Jahadhmy & another v Fort Jesus Sea View Apartments Ltd (Environment and Land Miscellaneous Application 1 of 2021) [2023] KEELC 18362 (KLR) (20 June 2023) (Judgment)

Neutral citation: [2023] KEELC 18362 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION 1 OF 2021

NA MATHEKA, J

JUNE 20, 2023

BETWEEN

RUKIYA ALI MOHAMED JAHADHMY ..... 1ST APPLICANT

MOHAMED KHAMIS MOHAMED MAZRUI ..... 2ND APPLICANT

AND

FORT JESUS SEA VIEW APARTMENTS LTD ..... RESPONDENT

JUDGMENT

1 This is the application of Rukiya Ali Mohamed Jamadhmy and Mohamed Khamis Mohamed Mazrui who claim to have purchased and paid a deposit for the properties known as Apartment numbers A4 and B4 and A5 and B5 respectively contracted on Plot No 280 of Section VI Mombasa Island Registered as CR No 3600 by a Sale agreement dated February 17, 2018 and have therefore brought this Summons for determination of the following questions;

1. Are the Applicants entitled to rescind the Sale Agreement between the Applicants and the Respondent dated February 17, 2018?
2. Has the Respondent breached the terms and conditions of the Sale Agreement by failing to complete the construction and transfer of the Apartments to the Applicants?
3. Are the Applicants entitled to a refund of the deposit paid of Kshs 3,000,000/= being the total for the deposits paid for Apartments A4 & B4 and A5 & B5 plus interest at 12% per annum from the date of payment of the deposits?
4. Are the Applicants entitled to damages for breach of contract?
5. Who is to bear the costs of this suit?

2 This court has considered the evidence and the submissions therein, this matter was filed by way of originating summons and the Respondent entered appearance but failed to file any defence. The matter proceeded by way of oral evidence where PW1 the 1st Applicant testified that she entered into an agreement with the Respondents and paid a deposit of Kshs 1,2000,000/= being deposits for apartments A4 and B4. The project never took off and she never got the apartments nor her deposit back. PW2 the 2nd Applicant entered into a similar agreement and paid a deposit for apartments A5 and B5 and paid a deposit of 1,800,000/= and suffered the same fate. The Respondent offered no defence despite entering appearance in this matter. PW1 has produced the two sale agreements both dated February 17, 2018 for Apartments 4A and 4B respectively between herself and the Respondent. The total purchase price is kshs 4,000,000/= for each Apartment and the contracts are duly signed and witnessed by both parties. Similary, PW2 produced two contracts for his apartments 5A and 5B also properly executed. Clause 2 of the agreements state that the deposit would be Kshs 800.000/= and the balance would be paid within 42 monthly installments for the remainder.

3 In order to determine whether or not there was breach of the contract, this Court must first determine whether there was a valid contract in place. The Applicants have alleged that they entered into sale agreements with the Respondent for the purchase of the suit properties. Further that the same was reduced into writing and signed by all the parties. Section 3 (3) of the *Law of Contract Act* provides that;

> " 3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless —
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> (a) the contract upon which the suit is founded—
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> (i) is in writing;
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> (ii) is signed by all the parties thereto; and
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> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:
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> Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust".

4 The Court has carefully perused the sale agreement produced as Exhibits by the Applicants and noted that the same are in writing and signed by the parties. They thus met the requirements of Section 3(3) of the Contract Act. Further the agreements for sale contain the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreements confirm that the same are valid sale agreements and enforceable by the parties. See the case of Nelson Kivuvani vs Yuda Komora & Another, Nairobi HCCC No 956 of 1991, where the Court held that;

> " the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract".

5 The sale agreements as discussed above have met all the requirements between the Applicants and the Respondent and therefore the sale agreements between the two parties are valid and they thus met the requirements of Section 3(3) of Contract Act. 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".

6 As the Court had earlier held that the Applicants' evidence remained uncontroverted and having held that the contracts were valid, the Court will then interrogate whether there was breach of the Contract. The terms of the contract were that the Applicants would buy from the Respondent four Apartments at Kshs 4,000,000= each and a deposit was paid of a total of Kshs 3,000,000/= as per documentary evidence produced before this court. The Applicants produced swift deposit slips dated March 15, 2018 and acknowledgement receipts from the Respondent dated March 16, 2018. The said apartments have never been delivered to date and were never constructed. The Respondent took the deposit, failed to deliver and has offered no explanation. I find this is a clear breach of the contracts entered between the said parties.

7 What remedy should this court award in this circumstance? The granting of the equitable remedy of specific performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative. See the Case of *Reliable Electrical Engineers Ltd vs Mantrac Kenya Limited* (2006) eKLR, wherein Justice Maraga (as he then was) stated that:

> "Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles"
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> "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
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> illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant."

8 As already found and held by this Court, there was a valid sale agreement by the parties that was duly signed. Further the said agreement has been vitiated as no Apartments exist. This Court will not take the risk of ordering specific performance with full knowledge that the Respondent might not be in a position to deliver the said Apartments even if the Applicants were willing to pay the balance of the purchase price due to the Respondent's fraudulent behaviour of not constructing anything from 2018. The Court finds that the suitable remedy in this case would be a refund of the deposit already paid to the Respondent by the Applicants.

9 The second issue is whether the Applicants are is entitled to compensation by way of damages given that the Respondent is in breach of the contract. In the case of *James Maranya vs. South Nyanza Sugar*

Co. Ltd (2017) eKLR the Court dealt with the issue of the remedies in breach of contracts and stated that;

> " 16. .... It is well settled in law that general damages cannot be awarded on a claim anchored on a breach of contract. In affirming that position, the Court of Appeal in the case of Joseph Urigadi Kedeva vs. Ebby Kangishal Kavai Kisumu Civil Appeal No 239 of 1997 (UR) emphatically expressed itself thus:
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> .....As to the award of Kshs 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract.....We respectfully agree. There can be no general damages for breach of contract.....
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> 17. The reason as to why general damages cannot be awarded in cases of breach of a contract was explained in the case of Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015) eKLR as follows:
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> The next question is whether the appellant was entitled to damages as a result of the breach. 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. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No 154 of 1992 (UR)."

10 The remedy arising from breach of contract is therefore in the nature of special damages. It is settled that a claim on special damages must be specifically pleaded and proved. (See the Court of Appeal in Coast Bus Service Ltd vs Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No 192 of 92 (UR) and Charles C. Sande vs Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No 154 of 1992 (UR). In this case the Applicants prayed for damages for breach of contract these were not specifically pleaded nor were they proved and the same cannot be awarded. I therefore find that the Plaintiffs have proved their case on a balance of probabilities and I grant the following orders;

1. A refund of the deposit paid of Kshs 3,000,000/= being the total for the deposits paid for Apartments A4 & B4 and A5 & B5 plus interest at 12% per annum from the date of payment.
2. Costs of this suit to the Applicants

11 It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF JUNE 2023.

N.A. MATHEKA

JUDGE