



Diamond Property Merchants Limited v Osman (Environment & Land Case 10 of 2020) [2023] KEELC 21063 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21063 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 10 OF 2020
LC KOMINGOI, J
OCTOBER 26, 2023**

BETWEEN

DIAMOND PROPERTY MERCHANTS LIMITED PLAINTIFF

AND

HAMUD MOHAMED OSMAN DEFENDANT

JUDGMENT

1. The Plaintiff vide a Complaint dated 19th February 2020 and Amended on 21st September 2020 claims that on 17th November 2016 it entered into a sale agreement with the Defendant for the purchase of Kajiado/Ildamat/5555 to Kajiado/Ildamat/5561 measuring approximately 145 acres for a consideration of Kshs 152,250,000. It was agreed that Kshs 20,000,000 would be paid upon execution of the agreement and the balance would be paid in eight (8) monthly instalments of Kshs 16,531,250 each from 10th December 2016. The Plaintiff got into financial difficulties and could not honour the completion notice issued on 9th January 2018 by the Defendant. By this time the Plaintiff had paid Kshs 112,750,000. However, the Defendant did not transfer land commensurate to the payment made but only transferred eighty (80) acres of land valued at Kshs 84,000,000 and has refused and/or failed to refund Kshs 28,750,000 to the Plaintiff. The Plaintiff therefore prays for:
 - a. Judgement of Kshs 28,750,000
 - b. Costs of this suit
 - c. Interest on item (a) and (b) above from 2016 at court rates.
2. In his Statement of Defence, the Defendant denied the claim stating that the Plaintiff had been in continuous breach of terms of the agreement because it neither paid the deposit on time nor the monthly instalments. The agreement was therefore rescinded for failure to honour the twenty one (21) days completion notice issued. Thereafter the advocates agreed that the Defendant would transfer



thirty five (35) acres to the Plaintiff in lieu of the amount of money that was to be refunded by the Defendant. Consequently, the Defendant owed the Plaintiff no money and prayed for dismissal of the suit with costs.

3. The Plaintiff in its reply to this Defence reiterated that the Defendant was to allocate the Plaintiff land equivalent to the amount of money paid as per Clause 10 of the Agreement which he had not done.

The Plaintiff's Evidence

4. Testifying as PW1 was the Plaintiff's Director Josphat Gichunge Mwirabua. He adopted his witness statement as part of his evidence in chief and adduced eight (8) documents as evidence marked as P. Exhibit 1-8. He stated that the claim has never been settled despite the suit filed at the High Court HCCC No. 11 of 2019 having been withdrawn to allow for an amicable settlement. He confirmed that the agreement had a rescission clause which stipulated that 10% of the balance of the purchase price would be refunded to the Defendant although this was not applicable in this matter because the defendant had given him land.
5. On cross examination he confirmed that the Defendant terminated the agreement because the Plaintiff could not complete the transaction. He confirmed that the High Court suit was withdrawn and that he had made reports to various Police Stations concerning the money owed to them by the Defendant. And upon making the complaints, the Defendant handed over documents of transfer for the thirty five (35) acres to them while at Parliament Police Station. He indicated that he had given a portion of the 35 acres to one Mr. Kabaiku (his Advocate) as settlement of legal fees owed to him. He also stated that in 2018, the Plaintiff was in possession of 100 acres of land.
6. On re-examination he stated that the Defendant went to parliament police Station with his Advocate where he gave them documents for thirty five (35) acres of land which was part payment of the money paid to the Defendant.

The Defendant's Evidence

7. The Defendant testifying as DW1 stated that he is a businessman. He adopted his witness statement as part of his evidence in chief and adduced his bundle of documents as exhibits. He stated that in the year 2016 he was approached by some people who wanted to purchase some land. An agreement was entered for the sale of 145 acres of land comprising of different titles for a consideration of Kshs 1,050,000 per acre. The payment was to be finalised by August 2017. However in January 2018 a termination notice was issued due to the Plaintiff's failure to honour the agreement. As per the agreement they were to deduct commission and legal fees from the monies paid. He went on to state that by the time the agreement was terminated, the Plaintiff was in possession of 145 acres of land and it was agreed that the Plaintiff would return 65 acres to the Defendant and retain 35 acres as per the completion documents. From then he thought the dispute had been resolved.
8. He went on to state that if the Plaintiff wanted a refund of his money, then he ought to return the thirty five (35) acres of land given to it and then the Defendant would sell the land to refund the Plaintiff.
9. On cross examination he confirmed that the Plaintiff had paid Kshs 112,750,000 and was in possession of the entire land. He issued a completion notice on 9th January 2018 and invoked the second option as per Clause 10.2.2. He could not prove this. He also confirmed that he gave the Plaintiff thirty five (35) acres of land and the complaint filed at Parliament Police station was withdrawn. He reiterated that he was of the opinion that the dispute had been resolved and went on to dispose the sixty five (65) acres to another person.



10. On re-examination he stated that he had no claim against the Plaintiff indicating that after he gave them the thirty five (35) acres of land, his dealings with them ceased. He confirmed that he sold the sixty five (65) acres in 2021.
11. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's Submissions

12. Counsel outlined that the issue for determination was whether the Defendant was indebted to the Plaintiff to the tune of Kshs 28,750,000 and costs of the suit.
13. Counsel submitted that it was not in dispute that the Plaintiff had paid the Defendant Kshs 112,750,000 but the Defendant had only transferred to the Plaintiff 80 acres of land which was equivalent of Kshs 84,000,000 and thus ought to refund the Plaintiff Kshs 28,750,000. Further that the claim that the Defendant thought the dispute had been resolved when it was withdrawn at the police station was invalid since no agreement varying the terms had been effected. As such parties were bound by the agreement as held in *South Nyanza Sugar Co. Ltd v Leonard O. Arera* [2020] eKLR. He pointed out that Clause 10 of the agreement stipulated remedies for breach of contract. Therefore the Plaintiff was entitled to refund of his money. He put forward the case of *Sedena Agencies Ltd v Presbyterian Foundation* [2017] eKLR. Counsel further submitted that the withdrawal of suit HCCC 19 of 2019 did not bar the Plaintiff from filing another suit because it had not been determined and thus not res judicata as was held in *Rose Juma Ogola & 2 other v Paustina Anyango & Another* [2020] eKLR. In that regard, the Plaintiff was entitled to costs of the suit as prayed.

The Defendant's submissions

14. Counsel submitted that the Plaintiff's failure to complete the transaction amounted to breach of the contract and the Defendant rescinded the contract as per Clause 10 of the sale agreement. Advocates for the parties agreed on the amounts payable to the Plaintiff after deducting 10% of the outstanding amount, legal fees and agents' commissions and the Plaintiff requested to have 35 acres of land allocated to it which was equivalent of the money to be refunded. As this allocation being in exercise of the options available under Clause 10 of the Sale Agreement meant that the Plaintiff had no further claim against the Defendant. Counsel also submitted that the letter dated 16th January 2020 from the Defendant's advocates to the Plaintiff clearly articulated this position.
15. Counsel also questioned capacity of Josphat Gichunge Mwirabua stating that he had indicated that he was a Director of the Plaintiff but the CR12 adduced in court did not have his name as part of the Directors. Counsel thus prayed that the suit to be struck out because it was filed by someone without capacity. Counsel pointed out discrepancies in the company resolution dated 7th September 2020 which included the advocates appointed to act for the Plaintiff were different from the Advocates who had filed the instant suit and the other company resolution dated 22nd February 2023 confirmed that Josephat had ceased to be a Director to concentrate on his political affairs and had thus lied under oath.
16. As such, the Plaintiff was not entitled to orders sought and the suit ought be dismissed with costs.

Analysis and Determination

17. I have considered the pleadings, the evidence on record, submissions and the authorities cited. The issues for determination are:
 - i. Whether the Plaintiff is entitled to a refund of Kshs 28,750,000 as sought.



ii. Who should bear costs of this suit?

18. Before delving into the issue, the Defendant submitted that PW1 had no locus standi to institute the suit because he was not a Director of the plaintiff. This court shall first address the issue of locus standi because locus standi is akin to court's jurisdiction and a suit cannot be sustained by a person without the legal authority or mandate as was held by Mrima J. in *Julian Adoyo Ongunga & another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi, Deceased)* [2016] eKLR where he stated;

“...the issue of locus standi is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without locus standi in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. Locus standi relates mainly to the legal capacity of a party. The impact of a party in a suit without locus standi can be equated to that of a court acting without jurisdiction since it all amounts to null and void proceedings...”

19. This court notes that the Company Resolution dated 21st February 2023 reads:

...The Board ratifies the decision that Mr. Josphat Gichunge Mwirabua represents the Company and is hereby authorised to plead and appear on behalf of the Company in the said matter and sign any or all documents required to represent the Company. It is further confirmed by the Board that Mr. Josphat Gichunge Mwirabua was a Director of the Company as at the date of institution of the said suit... but ceased to be such a Director to concentrate on matters relating to his membership to the National Assembly. Mr. Josphat Gichunge Mwirabua otherwise remains the Executive Chairman of the company with the responsibility to pursue for and on behalf of the company to logical conclusion all the matters relating to the transactions and interactions of the company with Mr. Hamud Mohamed Osman.

20. The Court therefore finds that Mr. Josphat who also testified as PW1 was clothed with *locus standi* to institute and sustain the suit.

21. There is no dispute that the sale agreement dated 17th November 2016 was breached and subsequently rescinded due to the Plaintiff's failure to complete the transaction.

22. The central issue under consideration is whether the Defendant is liable to the Plaintiff in the amount of Kshs 28,750,000. The Plaintiff's assertion is that, despite having made a payment of Kshs 112,750,000, the Defendant transferred only eighty (80) acres of land to the Plaintiff, which was valued at Kshs 84,000,000, and failed to remit the remaining balance of Kshs 28,750,000.

23. The Defendant has challenged this position by asserting that no outstanding debt is owed to the Plaintiff. They contend that they invoked the provisions of Clause 10 in response to the breach of contract. The said Clause provides:

“ 10. Breach of Agreement

10.1. If the purchaser shall fail to comply with any of the conditions hereof ... including the condition relating to completion... the vendor may give the purchaser at least 21 days' notice in writing specifying the default and requiring the purchaser to remedy the same... and if the purchaser shall fail to comply with such notice the vendor shall at the vendors' sole option be entitled to do any of the following:



10.1.1 Allocate land equivalent to the amount paid provided that no further subdivision shall be undertaken; or

10.1.2. To rescind the contract and forfeit to the account of the vendor as agreed liquidated damages the equivalent of 10% of the outstanding balance of the purchase price and refund to the purchaser any surplus monies paid by the purchaser to the vendor only after the property has been resold and the purchase price from the new purchaser received by the vendor in full...

10.1.3. To sue the purchaser forthwith for all sums due and unpaid by the purchaser...”

24. The Plaintiff alleged that only eighty (80) acres of land were transferred, which did not correspond to the amount paid. Apart from this assertion, no supporting evidence was presented regarding the transfer of the mentioned acres. In the absence of any rebuttal or evidence challenging this claim, the Court will accept that indeed eighty (80) acres were transferred. Since it was established that each acre was valued at Kshs 1,050,000, it follows that the total value of 80 acres is Kshs 84,000,000. Therefore, considering that the Plaintiff made a payment of Kshs 112,750,000, as substantiated and acknowledged, there remains an outstanding balance of Kshs 28,750,000, as quantified by the Plaintiff.

25. Conversely, the Defendant disputed the Plaintiff's assertion, contending that they had transferred 35 acres of land to the Plaintiff and therefore owed no refund. However, the precise nature of this 35-acre transfer remains unclear, as no supporting evidence of the transfer was presented. Consequently, the established fact is that only 80 acres were indeed transferred. If that is the case, it is accurate to conclude that the Defendant owes the Plaintiff Kshs 28,750,000.

26. The Defendant went on to state that he followed clause 10.1.2 of the agreement and retained 10% of the outstanding balance as liquidated damages. An excerpt of the said clause stipulates 10.1.2. “To rescind the contract and forfeit to the account of the vendor as agreed liquidated damages the equivalent of 10% of the outstanding balance of the purchase price and refund to the purchaser any surplus monies paid by the purchaser to the vendor only after the property has been resold and the purchase price from the new purchaser received by the vendor in full...”

27. This then means that the sum owed to the Defendant as per clause 10.1.2 would be as follows:

Total Purchase price of the land was Kshs 152,250,000

Amount paid was Kshs 112,750,000

Therefore the outstanding balance was: Kshs 152,250,000 - Kshs 112,750,000= Kshs 39,500,000

The plaintiff however seeks Kshs28, 750,000/=.

Parties are bound by their pleadings.

28. This means that as per Clause 10.1.2 the Defendant was entitled to Kshs 28,750,000 as damages for breach of agreement from the Plaintiff. I find that the Plaintiff has proved that it was owed Kshs 28,750,000 by the Defendant. I find that the Plaintiff has proved its case as against the Defendant on a balance of probabilities. I enter Judgement in favour of the Plaintiff for;

a. Kshs28,750,000/= less 10%.

b. Each party do bear own costs.



DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF OCTOBER, 2023.

L. KOMINGOI

JUDGE

IN THE PRESENCE OF:

Mr. Ochieng for the Plaintiff.

Mr. Ibrahim Mwangi for the Defendant.

Court Assistant – Mutisya.

