



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL APPEAL NO. 723 OF 2016**

**CHAI HOUSING CO-OPERATIVE SOCIETY LTD.....APPELLANT**

**VERSUS**

**JOHN MARK KARURIA.....RESPONDENT**

*(Being an appeal from judgment and Decree of the Co-operative Tribunal Court at Nairobi delivered on the 11<sup>th</sup> November 2016 by the Honourable Tribunal)*

**JUDGMENT**

1. The Respondent who was the claimant in the case before the Co-operative Tribunal hereinafter referred to as “the Tribunal” filed a statement of claim dated 5th March, 2011 against the Appellant and sought the following reliefs:-

*i. A mandatory injunction directed at the defendant directing it to allocate the plaintiff a similar plot in acreage within the same area where plot number 313 earlier allocated to the plaintiff is located.*

*ii. In the alternative, to the above, the respondent do refund the sum of Kshs.141,518.11 paid by the claimant being the purchase price of plot number 313 located at Juja Muigai Inn*

*iii. Loss of bargain being Kshs.658,481.90*

*iv. Interest on (a), (b) and (c) hereinabove.*

*v. Costs of the Suit.*

*vi. Any other remedy that this Honourable Tribunal deems fit to grant.*

2. The respondent avers that he was member number 14779 with the appellant. That on or about the year 1996, the appellant started a project of selling its members plot at Muigai inn Juja town. He applied for the commercial plot and paid for plot Number 313 by check off system and by 31st December he had paid a total of Kshs.141,518.11/=.

3. That vide a letter dated 21/10/2010 the Respondent purported to cancel the allocation on the grounds that he had not fully paid for the plot.

4. The Appellant filed a statement of defence dated 15/4/2011 denying the claim. The appellant though did admit the allotment of Plot No.313 and that the respondent paid Kshs.141,518.11 as at December 1997 but failed to pay the attendant administrative costs inspite of the grace period of two years as well as an advert in the Daily Nation Newspaper in December, 2009.

5. That a resolution was passed to repossess and re-allocate plots for members who defaulted. As at December 2010 attendant costs amounted to Kshs.9,800/= .That the respondent claims this sum and they are willing to refund the amount paid by the Claimant.

6. After the hearing, the Cooperative Tribunal in its judgment delivered on 11th November 2016 confirmed that prayers (a) and (b) were spent and awarded the Claimant a sum of Kshs.3,000,000/= being loss of bargain plus interest at court rates as well as costs of the suit.

7. The appellant being aggrieved preferred this appeal and put forward the following grounds;

*i. That the learned Tribunal erred in failing to appreciate the triable issues raised in the Appellant's Response to the Statement of Claim and in allowing the Respondent's claim.*

*ii. That the learned Tribunal erred in entering judgment in favour of the Claimant as against the Respondent.*

*iii. That the learned Tribunal erred by awarding the Claimant a sum of Kshs.3,000,000/= being loss of bargain (which falls under the category of special damages) despite the fact that in the statement of claim the sum pleaded was only Kshs.658,481.90/=.*

*iv. That the learned Tribunal erred in finding that the Respondent had proved the case on a balance of probability.*

*v. That the learned Tribunal erred by awarding the Claimant a sum of Kshs.3,000,000/= being loss of bargain (which falls under the category of special damages) despite the fact that the statement of claim the said sum was not specifically pleaded and strictly proved.*

*vi. That the learned Tribunal erred in failing to evaluate the evidence on record as submitted by both the Claimant and the Respondent.*

*vii. That the learned Tribunal erred in upholding that the Respondent was entitled to judgment against the Appellant as claimed in the statement of Claim.*

8. The court directed the parties to file and exchange written submissions. The appellant vide its submissions dated 10th March 2021 gave a brief background of the matter and submitted that the subject plot was allegedly valued at 3M at the time of the trial given that in the Claim as drawn the respondent did not seek compensation of the same at the current market value but his claim as set forth was for loss of bargain being Kshs.658,481.90/= .

9. It is the appellant's submissions that in the circumstances the Kshs.3,000,000/= awarded to the respondent as loss of bargain was unfair and unjust as the same had no legal basis and as a result the appellant was greatly prejudiced and aggrieved by the said decision.

10. The appellant argued that the loss of bargain as was claimed by the respondent directly resulted from actions/inactions of the Respondent.

11. The appellant also pointed out that a Resolution was passed by the Committee at a General Meeting of the Appellant that all plot issued to members who had defaulted in payment were to be repossessed. The appellant therefore submits that the Respondent was among those affected by the resolution which is a clear demonstration that he was an architect of his misfortune.

12. The appellant submitted that they refunded the Respondent all the purchase deposit of Kshs.141,518.11/= on the 6th day of May 2011 after he was affected by the Resolution of the Committee at the Appellant's General Meeting and in that regard the respondent would not be entitled to any loss of bargain past the said date since it would give them unwarranted benefits. On this the appellant relied on the case of **Hellen Wangari Wangechi v Carumera Muthoni Gathua (2015) eKLR** it was held that parties are bound by their pleadings.

13. The appellant further placed reliance on the following authorities:

*a) Jackson Mwabili v Peterson Mateli (2020) eKLR.*

*b) Okulu Gondi v South Nyanza Sugar Co.Ltd (2018) eKLR*

*c) Savona Enterprises Limited & Another v Pioneer Holdings Limited (2018) eKLR.*

*d) Equity Bank Ltd v Gerald Wangombe Thuni (2015) eKLR.*

14. In retort, the respondent submitted that the Appellant misunderstood the Tribunal's judgment or did not understand what was on trial before the tribunal in that they crafted their ground of appeal.

15. The respondent pointed out that the tribunal did not award the sum of Kshs.3,000,000/= as alleged by the appellant but awarded the difference between the market value and the amount similar to the piece of land would cost at the time of making a determination of matter brought before it.

16. The respondent contends that the court should take judicial notice of the fact that value in land does not depreciate but appreciates in value as years go by. The respondent relied on the case of **Millicent Atieno v Louis Onyango Otieno (2013)eKLR** where the court of Appeal quoted with approval **Halsbury's Laws of England ,Volume 12 4<sup>th</sup> Edition at paragraph 1183** on the type and measure of damages recoverable by a purchaser upon breach by a seller of land

**“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.....”**

17. The respondent contends that the claimant filed a valuation report and adduced evidence through a qualified certified land valuer who placed the land value at Kshs.3,000,000/= of which the Tribunal took into consideration that the value of the land had appreciated at the time of judgment which was delivered six years later.

18. The Respondent further contends that after the breach, it was self-evident that land could not cost the same price as the valuer also adopted a market comparison by cross checking the value of the adjacent plots in the area, of which the appellant did not oppose nor a parallel one tabled by them.

19. This is a first appeal and this court has a duty to re-examine and re-evaluate the evidence on record and arrive at its own conclusion. Bearing in mind that it did not see nor hear the witnesses and give an allowance for that.

20. I have considered the contending submissions and authorities cited on appeal. I have likewise reevaluated the material placed before the trial court. I find the issue falling for determination is whether the learned Tribunal erred by awarding the Claimant a sum of Kshs.3,000,000/= being loss of bargain.

21. It is not in dispute that the respondent had been allocated plot number 313 in Juja Town known as Muigai Inn Plots and paid for the plot vide a check off system the sum of Kshs.141,518/= by December 2007 .

22. The Respondent avers that the said sum was the cost of the plot together with attendant administrative costs to be expended upto the issuance of the title document which sum the appellant acknowledged.

23. According to the appellant, the Respondent failed or neglected to pay the full amount of the purchase price within the stipulated period and that is why he was affected by the Resolution passed by the committee that all plots issued to members who have defaulted in payment to be repossessed.

24. The appellant on the other hand insists that he had paid the full amount and that the respondent purporting to have cancelled the claimant's allocation of the plot number 313 on grounds of non-payment of the requisite fees is not true.

25. The appellant in its ground of appeal have emphasized that the said loss of bargain falls under the category of special damages despite the fact the statement of claim the said sum was not specifically pleaded.

26. On the other hand the respondent contends that loss of bargain cannot be treated in the same footing as special damages.

27. In my view the law on awarding special damages is very clear and that it cannot be used in the same measure under the claim for loss of bargain.

28. The court of Appeal in *Hahn V. Singh, Civil Appeal No. 42 Of 1983 [1985] KLR 716*, held that special damages must both be pleaded and proved before it can be awarded by the Court. It stated:-

*“Special damages must not only be specifically claimed (pleaded) but also strictly proved....for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The decree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”*

29. In loss of bargain the court looks at the number of years that have lapsed since the breach was committed, the change in value of land since it appreciates and from the time of the breach upto the date of judgment.

30. In my view the Tribunal’s judgment was based on sound and solid principles of awarding a claim under the head of loss of bargain.

31. In the end this appeal is found to be without merit. The same is dismissed with costs being awarded to the respondent.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021.**

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**J. K. SERGON**

**JUDGE**

In the presence of:

..... for the Appellant

..... for the Respondent