 (KLR) (Commercial and Tax) (27 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14824 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E842 OF 2021
A MABEYA, J
NOVEMBER 27, 2024**

BETWEEN

VICTOR M NGUTA T/A ARCHETYPE CONSULTANTS PLAINTIFF

AND

SHADY ACRES LTD DEFENDANT

JUDGMENT

1. By plaint dated 1/10/2021, the plaintiff sought judgment against the defendant special damages of Kshs 17,830,659/= together with damages for breach of contract and interests from 23/7/2019 until full payment. The plaintiff also sought for specific performance of the agreement dated 31/7/2013 the registration of the transfer documents over apartment No E8-3 on land parcel registration number 209/20735 in his favor. In default, the deputy registrar be ordered to execute the agreement and lease documents.
2. The plaintiff's case was that the plaintiff entered into an agreement with the defendant whereby the plaintiff was contracted to undertake design works for defendant's apartments in land parcel no. 209/20735, at Madaraka Estate ("the property"). The plaintiff's services included consultancy and coordination of other contractors on site, overseeing the tendering process and supervising the entire construction work.
3. The plaintiff designed 245 units and was paid Kshs. 16,611,117/= out of the agreed cost of the project of Kshs. 1,140,925,052/=. That the defendant remained indebted to the plaintiff for the balance of Kshs.17,830,659/=. That it was agreed that in addition to the remuneration for the works done, the plaintiff was to get title to one apartment. The plaintiff is in occupation of apartment no. E8-3 but the defendant has failed and/or neglected to execute the agreement for sale and lease documents in the plaintiff. That demand letters and notice of intention were issued but in vain.



4. Interlocutory judgment was entered against the defendant on 21/2/2021. An application dated 1/2/2022 to set aside the same was declined. The matter therefore proceeded by way of formal proof before Mong'are J who took the evidence but later recused herself and the matter was allocated to this Court to write the judgment on the evidence taken before her.
5. At the trial, the plaintiff adopted his witness statement and produced his bundle of documents dated 1/10/2021 and supplementary bundle of documents dated 31/10/2021 as his evidence. He stated that by a memorandum of agreement dated 31/7/2013, he was to design a development of 160 apartment units on the property at a cost of Kshs 640,000,000/=. However, the defendant later altered the original instructions and the plaintiff eventually designed 245 apartment units together with two parking silos all costing Kshs.1,140,925,052/=.
6. The works were executed and project completed by issuance of a certificate of practical completion dated 23/7/2019 and obtaining a certificate of occupation on 26/3/2019. It was a term of the agreement that the plaintiff would be paid 3.5% of the final cost which translated to Kshs. 39,932,376/= plus VAT and one apartment identified as E 8-3 in the development. That although he had taken possession of the apartment, the defendant had refused to execute the transfer documents for the same.
7. The plaintiff therefore claimed special damages of Kshs.17,830,659/= and other reliefs as set out at the beginning of this judgment.
8. Although the plaintiff's claim is uncontested, nevertheless, he must discharge the burden of proof in order to be entitled to any judgment. Section 107 of the *Evidence Act* as read with Section 111 and 112 of the *Evidence Act* provides for legal and evidential burden of proof.
9. I have considered the plaintiff's claim. The issues that arise for determination are; whether there was any breach of contract, whether there was any loss and damage as a result thereof, if so, what was the loss, whether general damages can be awarded in this case, whether specific performance can be granted.
10. The agreement of consultancy services was produced as exhibit 1. It showed that the parties agreed on terms and conditions relating to the design and development of apartments for the defendant. The plaintiff was hired as the architect lead consultant for the project. The original number of apartments were 160 but later escalated to 245. The remuneration of the plaintiff was pegged at 3.5% of the total cost of the project.
11. The payments were agreed to be by installments as outlined on clause 4.6 (a) to (f) of the Memorandum. The final payment was to be 10 % plus VAT to be paid when the practical completion of the development would be issued.
12. The Certificate of Practical Completion dated 23/7/2019 was produced as exhibit 4. the total cost of the work done is indicated therein to be Kshs. 1,140,925,052/=. The same was for the construction of 13 floor apartments and floor parking slots boundary walls gate and external civil works.
13. The defendant acknowledged receipt of the said Certificate. It promised to confirm the payment plan and to complete the mortgage process for the apartments. The letters dated 18/12/2019 and 10/3/2020 by the plaintiff and the response dated 16/12/2019 prove that the defendant was aware of the breakdown of amount due but failed to honour its obligation.
14. An agreement for sale between Westpointe Realty Ltd as registered Leasee of the property and the plaintiff was produced. It was for lease of a 2 bedroomed apartment no. E8-3 together with 1 car park space. However, the same was not executed by the vendor. There was also a letter of demand that was produced. Despite all these, the defendant had not performed its part of the contract. Clearly, the issue is returned in the affirmative, the defendant was in breach.



15. In National Bank Kenya Limited –vs- Pipeplastic Samsolit (K) Limited and Another [2002] 2.EA 503, the Court of Appeal held that parties are bound by the terms of their contract unless they can prove that coercion, fraud or undue influence was used to procure the contract.
16. In William Kazungu Karisa –vs- Cosmas Angore Chanzera (2006) eKLR, the court held that: -

“The basic rule of the law of contract is that parties must perform their respective obligation in accordance with the terms of the contract executed by them”.
17. From the evidence on record, I am satisfied that the defendant did not perform its part of the bargain and was therefore in breach of the agreement dated 31/7/2013.
18. The next issue is whether special damages claimed were proved. Special damages were specifically pleaded. From the agreement, the letters and invoices produced, it was clear that whilst the defendant had paid the plaintiff part of the amount due, the balance of Kshs. 17,830,659/= still remained unpaid. The total amount due to the plaintiff is pegged on the total cost of the project as set out in the Certificate of Completion dated 23/7/2019 which was Kshs. 1,140,925,052/=. Accordingly, special damages of Kshs.17,830,659/=were proved.
19. The next issue is whether general damages are awardable in this case. It is trite law that damages for breach of contract cannot issue in isolation. The aggrieved party must demonstrate that there is loss suffered as a result of the breach. Unless there is prove of loss no damages are awardable. See the Court of Appeal decision in Kenya Tourism Development Corporation Vs Sundowner Lodge Ltd 2018 eKLR
20. Further, in Anson’s Law of Contract, 28th Edition at pg 589 and 590, it is posited that: -

“Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal.”
21. Further, in Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015)eKLR, the Court of Appeal held: -

“As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred.”
22. In the present case, the plaintiff has not demonstrated the nature of loss suffered. He has also not quantified the damage suffered by the defendant’s failure to settle the outstanding amount to-date. The only loss suffered is the delay in recovering his fees. Any such loss in my view is recoverable by way of interest on the special damages awarded.,
23. As regards the prayer for specific performance, the same is in the nature of an equitable remedy. It is granted in the court’s discretionary power and also granted in particular cases where damages would not be an appropriate remedy. The agreement to be performed must be enforceable and the plaintiff must not be in breach.



24. In *Thrift Homes Limited v Kays Investment Limited* [2015] eKLR, it was held that: -
- “Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. “
25. In *Halsburys Laws of England* (4th Edition) at paragraph 487 vol. 44, the learned authors quip thus: -
- “A plaintiff seeking specific performance must show that he has performed all the terms of the contract which he has undertaken to perform whether expressly or by implications ad which ought to have been performed at the date of the writ in the action. However, this rule only applies to terms which are essential and considerable. The court does not bar a claim on the ground that the plaintiff has failed in literal performance or is in default in some non-essential or unimportant term although in such cases it may grant compensation”
26. In *Gurdev Singh Birdi vs. Marinder Singh Ghatora and Abubakar Madhbuti* [1997] Eklr, Gicheru, JA (as he then was) observed that: -
- “When the appellants sought the relief of specific performance of sale of the respondent’s property ... they must have been prepared to demonstrate that they had performed or were ready and willing to perform all the terms of the agreement which ought to have been performed by them and indeed that they had not acted in contravention of the essential terms of the said agreement.”
27. And in *Nabro Properties Limited vs, Sky Structures Limited & 2 others* (2002) 2 KLR 300, the Court held: -
- “A party seeking specific performance must show and satisfy court that it can comply and be ready and able a mere statement that the appellant was ready to pay is not sufficient evidence to discharge the burden cast upon the appellant”.
28. In the present case, the evidence on record is crystal clear that the plaintiff duly performed his part of the agreement dated 31/7/2013. He issued the Certificate of Completion and procured the Certificate of Occupation. There is nothing else that was required remained to be done on his part.
29. The plaintiff’s case is that the sale agreement for the lease of the 2bedroom apartment was executed further to the agreement for architectural services to enable the plaintiff get one of the apartments. The plaintiff is already in occupation of Apartment 8 of Westpointe apartments. However, from the terms and recitals, it is apparent that parties executed an independent agreement stipulating the purchase price at Kshs 7,950,000/= and the completion date as 31/1/2019 or 7 days after the Certificate of Completion and Occupation is issued.
30. Recital No 4 set out the terms of payment and exchange of documents upon receipt of full purchase price, the plaintiff was also obligated to pay further fees listed under clause 4. These include legal fees and lease plus VAT, stamp duty, service charge, transfer of reversion fee and share capital to the management company amid other charges. These were payable at the time of completion.



31. However, I note that the plaintiff's evidence on this issue was silent. Further, the vendor in the agreement is not the defendant but another party. That party was not joined in these proceedings. The vendor is shown to be Westpointe Realty Limited. There was no evidence that was led to show the connection between the said vendor and the defendant herein. In this regard, the prayer for specific performance is a long short.
32. In the end, the Court finds that the plaintiff's suit partly succeeds. The prayer for special damages and interest is allowed. Judgment is entered for the plaintiff against the defendant for Kshs. 17,830,659/= together with interest at court rate from the 23/7/2019 until payment in full.
33. The claims for general damages and specific performance are dismissed. The plaintiff will have the costs of the suit.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF NOVEMBER, 2024.

A. MABEYA, FCI Arb

JUDGE

