



**Lomoro v Spring Hillpark Limited (Environment & Land Case
E151 of 2021) [2023] KEELC 19144 (KLR) (27 July 2023) (Judgment)**

Neutral citation: [2023] KEELC 19144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E151 OF 2021**

JA MOGENI, J

JULY 27, 2023

BETWEEN

OLIVIA ADONG' GEORGE LOMORO PLAINTIFF

AND

SPRING HILLPARK LIMITED DEFENDANT

JUDGMENT

1. Vide a Complaint dated 27/04/2021 the plaintiff filed this suit against the defendant, because the defendant through its agents offered to sell to the plaintiff a three (3) bed-roomed apartment with DSQ in Westlands along Kileleshwa Road to be erected on L.R. No 209/14990/22 vide the letter dated 3/06/2014. The plaintiff agreed to purchase from the Defendant all that piece of property known as Apartment No. B2, Wing B situated on Title L.R No. 209/14990/22, which is one of the 31 apartments that was to be erected on referenced land for a consideration of Kshs. 17,550,000/=.
2. The said purchase was subject to certain terms and conditions. These were the payment plan and acceptance of the offer. Upon appending her signature in the said letter of offer which was produced in evidence as part of the documents for the plaintiff, confirmed acceptance of the following payment plan:-
 - i. Initial deposit 24.5% payable upon signing of the offer letter - Kshs 4,300,000= .
 - ii. On or before 30th March 2015 – Ksh 5,000,000
 - iii. On or before August 2015 -Ksh 2,300,000
 - iv. On or before 30th November 2015 2,450,000
 - v. Final deposit on or before 28th February 2016



3. It was the plaintiff's contention that while she complied with all the terms and conditions of the Agreement, including the payment of the Fifty Thousand (US \$50,000) deposit, the defendant failed to complete the transaction as required. Accordingly, the Plaintiff was constrained to file this suit vide the Plaint dated 27/04/2021, seeking Judgment in her favour against the Defendant has principally sought the following orders against the defendant: -
 - a. Rescission of the Agreement for sale
 - b. A refund of the total amounts paid to the Defendant totaling to Kenya Shillings Sixteen Million One Hundred Thousand (Kesh 16,100,000-) being the amount due and owing to the Plaintiff
 - c. Damages for the breach of contract by the Defendants.
 - d. Interest on (b) and (c)
 - e. Costs of this suit
 - f. Any further or other relief that this Honorable Court may deem just and fit to grant
4. She stated that through her advocate she requested on 10/12/2014 and received on 17/12/2012 a copy of the draft sale agreement and which she commented on and send back to her the defendant's advocate raising areas of concern which however were not incorporated in the proposed sale agreement. In the end she stated the defendant's advocates did not forward the completion documents to the plaintiff as required nor they did they forward the variation deed as had been requested by the defendant.
5. The plaintiff stated that despite not forwarding the completion documents including change of user and the variation Deed, the defendant's did not comply with the plaintiff's request to share the documents but they continued receiving payments from the plaintiff for the apartment.
6. Upon receiving the plaintiff's intention to sue, the Defendant's advocates then wrote to the plaintiff offering her an alternative apartment at a different location and at a price to be agreed upon. The plaintiff therefore having paid a total of Kesh 16,100,000 out of the Kesh 17,550,000 which was the purchase price and the defendant not willing to rescind the agreement contends that the defendant was in breach of the agreement and particularizes the breach as follows:
 - a. Failing to provide all the requisite documents for completion as stipulated in the Agreement for Sale
 - b. Failing to obtain the change of user as required to enable the transfer of the apartment.
 - c. Failing to adhere in time honored practices further codified under the Law Society Conditions of sale.
7. She produced copies of the Agreement for sale and Lease that she had duly signed in support of her case.
8. The Defendant, upon being served with the Plaint and Summons to Enter Appearance, filed a statement of defence dated 16/05/2022 denying the allegations made herein by the Plaintiff and stating that the delay occasion in completing the project was occasioned by unforeseen processes that were beyond their control necessitated by a boundary dispute with their neighbors. This led to the Nairobi City County stating that there was need to re-survey the suit land that was to house the suit property in order to verify the beacons and boundary of the suit land.
9. With regard to execution of the Deed of Variation, the defendant stated that the plaintiff's advocates were informed by the defendant's advocate vide the letter dated 24/06/2016, that the sale agreements



in the project should be standard and that since the parties had already executed a sale agreement then they should be bound by the terms in the said sale agreement.

10. The defendant further averred that since there was a delay in completion of the intended project, its advocates wrote to the plaintiff's advocates on 28/09/2020 apologizing for the delay and offering alternative complete apartments to the purchasers of Spring Hill Park who are not willing to wait for the project commencement and completion.

Plaintiff's Case

11. PW1- Dr Olivia Adong' Lomoro – The plaintiff was the only witness in this case. She adopted her witness statement dated 26/04/2021 together with a list of a bundle of documents dated 27/04/2021 with 39 documents in total which she asked to be adopted as her exhibits and the same was marked as PW1-Exhibit 1-39 in support of her claim. She testified that this was a voluntary purchase and she instructed the firm of PJ Kakad to act for her. It was here testimony that she conducted due diligence and she confirmed that she was buying an off plan and the unit was in construction. The sale price was Ksh 17,550,000.
12. She stated that on the letter of offer payments are listed as Ksh 4,300,000, Ksh 5,000,000, then Ksh 2,300,000, Ksh 2,450,000 and the last listed is the deposit and the figure is Ksh 5,500,000. It was her testimony that she adhered to the schedule as was made in the letter of offer though not strictly. The plaintiff testified that she made payments using a check off system although she did not adhere to the schedule.
13. The plaintiff also stated that she signed the sale agreement but the same was not witnessed by a lawyer and that the expected completion date of the project was March 2016. That at the time of filing of the suit she had paid a total of Ksh 16,100,000 the outstanding balance was Ksh 1,450,000. Further that it was now 7 years since the project started and it has never been completed. It was her testimony that the deed of variation that she sought from the defendant was never remitted to her. That since the project never took off the defendants have no reason to utilize the funds since the agreement that she produced at page 37 stated so. Her prayers are that the court may aid her to get a refund of her money from the defendant. With this the plaintiff closed her case.

Defense Case

14. The defendant took some time before filing their statement of defence and the trial bundle which contained their witness statement. On the date of the hearing 04/07/2022 they sought an adjournment which I did not grant since they never produced any document to attest to the fact that their witness was indisposed. I noted that the defence was merely seeking to delay the suit and declined the application for adjournment. The defendant did not have any witness and chose to close their case.
15. Despite the defendant closing their case they filed an application dated 8/07/2022 seeking to have the court arrest its judgment and vacate the judgment date that was slated for 15/11/2022. Further that the court sets aside the order dismissing the defendant/applicant's application for adjournment of hearing of the defendant's case and reopens the case for defendant in order to have its witness examined in open court.
16. The court granted the prayers and scheduled the matter for hearing on 14/12/2022 but the court was not sitting on this date so the matter was rescheduled to 27/03/2023 for hearing of the defence case. On this date the Counsel for the defendant made an application to have the defendant to be heard virtually. The plaintiff indulged the defendant and the court got the defendant to be heard virtually integrating a hybrid hearing.



17. DW1- Daniel Ojijo Agili – He adopted his witness statement dated 30/06/2022 and the list of bundle of documents of even date with nine (9) documents marked as DW1-Exh 1-9. It was his testimony that the suit property was initially acquired by directors of Hillpark in May 2004. However, there was a mix up that arose. The property was part of a big parcel owned by Teleposta and then it was subdivided into 3 titles which were LR 209/14990/21, LR 209/14990/22 and LR 209/14990/23. That given the three titles there was a mix up of the titles and the survey plan in what was assigned to the purchasers. The titles did not match the parties’ respective plots on the ground. The mix up was resolved by parties who were each allocated the respective parcels agreeing to exchange titles to the parcels consequently the transfers by way of exchange were duly registered.
18. He testified that LR No. 209/14990/22 which had been registered in the name of Peter Gichuki Kinguare was transferred on exchange to Stephen Mutuku Nzonzi and Fideline Mueni Sila. And LR No. 209/14990/21 was transferred to Peter Gichuki Kingara. The mismatch between the registered survey plans and the actual plot held by the 3 property owners was thus resolved.
19. It was his testimony that the Spring Hill Park Limited was incorporated in 2015, by its directors Stephen Mutuki Nzonzi and Mueni Sila for the purposes of undertaking the construction of an apartment block on the suit property dubbed Pre-Hill Park apartments. He testified that he was appointed as managing director of the defendant company and his main task was to handle the marking, management and development of the apartments through the Villa-Care Limited.
20. He testified that the owners of the land had already invested some capital into the project prior to construction.
21. In cross-examination he testified that the title mix-up was resolved in 2020. That the transfer to Peter Kingara was due in 2004, and he exchange of transfer to Stephen and Fedeline Mueni was done in 2009 and he subsequent transfer to Spring Hill was done on 3/03/2015. That the title to the suit property herein was in the name of the defendant in 2015. With this the defendant closed their case.
22. The parties were directed to file their submissions.

Determination

23. Having read and considered the pleadings, the evidence adduced at the hearing by the parties the rival written submissions and all other materials placed before me, the issues that commend themselves for determination are as follows; whether the defendant is in breach of the terms of the agreement of sale of LR 209/14990/22? Whether the plaintiff is entitled to the reliefs sought?
24. It is not in dispute that the plaintiff’s case is uncontroverted. That being the case she retains the burden to proof her case, albeit, on a balance of probabilities.
25. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of *Rufale vs Umon Manufacturing Co. (Ramsboltom)* (1918) L.R 1KB 592, Scrutton L.J. held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”



26. Equally in the case of Attorney General of Belize et alvs Belize Telecom Ltd & Another (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd vs Northwest Metropolitan Regional Hospital Board (1973) 1 WLR 601 at 609, held as follows:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

27. This court is reminded that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchaser’s conduct is such as to amount to a repudiation of the contract, and the parties can be restored to their former position. This position of law is provided in Halsbury’s Law of England Volume 42, 4th Edition at paragraph 242.

28. I have perused the undated sale agreement duly executed by the plaintiff and defendant forwarded by the advocate of the plaintiff vide the letter dated 11/11/2015 to the advocate for the plaintiff. Clause 4.5 of the agreement provided that the completion of the sale and purchase was to take place by notice to the other party where the provisions of clause 4.6 would be invoked and clause 4.6 provide that within (15) days from the date of service of such notice the lease shall be completed and that time would be of the essence in the agreement in relation to the provision of Clause 4.6.

29. I also note that in the definition and interpretation the Completion Date has been stated to mean the date falling thirty (30) working days after issuance of Certificate of Occupation. Further the Estimated Completion Date is provided under Clause 6.2 to mean 30th June 2016 or such earlier or later date as may be permitted pursuant to the provisions of paragraph 6.5. The sale agreement between the Plaintiff and Defendant did not provide for rescission but provided that the Law Society Conditions of Sale (1989 Edition) would apply, so far as they were not inconsistent with the conditions contained under the sale agreement.

30. The Law Society Conditions of Sale (1989 Edition) provided for rescission under Condition 11 as follows:

“Recession

1. Where a purchaser makes an objection or a requisition under Condition 10 with which the vendor is unable to comply or with which he is unwilling to comply on reasonable grounds of difficulty, delay or unreasonable expense, the vendor may give to the purchaser written notice referring to this Conditions, specifying his grounds and requesting withdrawal of the objection or requisition within a specified period being not less than seven (7) days.
2. If the purchaser to withdraw the objection or requisition with the period specified by the notice, the vendor may by notice in writing to the purchaser rescind the contract.



3. On recession the vendor shall repay to the purchaser his deposit and any payment of purchase price without interest and the purchaser shall return to the vendor all papers belonging to the vendor.
 4. The purchaser has no claim against the vendor for costs, compensation or otherwise.
 5. Where the contract becomes void under any law the provisions of sub-conditions (3) and (4) apply.”
31. The plaintiff in this regard produced evidence of various correspondence between her advocate and defendant’s advocate. Over ten letters and six emails from the plaintiff are instructive as to the plaintiff’s willingness to complete the sale. The said letters and emails also requested the defendant to avail the completion documents and to incorporate the changes the plaintiff was proposing.
 32. It is not disputed that it was not until a demand letter to sue that the defendant made an offer for an alternative apartment to be purchased by the plaintiff on new terms and this as the plaintiff stated was after a period of more than 6 years since the parties entered into the contract and the defendant had not provided completion documents or refunded the amounts paid by the plaintiff.
 33. Seeing that the transaction between the two parties did not go through, it follows that somehow somewhat, there was certainly a breach of the agreement.
 34. The Black’s Law Dictionary, 9th Edition, page 213 defines a breach of Contract as follows;

“a violation of a contractual obligation by failing to perform one’s own promise, 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”.
 35. In *Gatobu M’Ibuutu Karatho v Christopher Muriithi Kubai* [2014] eKLR the Ugandan case of *Nakana Trading Co. Ltd v Coffee Marketing Board* 1990 – 1994 EA 448, was cited where the High court in Kampala held that;

“In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts. No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous....”
 36. In the Court of Appeal case of *National Bank of Kenya vs. Pipeplastic Samkolit (k) Ltd & Another* (2001) eKLR, it was held that;

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”
 37. Likewise, in the instant matter, this court will not in any way strive to re-write the contract for the parties. It is indisputable that the defendant breached the contract and therefore the plaintiff has proved her claim because the defendant has even admitted that they have received Kesh 16,100,000 as claimed by the plaintiff, however the defendant states that they are not able to reimburse the funds



already paid and that is why they are offering the plaintiff an alternative apartment in other projects completed since the funds had been utilized to mobilize the construction of the property which has stalled. This new project was not part of the agreement executed between the two parties neither was it made in the letter of offer.

38. In the end, I enter Judgment in the Plaintiff's favour and grant her the following Orders:
- a. I declare the contract between the plaintiff and defendant rescinded by the plaintiff.
 - b. I enter judgment for the plaintiff for the sum of KShs. 16,100,000/= being refund of the money paid to the defendant as purchase price
 - c. I decline to make any award as damages for breach of contract.
 - d. The plaintiff shall have the costs of this suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2023

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MOGENI J

JUDGE

In the virtual presence of:

Ms. Koki for the Plaintiff

Mr. Mbaji holding brief for Mr. Njoroge for the Defendant

Ms. Hannah Komu: Court Assistant

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MOGENI J

JUDGE

