



**South Tetu Hotels & Bars Limited v Thuo & another (Environment & Land Case E067 of 2022) [2023] KEELC 21359 (KLR) (24 October 2023) (Judgment)**

Neutral citation: [2023] KEELC 21359 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E067 OF 2022**

**JA MOGENI, J  
OCTOBER 24, 2023**

**BETWEEN**

**SOUTH TETU HOTELS & BARS LIMITED ..... APPLICANT**

**AND**

**FRANCIS NDENSARI THUO ..... 1<sup>ST</sup> RESPONDENT**

**HEZEKIEL OIRA T/A OIRA & COMPANY ADVOCATES .... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The dispute in this suit relates to the applicant's position that he is entitled to the completion documents forwarded to the 2<sup>nd</sup> respondent pursuant to the sale of property Land Reference Number 209/6296 through an agreement dated 15/11/2019 that aborted.
2. The application is based upon six grounds that have been enumerated by the applicant in the application as follows:
  - a. The Applicant and the 1<sup>st</sup> Respondent entered into an Agreement for Sale dated 15<sup>th</sup> November, 2019 for the sale of a Maisonette erected on Land Reference Number 209/6296 to the 1st Respondent for consideration of the Purchase Price of Kenya Shillings Seven Million (Kshs 7,000,000/-).
  - b. The Applicant delivered up the Completion Documents to the 2<sup>nd</sup> Respondent as per Clause 6.1 of the Sale Agreement against payment by the 1<sup>st</sup> Respondent of the Purchase Price amounting to Kenya Shillings Seven Million (Kshs 7,000,000/-) in accordance with the terms of the Agreement for Sale.
  - c. The 2<sup>nd</sup> Respondent did not lodge the Transfer for registration upon discovery that although the contracted property was LR No 209/61.96 which was a property in Makadara estate, Nairobi,



the parties had in fact negotiated for and intended to transact with respect to a property in Shauri Moyo estate, Nairobi, which was LR No 209/6425 also owned by the Applicant.

- d. The Applicant readily acknowledged the mix up in documentation and offered to execute a fresh contract with respect to the negotiated parcel of land at Shauri Moyo estate Nairobi, namely, LR No 209/6425.
  - e. The 1<sup>st</sup> Respondent declined to enter into a fresh contract with respect to LR 209/6425 on the pretext that there was a tenant in the property who had signified her reluctance to vacate alleging she was a protected tenant. On the 8<sup>th</sup> October, 2022 the Applicant refunded the 1<sup>st</sup> Respondent the Purchase Price of Kenya Shillings Seven Million (Kshs 7,000,000/-) and demanded that the 2<sup>nd</sup> Respondent returns the ownership documents.
  - f. Despite reimbursement in accordance with the Professional Undertaking to the 2<sup>nd</sup> Respondent and demand made the Respondents have not delivered the Completion Documents to the Applicant contrary to Section 11 (5) of the [LSK Conditions of Sale 1989](#).
3. The applicant sought to have the following completion documents in its name over Land Reference Number 209/6296 released to them:
- a. Original Title document with respect to Property Land Reference No 209/6296;
  - b. Duly executed but undated Transfer (in triplicate) with respect to the Property;
  - c. Commissioner of Land consent to Transfer the Property dated 4th February, 2022;
  - d. Original rates payment receipt dated 7<sup>th</sup> January, 2020;
  - e. Original rates clearance dated 27<sup>th</sup> April, 2020;
  - f. Original rent payment receipt and clearance certificate dated 17<sup>th</sup> January, 2020;
  - g. Certified copy of the Vendor's Certificate of incorporation;
  - h. Certified copy of the Vendor's pin Certificate;
  - i. Costs of this application
4. The application is opposed. The respondents through a joint response filed a replying affidavit sworn by the 1<sup>st</sup> respondent dated 15/2/2023.
5. At all material times to the Originating Summons, vide an affidavit sworn by one of its directors Charles Kinyua Kagio on 5<sup>th</sup> December, 2022, stated that 1<sup>st</sup> Respondent identified a maisonette that had been put up for sale and officials of the applicant company namely Mr Charles Kinyua Kagio, David Kibora Mwangi and Geoffrey Mwangi Kibicho introduced themselves as owners of the applicant company and they started negotiating with the 1<sup>st</sup> respondent for the house in Shauri Moyo Estate.
6. That the 1<sup>st</sup> respondent being desirous of purchasing the said maisonette, and on agreed price, was taken for physical inspection of the property the 1<sup>st</sup> respondent accepted to purchase the property for Kshs 7,000,000.
7. The plaintiff was represented by M/S Kabiro Ndaiga & Co. Advocates while M/s Oira & Co. Advocates the 2<sup>nd</sup> respondent herein represented the 1<sup>st</sup> respondent.
8. By an agreement entered into between the parties, the 1<sup>st</sup> respondent paid a 10% deposit of Kshs 700,000 on 28/11/2019 for purchase of LR 209/6296 Grant Number IR 28073 situate in Shauri



Moyo Estate. That despite sending to the plaintiff's advocate the transfer documents by 16/12/2019 for execution, they did not provide the completion documents nor the original title documents. On 19/02/2020 due to the failure of the vendor providing the completion documents, the 1<sup>st</sup> respondent instructed his advocates to terminate the contract after a lapse of 90 days.

9. Despite the proposal to cancel the contract, the purchaser's advocate paid the balance of Kshs 6,300,000 on 9/07/2020 and the Applicant delivered up the Completion Documents to the 2<sup>nd</sup> Respondent as per clause 6.1 of the Sale Agreement.
10. Upon lodging the transfer documents, with the Ministry of Lands the purchaser realized that the suit property he had been given by the vendor was not the suit property they had agreed to transfer to him and also that it was of a lesser value.
11. The vendor also noted that although the contracted property was LR No 209/6296 which was a property in Makadara Estate, Nairobi, the parties had in fact negotiated for and intended to transact with respect to a property in Shauri Moyo Estate, Nairobi which was LR No 209/6425 which was also owned by the Applicant/vendor. They offered to transact and sell the second property LR No 209/6425 and not the initially identified LR 209/6296 to the purchaser but the purchaser declined.
12. This led to the purchaser asking his advocate to cancel the contract because he feared that he may be conned. The counsel for the purchaser wrote to the vendor's advocate on 19/09/2020 seeking a refund of the monies paid and damages for fraudulent misrepresentation.
13. The vendor delayed in refunding the money to the purchaser and this led to the 1<sup>st</sup> respondent/purchaser to write to the Advocate's Complaints Commission. This prompted the release of Kshs 7,000,000/= Million to the purchaser's advocate. The purchaser however noted that the refund of Kshs 7,000,000 was less the amount of damages and interest.
14. As a result, the purchaser declined to remit to the vendor the completion documents until the payment of the liquidated damages of Kshs 700,000 and interest on the delay to surrender Kshs 7,000,000.
15. At the same time, the 1<sup>st</sup> respondent filed a counter claim and sought the following:
  - a. Kshs 700,000 being liquidated damages
  - b. Interest of (a) above at court rates from 7<sup>th</sup> October 2020 until payment in full
  - c. Costs of this suit.
16. The applicant identified the following issues for determination:
  - i. Whether the 1<sup>st</sup> Respondent was entitled to withhold the Applicant's title and ownership documents upon the rescission of the Sale Agreement and full reimbursement of the monies paid to the Applicant.
  - ii. Whether the 1<sup>st</sup> Respondent's claim for damages is sustainable.
  - iii. Who is liable to meet the costs of this suit?
17. On their part the 1<sup>st</sup> respondent also identified the following issues for determination:
  - i. Did the Applicant through its advocates act in good faith in the sale transaction?
  - ii. Did the Applicant through its advocates act fraudulently in the sale transaction?
  - iii. Is the Applicant entitled to the Completion documents without paying for the default?



- iv. Is the 1<sup>st</sup> Respondent entitled to the claim in the Counter-Claim?
- v. Did the Applicant fail to effectuate the transfer of the correct property?
- vi. Did the Applicant refuse or fail to submit to the Respondents the CR 12 for the Company Vendor?

### **Issues for Determination**

18. I have taken the liberty to set out the genesis and reliefs sought in the Originating Summons and the Counter Claim. Having gone through the pleadings, written submissions by the applicant dated 6/07/2023 and the joint submissions by the respondents dated 4/08/2023 and exhibits produced in Court, the Court finds that issues for determination are; -
- a. Was there breach of the terms of the contract between the vendor/applicant and the purchaser/1<sup>st</sup> respondent as regards the property being sold and purchased?
  - b. Is the vendor/applicant liable to pay damages to the purchaser/1<sup>st</sup> respondent?
  - c. Who will pay the costs of this suit ?

### **Analysis and Determination**

#### **a. Was there a breach of the terms of the contract between the applicant and the 1<sup>st</sup> Respondent?**

19. The 1<sup>st</sup> Respondent relied on the physical visit he made to the suit property which he inspected and was satisfied and agreed that he would purchase and also the amendments he proposed to the sale agreement for clauses 8.1 by introducing a new clause 8.2, clause 6, clause 3 and an insertion in the preamble of the Identity Card Number of the Applicant. Which changes were agreed upon by the vendor who sent an amended agreement on 13/11/2019. Further flaws in clause 3.1 and 6.1 were noted and the 1<sup>st</sup> respondent's counsel, the 2<sup>nd</sup> respondent who corrected them and sent the applicant a corrected agreement which was also signed by the 1<sup>st</sup> respondent on 15/11/2019.
20. The agreement between the applicant and 1<sup>st</sup> respondent dated 15/11/2019 was produced in evidence as the applicant's exhibit marked as "CKK1" and stated as follows in its recital:
- " 8.2 If the transaction is not completed by reason of the default by the Vendor, the Purchaser may give to the Vendor, through their advocates , Twenty One (21) days' notices in writing to comply with their obligations and such notice shall specify the default and require the Vendor to make it good within Twenty One (21) days and if the Vendor then fails to comply with the said notice, the Purchaser may at their discretion and without prejudice to their other rights and remedies under law rescind their Agreement and the Vendor shall within Seven (7) days thereafter return all monies paid by the Purchaser pursuant the Agreement."
21. It is my opinion that a contract can include terms incorporated from another document by reference, as well as the terms of a contract entered into by one of the parties and a third party (See *Halsbury's Laws of England*, Fourth Edition (Reissue), Volume 9(1) at paragraphs 686 and 688) The terms of the contract entered into by the applicant and the 1<sup>st</sup> respondent dated 15/11/2019 was with reference



to the property known as LR No LR 209/6296. The terms of the agreement dated 15/11/2019 with regard to the said property was in clause 2 which stated as follows:

- a. “The vendor hereby agrees to sell and the Purchaser hereby agrees to purchase the Property, at the Purchase Price and upon the terms and conditions set out in this Agreement.
  - b. The interest sold is Leasehold”
22. According to the correspondence exchanged between the parties, the purchaser discovered that the suit property he had inspected was not available for purchase since the Land Reference Number he had been given was in relation to a property in Makadara and not the suit property in Shauri Moyo. The vendor owned up to this mistake and mix up vide the letter dated 12/08/2020 and they proposed that they prepare a deed of variation of Agreement for sale.
23. This proposal was rejected by the purchaser vide his letter through his advocates dated 9/9/2020 which also pointed out that the CR 12 sought from the vendor in order to show the true directors of the vendor company had not been provided since July 2020. The purchaser therefore saw these as two actions that raised a red flag for him and he chose to rescind the contract.
24. The anomaly of the descriptions of the suit property provided by the directors of the vendor and failure to provide the CR 12 as requested did not sit well with the purchaser. These were representations of fact that were made to the purchaser before entering into contract. The contractual effect of representations of fact in contracts for the sale of land is stated in *Halsbury’s Laws of England*, Fourth Edition, Volume 42 at paragraph 57 as follows:
- “The vendor is bound to deliver to the purchaser property corresponding in extent and quality to the property which, either by the description in the contract (including any particulars of sale), or by representations of fact made by the vendor, the purchaser expected to get. Where, owing to a misdescription, the vendor fails to perform this duty, and the misdescription, although not proceeding from fraud, is material and substantial, affecting the subject matter of the contract to such an extent that it may reasonably be supposed that, but for the misdescription, the purchaser might never have entered into the contract at all, the contract may be avoided altogether, and if there is a clause of compensation, the purchaser is not bound to resort to it. Where a representation is true at the time when it is made, but owing to change of circumstances becomes untrue before or at the time of completion, it is the vendor’s duty to disclose the change of circumstances. However, where the discrepancy between the property as offered by the vendor and the property which, by reason of the defect, the vendor is able to hand over is not such as to alter substantially the nature of the property, then the contract is enforced subject to payment of compensation by the vendor.”
25. The sale agreement between the applicant and 1<sup>st</sup> respondent was entered into on 15/11/2019. The statements by the applicant on the description of the property were made at the time of making of the contract and were to an extent confirmed in the sale agreement which referred to the suit property and described its dimensions and abutments and boundaries on LR No 209/6296.
26. It is therefore the finding of this court that the intention of the parties was that the property physically inspected by the purchaser that was shown to him by the directors of the applicant was subject of the sale agreement entered into, which later turned out not to be the case. There was thus clearly a misrepresentation of the property that was being purchased by the 1<sup>st</sup> respondent.



27. This finding however has to be balanced against the clear duty on the part of the 1<sup>st</sup> respondent as the purchaser in the contract of sale of land, to conduct due diligence and inform himself on all the relevant aspects concerning the property that he was seeking to purchase. The rule of caveat emptor applies to contracts for the sale of land, and this responsibility on the part of the 1<sup>st</sup> respondent is clearly explained in *Halsbury's Laws of England*, Fourth Edition, Volume 42 at paragraph 51 as follows:

“Defects of quality may be either patent or latent. Patent defects are such as are discoverable by inspection and ordinary vigilance on the part of a purchaser, and latent defects are such as would not be revealed by any inquiry which a purchaser is in a position to make before entering into the contract for purchase.

The vendor is not bound to call attention to patent defects, the rule is “caveat emptor”. Therefore, a purchaser should make inspection and inquiry as to what he is proposing to buy. If he omits to ascertain whether the land is such as he desires to acquire, he cannot complain afterwards on discovering defects of which he would have been aware if he had taken ordinary steps to ascertain its physical condition, and, although as a general rule a vendor must deliver property corresponding to the description contained in the contract, yet an error in the particulars of description of the property in the contract is not a ground of objection if it is readily corrected on inspection.”

28. The question therefore to be answered by this Court is whether the 1<sup>st</sup> respondent did undertake such due diligence. Such due diligence would have included undertaking his own independent survey that would have established whether the representations made by the applicant were correct or not.

29. The advocates for the 1<sup>st</sup> respondent wrote to the applicant’s advocates vide a letter dated 12/08/2020 stating that when a Valuer was commissioned to go to Shauri Moyo for purposes of valuing the suit property he pointed out that the parcel LR 209/6296 was not in Shauri Moyo but in Makadara. The 1<sup>st</sup> respondent had therefore made effort in establishing the correctness of title and location and in so doing they established that what the applicant had offered did not correspond to the description of the property he was buying.

30. It is the finding of this court that to the extent that the applicant went out of their way to give detailed and technical representations about the property to be purchased and which was consequently was relied upon by the 1<sup>st</sup> respondent, they were thereby bound to deliver property corresponding to that description and was in breach of the agreement.

#### **b. Is the applicant liable to pay damages to the 1<sup>st</sup> Respondent?**

31. The effect of misrepresentation is to entitle the wronged party to either repudiate or rescind a contract or to be paid compensation. The measure of compensation or damages payable differs depending on whether the misrepresentation was fraudulent, negligent or innocent. In the present case the 1<sup>st</sup> respondent relying on the information given to him and having been taken to see the suit property, that he relied on representations made through the correspondence and made his payment for the suit property.

32. Vide a letter dated 13/07/2020 the Counsels for the applicant after receiving the balance of the purchase price sent to the 1<sup>st</sup> respondent through his Counsel the completion documents which included original title documents in relation to the suit property LR 209/6296. It took the Valuers from the Ministry of Lands to note the anomaly on the location of the suit property as not being in Shauri Moyo but Makadara.



33. Given the fact that the 1<sup>st</sup> respondent rescinded the contract after realizing that the suit property is different is in line with the contract provisions Clause 8.2.
34. The 1<sup>st</sup> respondent herein has sought for Payment of Damages for breach of contract. However, he has not specified whether what he has sought for, was/is General Damages or Special Damages he has referred to them as liquidated damages.
35. To the extent that the 1<sup>st</sup> respondent in his counter-claim has not specified the nature of Damages that are sought for, I will address both general and special damages.
36. Now with regard to general damages, it is trite that no such damages can arise and/or be granted for breach of Contract. For clarity, the damages that arise from breach of contract are ascertainable, quantifiable and are thus known from the onset since they are already factored into the contract.
37. The court with regard to general damages in *Kenya Tourism Board v Sundowner Lodges Limited* [2017] eKLR stated as hereunder:

“With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *Dharamshi v Karsan* [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication”.

38. On the other hand, with regard to Special Damages, same can and do issue for breach of contract. However, before any amount can be awarded on account of Special Damages, the claimant must particularly plead and thereafter specifically prove same.
39. The 1<sup>st</sup> respondent neither pleaded nor specifically placed before this court prove of special damages. I am therefore not persuaded that the 1<sup>st</sup> respondent has proved this claim in the counter-claim.
40. The measure of damages in cases of innocent misrepresentation is stated in *McGregor on Damages*, Eighteenth Edition at paragraph 41-062 to be as follows:

“It is submitted that the damages should here aim to put the claimant, so far as it can be done by a money award, into the same position as he would have been if a decree of rescission had been granted to him. Not only does this appear to be the appropriate aim for damages which are explicitly a substitute for rescission, but also it leads to a measure of damages which meets the criterion of failing below the tortious measure. It becomes necessary therefore to examine what is, for a claimant, the practical result of setting aside the contract into which he has been induced to enter by misrepresentation. First and foremost, of course, rescission entails the mutual restoration, generally in specie, of benefits conferred in performance of the contract.”



41. Further in the case of *Millicent Perpetua Atieno v Louis Onyango Otieno* (2013) eKLR, the Court of Appeal quoted with approval [\*Halsbury's Law of England\*](#), Volume 12, 4th 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.....”

42. The 1<sup>st</sup> Respondent sought through the counter-claim to be paid Kshs 700,000 which he terms to be a liquidated sum following the delay of the applicant to refund the sum of Kshs 7,000,000 and interest. The measure of damages if any that can be payable in the instant case is that applicable to breach of contract, as the 1<sup>st</sup> respondent herein has only succeeded in showing that there was a contract between it and the applicant and the 1<sup>st</sup> respondent for the purchase of the suit property, based on the executed lease agreement and the various correspondence they exchanged thereafter referred to in the foregoing.

43. The applicable principles in this regard are that a contract breaker is only responsible for resultant damage which he ought to have foreseen or contemplated when the contract was being made as being not unlikely, or liable to result or flow naturally from his breach. This is commonly referred to as the rule in *Hadley v Baxendale*. See also [\*Halsbury's Laws of England\*](#), Fourth Edition, Volume 12 paragraphs 1174 – 1176 at pages 462 -464 in this respect.

44. In addition the principles to take into account in assessing general damages in a case where specific performance is not granted were set out in the case of [\*Amina Abdul Kadir Hawa v Rabinder Nath Anand & another\*](#) (2012) eKLR thus:-

“On general damages for breach, which this court has found payable as opposed to an order for specific performance, the principles guiding its award which this court has to bear in mind when making the assessment are:-

1. These are discretionary, meaning the court has to ensure that it exercises its discretion judiciously and with a reason.
2. They are not meant to enrich a party but to compensate him/her for the injury suffered.
3. These should not be inordinately too low or too high”.

45. It is evident that the 1<sup>st</sup> respondent's expectation was that it would get title and possession of the suit property that it contracted with the vendor/applicant, and this is a reasonable expectation that this Court finds flowed naturally from the agreement for sale that the said parties executed. In the circumstances, the 1<sup>st</sup> respondent is entitled to be paid damages as would enable it acquire an equivalent property

46. The 1<sup>st</sup> Respondent would therefore have been put back to the financial position he was in before the contract was made. This was already addressed through the refund that was made to the 1<sup>st</sup> respondent who through the contract provisions, rescinded the contract since due to the failure of the applicant to provide the suit property that he paid for.



47. Having now carefully considered the available evidence, the Court finds that the plaintiff has proved their case on a balance of probability and consequently their claim against the 1<sup>st</sup> respondent is upheld with costs of both the suit and the counter-claim to the applicant.

### **Disposal Orders**

48. Consequently, I now make the following orders in relation to the 1<sup>st</sup> and 2<sup>nd</sup> Respondents.

1. That they be compelled to deliver to the Applicant through his advocates Messrs Kabiro Ndaiga & Co. Advocates the Completion documents for Land Reference Number 209/6296;
    - i. Original Title document with respect to Property Land Reference No 209/6296;
    - ii. Duly executed but undated Transfer (in triplicate) with respect to the Property;
    - iii. Commissioner of Land consent to Transfer the Property dated 4th February, 2022;
    - iv. Original rates payment receipt dated 7<sup>th</sup> January, 2020;
    - v. Original rates clearance dated 27<sup>th</sup> April, 2020;
    - vi. Original rent payment receipt and clearance certificate dated 17<sup>th</sup> January, 2020;
    - vii. Certified copy of the Vendor's Certificate of incorporation;
    - viii. Certified copy of the Vendor's PIN Certificate;
    - ix. Certified copies National Identity cards and PIN Certificate of two (2) of the Vendor's director executing the Transfer;
    - x. KRA Acknowledgement Receipt with original Cooperative Bank Deposit slip dated 25<sup>th</sup> February, 2020 with respect to payment of Capital Gains Tax property; and
    - xi. Board Resolution dated 15<sup>th</sup> November, 2019.
  2. Costs of this Application and the Counter-claim are awarded to the plaintiff.
- It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF OCTOBER, 2023.**

.....

**MOGENI J**

**JUDGE**

Judgment read in virtual court in the presence of:

Mr Mbugua Njoroge for the Applicant

Mr. Muriithi for the Respondents

Ms. Caroline Sagina - Court Assistant

