



REPUBLIC OF KENYA



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**Ngomanze Investment Limited v Sammy & another (Environment and Land
Case 107 of 2018) [2023] KEELC 16821 (KLR) (17 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 16821 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE 107 OF 2018
CA OCHIENG, J
APRIL 17, 2023**

BETWEEN

NGOMANZE INVESTMENT LIMITED PLAINTIFF

AND

**EDITH MUTHIKE SAMMY ALSO KNOWN AS EDITH
MULWA 1ST DEFENDANT**

**JOSHUA MBOLU MUREFU ALSO KNOWN AS JOSHUA MBOLU
MULEVU 2ND DEFENDANT**

JUDGMENT

1. Through a Plaint dated the 13th March, 2018 and amended on 20th February, 2019, the Plaintiff seeks the following prayers against the Defendants;
 - a. Kshs. 2,400,000 plus interest thereon calculated at court's rate from the date of filing the suit.
 - b. Kshs. 38,000 plus interest at the court rates calculated from the day of filing this suit.
 - c. Kshs. 29,800 plus interest thereon at court's rate calculated from the day of filing this suit.
 - d. Kshs. 150,000 being the cost of fencing the suit land plus interest thereon.
 - e. Cost of this suit plus interest at the rate of 14% per annum calculated from the date of judgment until payment in full.
 - f. Any other relief that the court may deem fit to grant.
2. The Defendants though duly served as evident in the various Affidavits of Service in the court record, failed to enter appearance nor file their Defence to controvert the Plaintiff's averments.
3. The matter proceeded for hearing where the Plaintiff called one witness.



Evidence by the Plaintiff

4. PW1 Daniel Mbuvi Mulandi, adopted his witness statement dated the 13th March, 2018 wherein he confirmed to be a Director of the Plaintiff and that the Company had passed a resolution on 7th December, 2017 allowing him to file the instant suit. It was his testimony that the Defendants had approached the Plaintiff with an offer to sell one acre to be excised from Plot 2730 within Katelembo Athiani Mavuti Ranching Cooperative Society, hereinafter referred to as the 'suit land', to them, stating that the 1st Defendant had purchased it from the late Mulevu Mboya and that it would be directly transferred to the Plaintiff by the 2nd Defendant upon confirmation of the Grant of Letters of Administration Intestate. PW1 explained that the agreed purchase price was Kshs. 3,800,000 and that the Plaintiff did make a payment of Kshs. 2,400,000 via electronic funds transfer as well as cash modes, a fact acknowledged in the Sale Agreement. PW1 confirmed that the Plaintiff thereafter took possession of the suit land. PW1 stated that the Grant of Letters of Administration Intestate was later confirmed on 31st May, 2016 but the same did not confer any interest to the Plaintiff, contrary to the earlier assurance by the Defendants. It was PW1's testimony that strange people did enter the suit land around the 23rd May, 2017 claiming to be bona fide owners of the suit land and cited ELC Case Number 240 of 2017 where other parties claimed to have bought the entire plot number 2730 in 2014 with the 2nd Defendant being a witness to the said sale. PW1 further clarified that their agreement with the Defendants had envisaged such a dispute in Clause 2.1 and in case of default, the Defendants were expected to refund the paid amount and any other monies payable, or enforceable by court action. He did confirm that he had since rescinded the Sale Agreement vide a letter from his advocates dated the 23rd February, 2018 and sought for a refund of the Plaintiff's money, advocate's fees plus interest but the letter elicited no response. He averred that the Defendants are yet to make any payment of the sum tabulated at Kshs. 2,617,800 as at 26th November, 2019 despite their undertaking to do so. The Plaintiff produced the following documents as exhibits: Sale Agreement dated 25th November, 2014; Computer print-out evidencing electronic funds transfer to Edith Mulwa; Receipt No 837 dated 28th November by J.M Mutua Advocates; Receipt No. 2536 by Land Plan consultants; Letter dated 23rd February, 2018 to 1st Defendant; Certificate of Grant dated 31st June, 2016; Postal corporation receipt dated 26th February, 2018; Directors' resolution dated 23rd February, 2018; Demand letter to the Defendants; Letter by Mr. Joshua Mbolu to Messrs Joe Mwanthi Advocates dated 6th November, 2019 and Letter by Messrs Joe Mwanthi & Co. to Joshua Mbolu Mulevu.

Submissions by the Plaintiff

5. In the Plaintiff's submissions, it reiterated its evidence as presented and insisted that it indeed entered into an enforceable Sale Agreement with the Defendants which they breached. It relied on provisions of Section 3(3) of the *Law of Contract Act* that provided that a valid contract for disposition in land should be in writing, executed by the parties and attested to. It further argued that the Defendants had breached the agreement as evidenced by the existence of a suit in respect to dispute over the suit land, being ELC No. 240 of 2017. It contended that the Defendants had committed fraud in the selling of the suit land to it, being fully aware that they had no legal capacity to do so. It relied on the particulars of fraud as laid out under paragraph 17A of the amended Plaintiff. On whether it was entitled to the prayers as sought, it relied on the case of *General Properties Limited v Saika Two Estate Developers Limited* (2021) eKLR where the court held that a person should not be allowed to keep an advantage which he has obtained by fraud. It concluded that it had proved specific damages as pleaded, by means of receipts and that the same ought to be granted. It further relied on the following decisions in support of its case: *Broadspect Investment Limited v Francis Njoroge Mwangi* (2017) eKLR; *Ratital Ghela Shah v*



Analysis and Determination

6. Upon consideration of the Amended Plaintiff, testimony of the witness and exhibits, the only issue for determination is whether the Plaintiff is entitled to the orders as sought in the Plaintiff.
7. This matter is premised on an alleged land Sale Agreement dated the 25th November, 2014 between the Plaintiff and the Defendants over the suit land. The Plaintiff claims to have paid a total of Kshs. 2,400,000 and constructed a fence worth Kshs. 150,000. It was PW1's testimony that the Defendants had claimed to be the bona fide owners of the suit land but it later turned out that there was a dispute over the ownership of the said suit land and the Defendants allegedly did not have a valid title to it.
8. On validity of a contract, Section 3(3) of the *Law of Contract Act* provides that a valid contract for disposition in land should be in writing, executed by the parties and attested to. Since there was indeed a Sale Agreement entered into between the Plaintiff and the Defendants, I find that there was indeed a valid contract between the parties herein.
9. The Plaintiff contended that the Defendants fraudulently obtained monies from it, knowing fully well it did not have capacity to transact over the suit land. It further argued that the Defendants had breached the agreement as evidenced by the existence of a suit in respect to dispute over the suit land, being ELC No. 240 of 2017. The Plaintiff produced a Letter dated the 6th November, 2019 written by the 2nd Defendant to the firm of messrs Joe Mwanthi Advocates who were acting for it, wherein he confirmed that he received the court pleadings as well as acknowledged the amount owed to the Plaintiff. I note in the said letter, the 2nd Defendant requested the Plaintiff to hold any adverse action until 19th November, 2019 when they expected to have settled the entire debt. The contents of the said letter including the Plaintiff's claim as per the Plaintiff remain uncontroverted.
10. I note the Plaintiff as per the explanation of PW1 including the proof of payment produced as an exhibit, indeed made substantive payment of Kshs. 2,400,000 via electronic funds transfer as well as cash modes, which fact was even acknowledged in the Sale Agreement. This was in accordance with the agreement of the parties in respect to payment of purchase price as per the said Sale Agreement but the Defendants are yet to transfer the suit land to it.
11. I wish to reproduce Clause 2.1 and 2.2 of the Sale Agreement which provides as follows:
 - 2.1. In case of default by the vendor, through herself or any person claiming interests over the property, that may lead to dispute over ownership of the property, the vendor will refund the amount of purchase price plus interest of 20% p.m from the date of this agreement till payment in full. The vendor will compensate the purchasers of any developments done on the property at market value at the time of default.
 - 2.2. Clause 2.1 above will be enforced in court of law summarily against the vendor."
12. *Black's Law Dictionary* 8th Edition at page 200 defines breach of contract as follows:

Violation of contractual obligation by failing to perform one's own promise by repudiating it or interfering with another party's performance."
13. From a reading of the Sale Agreement, I note the Defendants indeed breached the terms of the contract as had been agreed. It emerged in evidence that the Plaintiff has since rescinded the Sale Agreement vide a letter from his advocates dated the 23rd February, 2018 and sought for a refund of the Plaintiff's money, advocate's fees plus interest but the said letter failed to elicit a response.



14. In the case of *Millicent Perpetua Atieno v Louis Onyango Otieno* (2013) eKLR, the Court of Appeal while dealing with and issue of assessment of damages over breach of contract, cited in approval paragraph 1183 of the *Halsbury's Law of England*, Volume 12, 4th Edition and stated that:

Where it is the vendor who wrongfully refuses to complete the measure of damage is similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain...”

15. See also the case of *General Properties Limited v Saika Two Estate Developers Limited* (2021) eKLR.
16. Based on the facts as presented while relying on the excerpt I have quoted above as well as associating myself with the decisions I have cited, I find that the Plaintiff is indeed entitled to a refund of the purchase price it had paid the Defendants as well as interest. From the receipts produced, I further find that the Plaintiff has proved special damages as against the Defendants and is hence entitled to compensation as had been agreed upon by the parties.
17. It is against the foregoing that I find that the Plaintiff has proved its case on a balance of probability. I will proceed to enter Judgment in its favour as against the Defendants and make the following final orders:

The Defendants be and are hereby directed to undertake the following:

- a. Payment of Kshs. 2,400,000 plus interest thereon calculated at court's rate from the date of filing the suit.
- b. Payment of Kshs. 38,000 plus interest at the court rates calculated from the day of filing this suit.
- c. Payment of Kshs. 29,800 plus interest thereon at court's rate calculated from the day of filing this suit.
- d. Payment of Kshs. 150,000 being the cost of fencing the suit land plus interest thereon
- e. Cost of this suit plus interest at the rate of 14% per annum calculated from the date of judgment until payment in full.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 17TH DAY OF APRIL, 2023

CHRISTINE OCHIENG

JUDGE

