



Lutomia v Kings Pride Properties Limited & another (Environment and Land Case Civil Suit E228 of 2022) [2025] KEELC 1310 (KLR) (13 March 2025) (Judgment)

Neutral citation: [2025] KEELC 1310 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT E228 OF 2022
AA OMOLLO, J
MARCH 13, 2025**

BETWEEN

JACKSON WANDERA LUTOMIA PLAINTIFF

AND

KINGS PRIDE PROPERTIES LIMITED 1ST DEFENDANT

TELAGEN INVESTMENTS LIMITED 2ND DEFENDANT

JUDGMENT

1. The Plaintiff filed this suit vide a Plaint dated 7th July 2022 which was later amended on 6th November 2023. He is seeking the following reliefs;
 - i. A refund of the full Purchase Price for the apartment amounting to Kenya Shillings Nine Million Five Hundred thousand (Ksh 9,500,00).
 - ii. A refund of stamp duty and legal fees in the sum of Kenya Shillings Five Hundred and Eight Thousand and Five Hundred shillings (Ksh 508,500).
 - iii. Loss of rental income from May 2022 till 31st October 23 amounting to Kenya Shillings Nine Hundred and Ninety Thousand (Ksh 990,000).
 - iv. Loss of rental income during the pendency of this suit.
 - v. General damages for Breach of Contract
 - vi. Damages for emotional distress, humiliation and loss of bargain and use of the suit property.
 - vii. Interest at court rate from date of filing of the suit on item (i) (ii) & (iii)
 - viii. Cost of the suit and any other relief that this court may deem fit and just to grant.



2. The Plaintiff stated that at all material times, the 1st Defendant is the registered proprietor of all that parcel of land known as Title Number Nairobi/Block/93/1488 whereupon the 1st Defendant has erected and developed Capital View Apartments. He pleads that through a Letter of Offer dated 28 August 2015 and accepted on 30 August 2015, he agreed with the 2nd Defendant who was acting on behalf of the 1st Defendant, to purchase the property described as Unit 2 on the 2nd Floor of Capital View Apartments for consideration of the sum of KES 9,500,000/= (hereinafter “the unit”).
3. As a consequence, to the terms of the accepted offer, he made payments towards the purchase price in instalments as follows: KES 2,000,000 on 1st September 2015 (via multiple cheques). KES 1,500,000 on 27 November 2015. KES 1,500,000 on 23 February 2016. KES 1,500,000 on 2 June 2016. KES 2,000,000 on 2 February 2018.
4. The Plaintiff avers that on 2 February 2018, after the final payment, he and the 1st Defendant executed a Sale Agreement which stated that the unit was sold free of encumbrances or adverse claims. Vide a handover form issued by the 1st and 2nd Defendants he was put in possession. Additionally, the Plaintiff said he paid KES 508,500 for processing the title document.
5. That he remained in possession of the unit until receiving a notice about the auction of the same apartment and about March 2020, he discovered that the unit was indeed scheduled for auction by Eco Bank. He impleads that unbeknown to him, the 1st Defendant had taken a loan of KES 90,800,000 from the Bank in April 2016 which was secured against Title Number Nairobi/Block/93/1488. Further, that by the time the 1st Defendant executed this loan, the Plaintiff had already paid KES 5,000,000, hence acquiring an overriding interest in the unit which was before the loan was taken.
6. Initially, this suit was filed against four defendants including Eco Bank and the Auctioneer with the Plaintiff seeking injunctive relief to stop the auction. The court ruled against the Plaintiff on 27th September 2022, allowing the auction to proceed on 7 October 2022. That as a result of the auction of the land which included sale of the unit sold to the Plaintiff, his property, lost rental income from a tenant who had been paying KES 55,000 monthly (because Eco Bank and its agents caused the tenant to stop paying rent to the Plaintiff and instead direct payments to Eco Bank).
7. The Plaintiff’s claim against the Defendants is for breach of the contract for misrepresenting that the unit was sold free of encumbrances. The 1st and 2nd Defendants without consent offered the Subject Land as collateral for a loan facility without notice endangering his interest in the said apartment unit. That the 1st Defendants actions have interfered with his right to quiet possession of the unit and has breached clause 6.1 of the agreement by failing to transfer the same and grant a Lease to the him after payment of the purchase price.
8. The Plaintiff contended that on account of the 1st and 2nd Defendant’s action, he suffered loss particularized as suffering a significant financial loss due to the auction of the unit and the loss of rental income, legal costs incurred in pursuing justice due to the Defendants’ breach of contract. Therefore, he seeks for damages for breach of the Sale Agreement and losses occasioned to it. He stated that he has issued a demand and notice to sue to the Defendants but they did not remedy the breach.
9. In support of his case, the Plaintiff relied on his sole evidence and testifying as PW1. He adopted his witness statement dated 10th November 2023 as evidence in chief and produced several documents to prove his case. He stated that on 30th August, 2015 he signed a letter of offer from the 2nd Defendant selling the unit at KES 9.5M. That the Unit was being purchase off-plan and completed payment on February 2 2018 whereupon he was given possession.



10. It is his evidence that after he made the final instalment for the purchase price he executed a Sale agreement with the Defendants. Besides the sale price, he also paid monies needed to be paid towards processing the title document, as captured under schedule 2 and 3 of the sale agreement amounting to Kshs 508,500.
11. He continued in his testimony that on 12th March, 2020, he became aware that an auction poster had been placed near the building where the unit was and to his shock the unit was among the apartments to be auctioned. Upon making inquiries, he discovered that on 19th April 2016, the 1st Defendant had taken out a credit facility with Eco Bank Kenya Limited of Kshs 90,800,000 with the subject Land where the unit was situated used as security for the financing.
12. That this information was new to him since at the time of signing the offer letter, the Defendants had not communicated intentions of using the unit and or subject land as security. He posits that when he signed the sale agreement, the Defendants never communicated that they had used the property as security for a loan and led him to believe he was buying the unit free of any encumbrance.
13. That despite his valiant efforts to protect his interest in the unit, he was unsuccessful and in December 2022 the house was taken by the bank. He averred that he used to have a tenant on the unit paying him a monthly rent of Kshs 55,000 and who on 6th May, 2022 was instructed by the agent of Eco Bank Limited to be paying rent in to Bank.
14. The documents produced in support of the claim include the following; a copy of the Letter of offer, copies of the payment and receipts, a copy of the Sale Agreement, a copy of the receipt confirming payment for processing of title, a copy of the Handover form, a copy of an auction poster and advertisement, a copy of the Memorandum of Sale, a copy of the Tenant lease agreement and a copy of a letter from Direct 'O' Auctioneers as the agent for Eco Bank Kenya Limited.

Analysis and Determination:

15. This claim proceeded as undefended suit since the 1st and 2nd Defendants did not file any statement of defence. The Plaintiff asserts that he made payments towards the purchase price of the unit in instalments, beginning from the signing of the Letter of Offer on 28th August 2015. He produced the evidence of payment of the purchase price in full and being put in possession which evidence has not been contradicted.
16. Upon full payment of the purchase price, the Plaintiff executed the sale agreement and took possession of the unit and further entered into a lease agreement with a tenant who used paid him monthly rent of Kshs. 55,000. The Plaintiff contends that the sale agreement explicitly provided that the unit was purchased free from encumbrance. However, the 1st and 2nd Defendants had, unbeknownst to the Plaintiff, used the land on which the unit was situated to secure a loan from Eco Bank Ltd.
17. Unfortunately, the 1st and 2nd Defendants failed to service the said loan which resulted in the auction by the Chargee. This caused the Plaintiff loss of the unit, loss of rental income, and incurring significant financial loss in defending his rights in court against the Defendants herein and the bank. The Plaintiff has provided a clear account of the events of the purchase of the unit, evidencing the offer letter that he accepted, proof of payments made including those of processing the title to the unit, the hand over form giving him full possession.
18. This case highlights a recurring issue in off-plan property transactions, where developers take advantage of the trust and enthusiasm of investors, often leading to the exploitation of their hard-earned money. Since the reliefs claimed by the Plaintiff as set out in the amended plaint has not been denied, nothing stops this court from making an order of granting the prayers as sought. However, allowing all the



prayers may amount to double compensation. The prayers granted as prayed shall be those under paragraphs i-iii which are for specific damages.

19. The prayer under loss of rental income from during the pendency of this suit and general damages for breach of contract are almost similar as the Plaintiff is seeking to be compensated for the loss incurred as a result of losing the purchased property. In explaining why general damages is not normally awarded for breach of contract, the Court of Appeal in *Kenya Tourism Development Corporation v Sundowner Lodge Ltd* 2018 eKLR quoted the case of *Consolata Anyango Ouma v South Nyanza Sugar Co. Ltd* [2015] eKLR as follows:

“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitution in integrum* (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC* No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* [1854] 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))”.

20. In a persuasive authority, Justice J. Njagi in the case of *Peter Umbuku Muyaka v Henry Sitati Mmbasu* [2018] eKLR discussed that,

“A claimant for general damages for breach of contract who does not prove that he suffered loss is all the same entitled to damages, though nominal. In the *Anson’s Law of Contract*, 28th Edition at pg 589 and 590 the law is stated to be that:-

“Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal”.

21. In the analysis of the above extract, it is evident that a party, upon the breach of an agreement, may seek damages that have accrued as a result thereof, provided such damages are adequately pleaded, quantified, and proven. The Plaintiff has in my view demonstrated that he was receiving income from the impugned premises which was cut short after the property was auctioned by the bank. Thereafter the bank directed his erstwhile tenant to deposit rent directly to the bank.
22. I hold that the general damages I shall award in this case is premised on lost rental income part of which has already been granted. Therefore, under the heading of general damages, I award the Plaintiff additional rental income constituted in the period running from November 2023 until March 2025 at a monthly rent of KES Sixty Thousand (Kshs 60000) per month. This adds up to a sum of KES



960000. The 1st and 2nd Defendants shall also re-imburse to the Plaintiff taxed costs awarded in favour of the 3rd Defendant in the sum of Kshs 502,750=

23. Consequently, the court enters judgement for the Plaintiff against the 1st and 2nd Defendants jointly and severally for Orders That;
- i. They refund forthwith the full Purchase Price for the apartment in the sum of Kenya Shillings Nine Million Five Hundred thousand (Ksh 9,500,000).
 - ii. They shall refund an amount of Kenya Shillings Five Hundred and Eight Thousand and Five Hundred shillings (Ksh 508,500) paid as stamp duty and legal fees.
 - iii. Refund (if the Plaintiff has already paid) and or pay to Eco Bank Ltd the sum of KES 502,750 being costs awarded against the plaintiff in favour of the said bank.
 - iv. Pay to the plaintiff Kenya Shillings Nine Hundred and Ninety Thousand (Ksh 990,000) tabulated as lost rental income from May 2022 till 31st October 2023.
 - v. Pay to the Plaintiff the sum of KES 960,000 as general damages based on loss of rental income as held in paragraph 22 hereinabove.
 - vi. Interest at court rate from date of filing of the suit on item (i) &(ii)
 - vii. Interest on (iii) & (iv) at court rate from date of this judgement.
 - viii. Cost of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH, 2025

A. OMOLLO

JUDGE

