



**Menza v Kanyi & 2 others (Environment & Land Case E009 of 2022)
[2023] KEELC 20146 (KLR) (26 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20146 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E009 OF 2022
NA MATHEKA, J
SEPTEMBER 26, 2023**

BETWEEN

MASUMBUO DAVID MENZA PLAINTIFF

AND

DAVID MUREITHI KANYI 1ST DEFENDANT

KENYA PROJECT BUDGET & EXECUTIVE HOME 2ND DEFENDANT

K.P. PROPERTIES 3RD DEFENDANT

JUDGMENT

1. The Plaintiff's claim against the Defendants jointly and severally arises out of breach of contract by the Defendants to build Maisonettes Numbers 22 and 23 at Serena Road Villas on subdivision number 11526, Section I Mainland North, within Mombasa County and/or to refund the sum of Kenya Shillings Two Million, Eight Hundred and Fifty Thousand (Kshs. 2,850,000.00 only) paid by the Plaintiff to the Defendants towards the said project. The parties entered into an agreement on the 4th August 2016, by which the 1st Defendant by himself, and through the 2nd and 3rd Defendants would build Maisonettes 22 and 23 for the Plaintiff at Serena Road Villas on subdivision number 11526, Section 1 Mainland North within Mombasa County, at a cost of Kenya Shillings One Million Eight Hundred Thousand (Kshs. 1,800,000.00 only) per unit, totalling Kenya Shillings Three Million, Six Hundred Thousand (Kshs. 3,600,000.00 only). On the said 4th of August 2016, the Plaintiff paid the sum of Kenya Shillings One Million, Five Hundred and Eighty Thousand (Kshs. 1,580,000.00 only) to the Defendants, by deposit to their designated Advocate, Messrs. Irene Maina & Company Advocates, a further Kenya Shillings Two Hundred and Twenty Thousand (Kshs. 220,000.00 only) on the 14th of July 2017 and Kenya Shillings One Million and Fifty Thousand (Kshs. 1,050,000.00 only) on the 8th of May 2019. Upon making the said payments, the Plaintiff demanded that the Defendants let him know when the Units would be ready to enable him pay the balance of Kenya Shillings Seven Hundred and Fifty Thousand (Kshs. 750,000.00 only), upon realizing that there was no ongoing construction



of the said maisonettes on the stated property. That the said information has not been forthcoming and the Defendants have taken to playing hide and seek with the Plaintiff. That the Plaintiff now does not have the maisonettes that he contracted to purchase, nor his money, six (6) years after he entered into the stated agreement. The Plaintiff prays for judgement against the Defendant for:

- a. Refund of Kenya Shillings 2,850,000.00 paid to the Defendants.
 - b. Interest thereon.
 - c. Costs of this suit.
 - d. Any other relief the court deems fit to grant.
2. This court has considered the evidence and the submissions therein. The Defendants were served but failed to attend court or offer any defence. The Plaintiff testified that he entered into an agreement of sale dated 4th August 2016 (PEX-1) with David Mureithi Kanyi. It was a term of the contract that the 1st Defendant through the 2nd and 3rd Defendants build the Plaintiff two maisonettes No. 22 and 23 at Serena Road Villas on Land Parcel No. 11526/1/MN at a cost of Kshs 1,800,000/= per unit. The Plaintiff has averred that he made payments to the Defendants through a deposit to the advocate Ms. Irene Maina & Company Advocates on 4th August 2016 he paid Kshs 1,580,000/= (PEX-2), on 14th July 2017 he paid Kshs 220,000/= (PEX-3) and on 8th May 2019 he paid Kshs 1,050,000/= (PEX-4). After making these payments, the Plaintiff demanded to know from the Defendants when the said maisonettes would be ready, to enable him pay the balance of Kshs 750,000/=. However, the Defendant has not been forthcoming with any information on the maisonettes and the Plaintiff prays for judgement against the Defendant for a refund of Kshs 2,850,000/= paid to the Defendants with interest and the costs of the suit.
3. It has not been disputed that the Plaintiff and 1st Defendant entered into an agreement for sale of Maisonettes Nos. 22 and 23 (Serena Road Villas) two bedroom apartments without parking on Land Parcel No. 11526/I/MN. The Plaintiff was purchasing the said apartments for Kshs 1,800,000/= each for a term of 99 years from 1st October 2017. The Plaintiff has satisfied the court that there was a valid and enforceable agreement between himself and the 1st Defendant in terms of the provisions of Section 3(3) of the Law of Contract Act, which provides that,
- No suit shall be brought upon a contract for the disposition of an interest in land unless—
- a. the contract upon which the suit is founded—
 - i. is in writing;
 - ii. is signed by all the parties thereto; and
 - b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
4. A look at the said sale agreement confirms that the same is a valid sale agreement which is 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 agreement having met all the requirements between the Plaintiff and the Defendants and therefore the sale agreement between the two is valid and it 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. On 4th August 2016 he paid Kshs 1,580,000/= as deposit to the firm of Irene Maina & Co Advocates and issued with receipt No. 265 (PEX-2). He also made a payment of Kshs 220,000/= as additional payment to the firm of Irene Maina & Co Advocates on 14th July 2017 and issued with receipt No. 1037 (PEX-3). Lastly on 8th May 2019 he a further additional payment of Kshs 1,050,000/= to the firm of Irene Maina & Co Advocates and issued with receipt No. 2601 (PEX-4). Further to that there is an email dated 8th May 2019 from one Carol Githanju to the Plaintiff, confirming receipt of Kshs 2,850,000/= as payment towards the purchase of apartments No. 22 and 23 in the suit premises. It is therefore clear to the court that the Plaintiff paid a total of Kshs 2,850,000/= to the 1st Defendant through the firm of Irene Maina & Co Advocates.

7. The Plaintiff’s suit remains undefended, the Defendants did not participate in the trial and the Plaintiff’s evidence has not been challenged. Still, the court has to examine the evidence adduced by the Plaintiff. The Defendants did not deliver the apartments as contracted, the Plaintiff asking for a refund of the monies paid towards the purchase of the said apartments. This remedy is available and the Plaintiff is entitled to it. The court proceeds to find that the Plaintiff’s suit is merited and judgement is entered for the Plaintiff against the Defendant for a refund of Kshs 2,850,000/= with interest at court’s rates with effect from 8th May 2019 until payment in full. The Defendants shall jointly pay the Plaintiff costs of the suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2023.

N.A. MATHEKA

JUDGE

