



Clonbrook Properties Limited v Dave Flowers Limited (Civil Case 3 of 2021) [2023] KEHC 24141 (KLR) (24 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24141 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 3 OF 2021
DKN MAGARE, J
OCTOBER 24, 2023**

BETWEEN

CLONBROOK PROPERTIES LIMITED PLAINTIFF

AND

DAVE FLOWERS LIMITED DEFENDANT

JUDGMENT

1. There is a clown who once told me that there is enough for everybody’s need but not enough for everyone’s greed. It reminds the debate between portia and shylock in the Merchant of Venice.

“Portia: It must not. There in no power in Venice coulter a decree established. I will be recorded for a predecence. And may an error by the same example will rush into the state it cannot be

Ahyloce: A Daniel come to Judgment Tea, a Daniel O. wife you Sujudge, how do I honour thee!

Shylock: as his breast. So says the bond, doth not, notable Judge? Nearest his heart. Those are the very words.

Portia: It is so. are there balance here to weight the flesh.”

2. The discussion is for the Merchant to get by bond of the flesh. The plaintiff herein has come to court claiming his pound of the flesh. However, as the Merchant of the yore, he must come with weight to measure it, last. However, this bond “has something else. This bond doth give there were no jot or blood. The words expressly are aa pound of flesh. Taken then they bond, take though they pound of flesh, but in the cutting, it thus dost shed one drop of Christian blood”

3. The Merchant of Venice lays the strict structures for enforcement of agreements. Each agreement is taken to constitute a whole agreement with no extreme or extrinsic evidence to explain the same. The



plaint was filed on 24/5/2017 in the Chief Magistrate's Court. The same was transferred to this court by an order given.

4. The sale related to a purchase price of 280,000,000/=. The completion dated was to be 90 days after the date of extension. The plaintiff pleaded that the clauses 4 gave, conditions that time is of essence. Clauses 1.4 and 1.5 provided for 17% interest.
5. The plaintiff claimed for Kshs. 5,281,643.80 being delay for 45 days. In the plaint there is no pleading on who the completion took place, and where it ought to have taken place. The country of 45 days is not given. The Court needed to verify the days and when the completion was done.
6. The defendant filed defence under protest stating that the lower court lacked jurisdiction. They stated that clause 9 provides for 21 days' Notice in case of breach. The clause provided that if the remedy is not done, then the vendor is entitled to the listed remedies; that is: -
 - a. Same for unpaid gives.
 - b. Rescind the agreement
 - c. Forest as retain deposit.
 - d. Resell the property.
7. Clause 10 incorporated had society conditions of sale.
8. They state that no completion notice was served. They state that interest is served only upon a completion notice being issued and non compliance.
9. They stated further that vide clause 4.3 the sale was conditional to the vendor's advocate recurring are acceptable undertaking time Advocates of I & M Bank to the financiers of the purchase price. There was delay in release of the document as the same were sent on 14/9/2011 since the property was charged to a third party. The defendant denied. The state that they made the payment within 7 days of receipt of the bundles documents. They state that having been paid within 7 days upon completion and the purchase price having been paid, the claim for 5,281,643.80 for 45 days at 17% per amount is without legal basis.

Evidence

10. The plaintiff testified through Hussein Bhanji, the plaintiff's managing director. He adopted his statement which is undated but filed on 14/5/2017. He prayed for 5, 281, 643.80 being accrued interest. He did not set out how the amount was arrived at and the dates concerned in the 45 days within the plaintiff, it is not explained how 252,000,000/= and when it arose.
11. The plaintiff produced 4 letters from Archer and Wilcock Advocates to A B Patel and 3 letters from A B Patel to archer and will cocle. A sale agreement dated 24/5/2011 and a demand letter dated 8/9/2016.
12. The letter of 5/11/2021 is not signed. It does not address who acts for which party. An unsigned letter has no probative value. It is not shown that it was even sent.
13. By letter dated 23/1/2012 the firm of AB Patel & Patel, though Vikram, Kanji stated that the firm was not involved in the undertaking. They state that they were requested to carry out registration of transfer and change, m, which they did with minimum delay in a strange twist of turns, the firm a letter dated 27/1/2012, stated that the firm of Patel & Patel were strangers to the agreement.
14. The plaintiff's witness was cross examined. He admitted there was a discharge change that was prepared 22 days after the proposed date of completion. There could not be completion without discharge. My



Understanding of charge was the business of the plaintiff. It was their duty to vail a title free from any encumbrances. By the date 90 days had lapsed, the discharge had not been done. It was 112 days after agreement was done, when the discharge was registered. The registration was to be after Transfer and discharge. It was to be within 7 days. These documents were to be provided by the vendor. He also stated that he could not give possession without payment. If there was default 21 days Notices was to be given. Thus was not given. There was no notice of breach given. The amount was paid within 7 days of registration. They confirmed that the defendant paid and did not commit any breach. He conceded that 110 days' delay was caused by the discharge. The agreement also does not indicate the property was charged.

15. The witness did not know when the defendant gave a professional undertaking. He stated that there was no dispute before completion.
16. DW1 was Hitesh Pravin Dave. He relied on his statement dated 12/5/2023. He stated that they agreed on 280,000,000. They paid 10% of the purchase price. The 2nd undertaking was come from the purchaser's advocates. The payment was made 7 days upon receipt of registered transfer. They relied on clause 9, related to 21 days' notice.
17. They adopted clause 10 of the 1989 Law Society conditions of sale. There were the plaintiff's financier's advocates, Ms Kiruti & Company who had not been disclosed. It is the plaintiff's fanciers who unsettled the balance. They purported to avoid the profession undertaking as explained in the letter of A B Patel & Patel advocates. The defendant was not party to the delay.
18. The plaintiff never exercised the clause of the agreement by issuing requisite notices. They predicate any interest on failure to comply with notice.
19. The defendant produced 6 exhibits. The discharge of charge dated 14/89/2021 was registered on 21/9/2011. He was cross examined. He stated that pursuant to clause 5 (a), it was clear they were being financed. An undertaking was needed from their banker. He blamed the seller for not indicating that the law was charged. The witness blamed the plaintiff bankers for the delay.
20. He stated that there was no delay in disbursement of funds. On Re Examination he stated that there were undertakings given. He stated that there was no breach. The 21 days' notice was not given. The suit was concluded. The plaintiff sought to improve their case though an application dated 6/6/2023. I dismissed the application as parties had already closed their cases.

Analysis

21. This is an unfortunate case. The plaintiff and defendant entered into an agreement. The plaintiff did not disclose that there wa a change on the suit land. In the process of undertaking the plaintiffs financiers turned up. There was various undertakings resulting in a discharge of charge. On 11/9/2021. There was a loss of time in dealing with the plaintiff's banker's Giro Commercial Bank Ltd. The period of 90 days from 24/5/2021 had lapsed before, the Plaintiff could give the defendant a clean title.
22. At that point, it was the plaintiff in default. The defendant moved with speed and alacrity and had the land registered charged and money given within 7 days of registration. The plaintiff did not plead on when the breach occurred and how.
23. The claim for interest is for breach of contract. I have perused the file and I have not seen the particulars of breach set out. The money is not gratuitously given but only if there is breach.



24. Further it is imperative that while pleading, particulars of any breach to be pleaded. In Order to prove breach to allow the interest to be applied, particulars need to set out Order 2 Rule 10 provides are doth: -

“Particulars of pleading [Order 2, rule 10.]

- (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing—
 - a. particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
 - b. where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.
- (2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.
- (3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party— (a) (b) where he alleges knowledge, particulars of the facts on which he relies; and where he alleges notice, particulars of the notice. (4) An order under this r. shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reason. (5) No order for costs shall be made in favour of a party applying for an order who has not first applied by notice in Form No. 2 of Appendix B which shall be served in duplicate. (6) Particulars delivered shall be in Form No. 3 of Appendix A which shall be filed by the party delivering it together with the original notice and shall form part of the pleadings.

25. Further there are no crucial dates. It is thus impossible to count 45 days for which breach occurred. The plaintiff must set out all the full case. Events for which they fully complied and events that breach occurred on the part of the defendant. I have already found that the plaintiff did not prove that they had carried out all their condition precedent before 24/8/2011.

26. If discharge was done by the plaintiff's bankers on 14/9/2021, then it is the plaintiffs to blame for any delay. The defendant had 90 days from 21/9/2011 to complete the transaction. They completed long before that.

27. Thirdly the parties agreed that in case of default a notice was to issue as doth:

“If the Purchaser shall fail to comply with any of the conditions hereof or of the condition subject to which this sale is made including the condition relating to the completion of the sale the vendor may give to the Purchaser at least Twenty One (21) calendar days' notice in writing confirming the Vendors readiness to complete the sale in all respects and specifying



the default and requiring the purchaser to remedy the same before the expiration of such notice and if the Purchaser shall fail to comply with such notice the vendor shall at the vendors option be entitled to do any of the following:

9.1.1 1.1 to sue the Purchaser forthwith for all sums due and unpaid by the purchaser under the terms hereof and for specific performance; or

9.1.2 1.2 to rescind this agreement, forfeit and retain the Deposit and resell or to otherwise deal with the Property.”

28. The remedies given in the said clause are specific remedies in clauses 9.11 and 9.12
29. The default could only occur, if the defendant had been notified by the plaintiff to complete. There is no notice showing the vendors readiness.
30. In this particular notice, it is the defendant who could invoke clause 9.2 since the delay up to 21/9/2011 was due to the vendor's fault, of not discharging the property, within the completion period. It occurred with a defendant on parties of the purchaser.
31. From clause 9.1, it is import that the signatory of readiness to complete be issued and the purchaser should have failed to remedy. In this case the plaintiff knew that they were at fault, hence less not issue 21 days not.
32. Further, though interest rate is given, the operative remedies are rescission, suing for unpaid, resell and retaining deposit. This options were not exercised. Without notice, the issue of the date the sums due did not arise.
33. The sum total of the matter is that there was no basis for the claim herein. The net results is that I find absolutely no merit in the claim herein. The suit is begging me to dismiss the same. I will oblige. The entire suit is dismissed in limine with cost to the defendant.
34. I also note that when the suit was transferred from the lower court due to the subject matter being Kshs. 280,000,000/= [though in actual sense, the dispute is over 252,000,000 the court, in Mombasa HCC 132 of 2018 ordered that the costs in that appeal do abide the outcome in this suit.
35. Now that the defendant has succeeded in this matter, the costs of that appeal shall be to the Defendant ordinarily I award cost with the determination of the suit. Given that there are two related suit I direct that the costs be taxed in both this suit and HCCA 132 of 2018 in the normal way.
36. Before, I depart, I need to express my disappointment on the nature and tenor of pleadings. It is imperative that pleadings ensure that crucial dates are set out. The parties cannot throw figures to court.
37. Further the nature of the orders sought must be particularized. In the case of *David Bagine vs Martin Bundi* [1997] eKLR, the court of Appeal stated as follows: -

“It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of *Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store*, Civil Appeal No. 5 of 1990 (unreported) and *Idi Ayub Sabbani v. City Council of Nairobi* (1982-88) IKAR 681 at page 684: "...special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in *Bonham Carter vs. Hyde Park Hotel Limited* [1948] 64 TLR 177 thus:



“Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it”

38. The court does not find any evidence of breach on part of the defendant. Any delay was on part of the plaintiff. Further crucial dates were not pleaded. It is a herculean task to know when the alleged amount arose

Determination

39. The upshot of the foregoing is that I make the following orders: -
- a. No merit in the suit. Consequently, it is dismissed with costs.
 - b. Given that the court in Mombasa HCCA 132 of 2018 (wrongly headed HCCC 132 of 2018) directed that cost in that suit shall abide the outcome of this suit, I therefore direct that the successive party, herein that is the defendant shall have costs of HCCA 132 of 2018.
 - c. The costs shall be taxed in the normal way.
 - d. The file is closed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 24TH DAY OF OCTOBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Miss Mureithi for the Defendant

Mr. Gitonga - Ms Muia holding brief for Mr. Gitonga

Court Assistant - Brian

