



REPUBLIC OF KENYA



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Wasike v Catholic Archdiocese of Kisumu (Tumsifu Agency-Sifa Gardens) (Civil Suit 25 of 2015) [2023] KEHC 1464 (KLR) (27 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1464 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL SUIT 25 OF 2015
RE ABURILI, J
FEBRUARY 27, 2023**

BETWEEN

CHARLES WASIKE PLAINTIFF

AND

CATHOLIC ARCHDIOCESE OF KISIMU (TUMSIFU AGENCY-SIFA GARDENS) DEFENDANT

JUDGMENT

1. The plaintiff sued the defendant vide a plaint dated June 18, 2015 seeking the following orders:
 - a. The sum of Kshs 13,007, 917.83/- together with interest at court rates from January 1, 2014 until payment in full.
 - b. Costs of this suit and interest thereon at court rates.
 - c. Such further or other relief and the court deems just and expedient to grant.
2. The plaintiff pleaded that in August 2005, the defendant advertised the development of a residential estate comprising of mansionetes on land parcel Kisumu Municipality Block 6/290 for sale at the price of kshs 3,600,000/- per unit whose construction were to commence as per the laid down plans provided.
3. That the plaintiff purchased an application form for kshs 3,000 on August 11, 2005 and paid a deposit of kshs 600,000 in November 2006 and was issued with a receipt dated December 1, 2006. That he made further payments of kshs 100,000 on December 18, 2006. 100,000 on January 22, 2007. that on March 15, 2006 the defendant acknowledged the above payments through its management and maintenance services agent Tumsifu Agency and issued the plaintiff with an allotment letter for a mansionette in the said estate and that a balance of kshs 2,800,000 remained outstanding as kshs 800,000 was 20% deposit. That from the balance, kshs 2,080,00 was to be paid during the construction while the balance of kshs



720,000 was to be paid upon completion of the house which was to be within six months from the date of commencement of construction/ deposit.

4. According to the plaintiff, the construction of the house allotted was not completed within the period but he nonetheless continued to pay up the full amount and a further Kshs 200,000/- despite the house not being ready. That by a letter dated October 22, 2009, the defendant sought to raise the price of the house to Kshs 6,500,000/- on the grounds that the cost of building materials had skyrocketed which decision was not acceptable to the plaintiff.
5. The plaintiff pleaded that despite his proposal to settle the dispute amicably, the defendant was not willing and ultimately it sold the house to a third party in the year 2015 thus prompting the instant suit.
6. The defendant filed its statement of defence denying the plaintiff's claim and contended that if there was indeed any sale agreement, then it was the plaintiff who had breached the pertinent terms of the agreement by failing to make payments.
7. The suit herein was heard by way of oral evidence. PW-1, Charles Wasike the plaintiff testified that in the year 2005, he applied to purchase the defendant's houses known as Sifa Gardens at the price of Kshs 3,600,000/-. That at the time, he was required to pay a non refundable application fee of Kshs 3,000/- and a further deposit of Kshs 600,000/- which he did. That it was a term of the agreement that the house was to be completed within 6 months.
8. That he subsequently paid by installments up to the tune of kshs 3,800,000/- and that despite this, he found that the house had been sold to a third party in the year 2014 and occupied in March 2015. He now wants to be refunded his money by the defendant as prayed in the plaint.
9. On cross examination, he stated that he complied with the conditions of the allotment letter although he did not pay within 6 months. He stated that from the various correspondences he had with the defendant, he indicated that he was willing to pay the entire sum but that construction of the houses was not going on. He stated that he was not agreeable to pay for the increased price by to 90%.
10. The defendant did not call any witness and its case was therefore closed.
11. The parties filed their written submissions. Both partes complied. The plaintiff's ubmissions are dated November 28, 2022 and the defendaant's are dated December 19, 2022.
12. The plaintiff submitted that it is unchallenged that he paid Kshs 3,800,000/= to the Defendant between the year 2006 and 2012 based on the Defendant's Promise of acquiring the allotted House in the defendants scheme.
13. That the defendant having used the plaintiff's money for construction of the house amounts to unjust enrichment and borders on fraud. That the failure by the defendant to give the plaintiff an agreement for sale was a clear demonstration of malice.
14. That being clearly aware that the defendant had not signed any agreement for sale with the plaintiff which satisfies the provisions of section 3(3) of the *law of contract act*, the defendant's actions were rogue, dishonest, unreasonable, unconscionable and outrightly greedy by seeking to revise the price of the house to Kshs 6.5 million.
15. It was thus submitted that the plaintiff has proved his case on a balance of probabilities and is entitled to the refund of his money (Kshs 3,800,000/=) together with interest at commercial rates (18% pa) totalling Kshs 13,007 917.83/- as prayed in the plaint and thereafter interest at court rates from January 1, 2014 until payment in full.



16. The justification of payment of commercial interest rates is that, had the defendant borrowed the money for construction of the house from any lender or bank, it was going to pay interest on such borrowed money at commercial rates of (18%). Secondly, that despite the plaintiff having paid Kshs 3,800,000/= to the defendant between 2006-2012, the defendant completed the house and sold the same to a third party.
17. The plaintiff relied on the case of *Sedena Agencies Ltd -v- Presbyterian Foundation* [2017]eKLR.
18. On its part, the defendant submitted that there was no written sale agreement between the parties and that if the court therefore finds that the defendant is to refund the money with interest, the court would have effectively re-written the contract between the parties.
19. Further submission was that the plaintiff failed to pay the money within the stipulated time and that the post election chaos witnessed in 2007-2008 caused the escalation of the cost of materials in between the period. That the defendant offered to refund the plaintiff's money in the 2009 but he chose not to receive the refund and continued paying including the excess of 200,000. That this implies that the plaintiff was willing to abide by the new price and it is thus unfair for him to claim a refund of the money allegedly paid despite having by his conduct accepted the new purchase price.
20. That from the plaintiff's conduct, he is estopped from laying claim for compensation at the rates stated as he is now unjustly seeking to enrich himself as he declined the initial offer.
21. It was submitted that in sum total, the plaintiff failed to prove his case to the required standards.

Analysis and determination

22. The facts of this matter are uncontroverted. The plaintiff expressed interest in one of the housing units which the defendant was to construct for sale. The defendant gave him the conditions which he accepted and paid the sums of money amounting to Kshs 3,800,000 which he now wants refunded to him at commercial interest rate of 18% already calculated and included in the principal sum totalling kshs 13,007,917.83 cts after the defendant sold the said house to a third party.
23. The defendant contests this position stating that there was no formal agreement entered into between it and the plaintiff and further that the defendant offered to refund this money in the year 2009 and that the plaintiff having continued to pay the money is estopped from claiming a refund at this time. That in any case, the plaintiff failed to complete his part of the bargain by failing to pay within the stipulated period.
24. I have considered the pleadings, the evidence adduced by the plaintiff both oral and documentary evidence as per the documents filed in court and which were produced in support of his claim as exhibits as well as the parties' respective written. I find the following issues arising for determination:
 - a. Whether there existed a binding contract that was capable of being acted upon and enforced between the Plaintiff and the Defendant;
 - b. If the answer to (a) is in the affirmative, was there any breach and by which party;
 - c. Whether the purchase price communicated to the Plaintiff was Ksh 3.6 million or Ksh 6.5 million;
 - d. What remedies are available to the Plaintiff;
 - e. who should bear costs of this suit?



25. On the first issue, it is common ground that the parties herein never executed a formal sale agreement. What we have on record is a letter dated March 15, 2007 from the defendant's agent Tumsifu Agency, addressed to the plaintiff. The said letter reads:

“We are pleased to inform you that you have been allotted the above captioned house at a purchase price of Kshs 3,600,000/- only.

We hereby confirm that to date you have paid Kshs 800,000/- being part payment of the purchase price leaving a balance of kshs 2,800,000.00 yet to be paid. You are expected to pay a sum of kshs 2,080,000.00 during construction and final payment of kshs 720,000.00 on completion.

Your house is expected to be ready within the next six months from the date hereof.

Thanking you in advance for your cooperation, yours faithfully.

signed

Erastus Ian Khandira.”

26. I find the letter dated March 15, 2007 unequivocal that the plaintiff had been allocated the house contained in the letter. The plaintiff asserted that the letter contained details of the intended purchase as well as the amount so far paid. The defendant on its part contended that there was no sale agreement.

27. Section 3(3) of the *Law of Contract Act* provides that all contracts dealing with disposition of land shall be in writing. The proviso under Section 3(5) of the *Act* provides that: “The term of a contract may be incorporated in a document either by being set out in it or by reference to some other document.”

28. In the circumstances of this case, I find the letter expressed the intention of entering into a contract of sale of a house. The fact that the plaintiff was allotted the house in question goes to demonstrate the intention of the parties.

29. On the second issue, the plaintiff pleaded that he had cumulatively paid the sum of kshs 3,800,000/- between the years 2006 and 2012 and he produced various receipts and correspondences between himself and the defendant. The plaintiff prepared a statement of account found at page 30 of his bundle of documents produced in evidence as exhibits showing that he had paid the sum of Kshs 3,800,000/-.

30. Under Sections 107, 108 and 109 of the *Evidence Act*:

107. Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

108. The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

31. The defendant then increased the cost of the house on account that the cost of construction materials had gone up after post election violence. The defendant never adduced any evidence to substantiate the above claim which remained an allegation as no evidence was tendered. The implication of the above is that the defendant having failed to give a satisfactory explanation of the reasons for enhancement of purchase price, it was the guilty party who reneged on the memorandum of understanding with the plaintiff and having asked the plaintiff to pay upwards by more than three



quarters of the original purchase price, I find that the plaintiff was in no way in breach of the Memorandum of understanding.

32. I further find that the plaintiff has proved on a balance of probabilities that he paid to the defendant the sum of kshs 3, 800,000/- which evidence was uncontroverted.
33. On the third issue, the letter addressed to the plaintiff was clear that the purchase price was kshs 3,600,000 and not 6.5 million. There is no agreement for the 6.5m which latter figure was communicated to the plaintiff in 2009 three years after the memorandum of understanding for kshs 3.6m and without renegotiating with the plaintiff. The plaintiff paid kshs 3.8 million, kshs 200,000 being an additional sum as he was trying to renegotiate the dispute amicably with the defendant.
34. The plaintiff claims against the defendant the sum of Kshs 13,007, 917.83/- with interest from 1st January, 2014. The issue here is whether the plaintiff is entitled to the sum sought.
35. The plaintiff asserts that the sum of Kshs 13,007,917.83/- is arrived at by applying 18% commercial interest rates on the sum of Kshs 3,800,000/- while the defendant contended that this assertion beats the in duplum rule in that the sum is triple the sum paid.
36. Section 26 (1) of the Civil Procedure Act provides as follows regarding interest:

“Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

37. From the pleadings, I gather that the plaintiff paid the sum of kshs 200,000/- in October 2012, being an additional sum to the purchase price before the defendant sold the house to a third party.
38. On the issue of interest, I am guided by the Court of Appeal decision in Alba Petroleum Limited v Total Marketing Kenya Limited [2019] eKLR, where it was held that if no evidence is provided regarding the rate of interest as claimed in the plaint, the claim must then fail. The Court held that:

“We have evaluated the evidence on record. The respondent did not lead any evidence to prove its claim of interest at the rate of 26% per annum. There is no evidence on record proving the prevailing commercial rate of interest. The trial court did not give any reasons for awarding 20% rate of interest. There is no evidence on record to demonstrate 20% per annum was the prevailing commercial rate of interest. In the final analysis, this appeal is partially successful on the issue of rate of interest. Guided by case law, the respondent is entitled to the court rate of interest with effect from the date of filing suit.”

39. In R. J. Varsani Enterprises Ltd v Pentoville Holdings Ltd [2021] eKLR Mabeja J stated as follows:

“Whilst the defendant proposes 7% to 11% the plaintiff submitted for 14%. Both offered no evidence. Since the plaintiff is entitled to interest, the Court shall apply the conventional court rate of 12%. Interest shall therefore be chargeable at 12% on all delayed payments for the various days of delay as per the agreement until when final payment was made. This will be undertaken by the Deputy Registrar of this Court.”



40. I am aware of the decision by Kaniaru J in *Margaret Atieno Mashashi & another v Arch Diocese of Kisumu & 3 others* [2014] eKLR where it was held:

“The more prudent thing to do is to order that the plaintiff gets back her money with interests. The interests have to be those that reflect the current market realities. Accordingly, let the plaintiff get all the money she paid. There are the banks where the plaintiffs paid that money. These banks have rates that they apply when they lend out money to people. I deem it here that plaintiffs must be taken to have lent out money to the defendants to invest. Such money was paid through the banks where it was deposited. Let the interests rates applied by those banks apply.

41. However, the above decision which is persuasive and not binding on this court can be distinguished from the present case for reasons that: there was no evidence that the plaintiff paid monies to the defendant through the bank or that he took a loan from the bank to purchase the house in issue; the bank's commercial rates were not specified in the said case and in this case, the plaintiff has simply calculated the rate to be 18% per annum without stating how he arrived at that percentage with no evidence that that is the commercial rate then prevailing. I find that holding by the learned judge not clear hence not applicable to this case verbatim although the defendant was the same over a similar subject matter.

42. For the above reasons, and in line with the spirit of section 26(1) of the *Civil Procedure Act* as reproduced above, I find that the plaintiff is entitled to pre institution of suit interest at court rates on the initial sums paid being kshs 3.6 million from the respective dates when he paid the said sums of money to the defendant until the date when the defendant offered to refund the plaintiff the said money in 2009 after it increased the purchase price for the house. Thereafter, the plaintiff shall be entitled to interest at court rates on kshs 200,000 from the date of payment in 2012 until the filing of this suit. This is because had the plaintiff accepted the refund or filed suit in 2009, he would have mitigated the loss. On the other and, the defendant knowing very well that it could not deliver the house to the plaintiff at the initial quoted cost, went ahead and received the extra payment of kshs 200,000 in 2012 yet it had no house to pass to the plaintiff.

43. The plaintiff shall also be entitled to interest on the whole sum of kshs 3.8m from the date of filing suit in court until settlement in full.

44. For avoidance of doubt, the Court interest rate is 12% per annum.

45. On the issue of costs, I find that the plaintiff being the successful party is entitled to the costs of this suit. I award him costs of this suit to be taxed on the scale of the lower court as the suit herein could have been filed in the Magistrates' Court which has the pecuniary jurisdiction to hear and determine the same. I make no orders on interest on costs.

46. The Deputy Registrar of this court shall calculate the interest as awarded above.

47. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF FEBRUARY, 2023

R.E.ABURILI

JUDGE

