



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO.834 OF 2008

ANTHONY NJOROGE KIARIE.....1ST PLAINTIFF

MARIE ANGELA WACEKE (Both suing as the

Administrators of the estate of the late

BENSON KIARIE NJAU).....2ND PLAINTIFF

VERSUS

MOHAMMED EGA MUSA.....DEFENDANT

RULING

This long outstanding matter came before me on the 14th June 2018 for the hearing of two applications dated the 5th April 2017 and 5th June 2017 and a notice of preliminary objection dated the 22nd November, 2017.

Both parties were heard on the two applications and the preliminary objection and the court delivered a ruling on 19th June 2018 in which it found that the matter had been concluded and since the plaintiffs were claiming interest, general damages and costs of the suit, the parties were ordered to file written submissions on those remaining items.

The plaintiffs filed their submissions on 3rd day of September, 2018 in which they argued that they are entitled to general damages for breach of contract and to interest at the rate of 32% per annum. They relied on the sale agreement dated 19th March 1998 between the late Benson Njau Kiarie and Mohammed Ega Musa which the defendant allegedly defaulted by failing to pay a balance of Kshs.2,252,200 prompting the plaintiff to file this suit on 12th August 2003 in which, they sought vacant possession of the suit premises and *mesne* profits upto the time the defendant would deliver vacant possession. They also sought interest on *mesne* profits. The plaintiffs attached a rental assessment report by Lloyd Masika Limited and the tabulation showing that the defendant has earned Kshs.6,757,744 excluding interest from renting the suit premises from the month of March 1998 to the time of filing the suit. It was also submitted that the value of the property had also quadrupled over time.

It was further submitted that by a consent dated 2nd November 2010 and filed in court on 22nd November 2010, parties agreed that the defendant would pay a total of Kshs.4,500,000 after which, the Defendant would take ownership thereof. The defendant undertook to remove the caveat lodged by him and also to execute Transfer Documents.

The defendants did not comply with the terms of the consent and only deposited the money in the month of July 2015 and the money was later released to the plaintiffs vide a consent that was recorded following an application dated the 15th September 2015 by the plaintiffs.

The plaintiffs submitted that the opportunity costs to them due to the defendant's wilful default on his obligation to pay the purchase price on time as agreed by the parties, is tremendous and largely unquantifiable. That, the plaintiffs have suffered great emotional distress due to the defendant's unlawful actions of interfering with the court process and with the title to the suit property at the Ministry of Lands. That the plaintiffs have incurred additional direct and indirect costs coupled with other human costs pursuing a matter that could have been concluded a long time ago, had the Defendant paid the purchase price as per the consent dated 11th February 2011.

It was submitted that, the defendant precipitated all the additional and unnecessary litigation following his deliberate default to pay for the purchase price on time while benefiting from the usage of the suit property. The plaintiffs agreed that the valuation and tabulation as proof of the Defendant's mercantile usage of the suit property had been pleaded by the Defendant in the course of the suit.

On the part of the defendant, it was submitted that there is no breach of contract that would entitle the plaintiffs to damages of any kind and that the claim for damages has no legal or factual basis. That the dispute in issue arose from contractual obligations between the Defendant

and the late Benson Kiarie Njau pursuant to which, a deposit was made and an amount of Kshs.2,525,000 was left outstanding by the time the late Benson Kiarie passed away. The plaintiffs cannot therefore purport to know the particulars of the said contract as they are not privy to the same and/or the arrangements. They are third parties to the contract that they seek to enforce and the contract had been performed and the terms settled by the time they instituted the suit and the only remaining issue was how to deal with Kshs.2,252,000/-.

It was further submitted that, after filing the suit, parties consented to the sum of Kshs.4,500,000/- but it could not be released to the plaintiffs until they sorted out the issue of the succession that was in dispute. The defendant relied on the case of **Provincial Insurance Co. Ltd Vs. Mordekai Mwangi Nandwa Ksm. C.A 179 of 1995** which cited with approval the case of **Capital Fish Kenya Limited Vs. the KPLC Limited Civil Appeal No. 189/2014** where the Court of Appeal held that no general damages may be awarded for breach of contract.

On whether the plaintiffs are entitled to 35% interest, the defendants submitted that the claim is unfair, unfounded and an effort to unjustly enrich themselves.

That, in the consent dated the 10th November, 2010 which translated to the decree of 10th October 2010 there was no provision for interest and/or damages. The amount of Kshs.4,500,000 was a final settlement without any conditions. That interest has to be anchored on a decree, order or contract which is not the case herein and to allow the same would be oppressive and unfair to the defendant.

With regard to the valuation report, it was submitted that if the plaintiffs intended to have the same considered during the negotiations that led to the consent in the matter, they should have used the same as it was already in their possession and allowing the same would be prejudicial to the defendant especially since there is already a judgment on record.

The court has considered the submissions of the parties on the twin issues of the interest and general damages. The plaintiffs have sought for interest basing their argument on the fact that the defendant delayed in paying the purchase price of the suit property and as a result of the said delay, they submitted that they have suffered damages in terms of opportunity costs. They have also alleged that they have suffered great emotional distress and further costs pursuing the matter herein which ought to have been concluded long time ago.

The court concurs with the plaintiff that this matter has been in court for close to fifteen (15) years now. In this court's ruling delivered on 19th July 2018, I captured the record of the proceedings culminating to the consent recorded on the 22nd November, 2010, the terms of which I set out in that ruling. That consent comprised the suit as the parties agreed on the sum of Kshs.4.5million as the balance of the purchase price for the suit property inclusive of costs and all other items and prayers in the plaint. It was a further term of that consent that, upon payment of the aforesaid amount, the plaintiff would undertake to and shall sign the transfer documents to formally transfer the suit property into the defendant's name. The parties also agreed that in the event of failure of the plaintiff to sign the transfer documents, the Registrar was to execute and/or sign all and any relevant documents or instruments to realize the said transfer and/or removal of the caveat. The terms of that consent were recorded as an order of the caveat on 31st January, 2011.

As I observed in the earlier ruling dated 19th July 2018, the defendant did not deposit the money as at 22nd November 2010 but the money was eventually deposited and in a consent recorded pursuant to an application dated the 15th September 2015, the plaintiffs sought the release of that money and it was released forthwith.

As rightly submitted by the counsel for the defendant, the consent of 22nd November, 2010 compromised the suit. In that consent there is no provision for interest and damages and awarding the same would be tantamount to rewriting a contract for the parties. The consent has to date never been set aside and even after the defendant delayed in paying the sum of Kshs.4.35 million, when it was eventually paid, the plaintiffs accepted the same and it was released to them. The money was not received on "a without prejudice basis." If the plaintiffs had wanted to claim any interest and general damages they would have negotiated the same before the consent was filed in court on 22nd November 2010 or in the alternative, decline to accept the Kshs.4.5million after the defendant failed to make the payment in time as per clause (b) of the consent. As at now, that consent has not been set aside and it is still binding on the parties and after receiving the purchase price of Kshs.4.5million, the defendant never required the plaintiffs' consent any more, to be able to realize the transfer of the suit property into his name as the consent gave the Registrar the mandate to execute the transfer or any other relevant document.

On the issue of the valuation report, the same was introduced at the submission stage which is too late in the day. The court notes that the said report was prepared on 7th April, 2010 and there is no reason why the plaintiffs did not use it to negotiate for interest and general damages prior to the consent order filed in court on the 10th November, 2010. I echo the sentiments of the learned Justice Kariuki in the case of **Cape Holdings Limited Vs. Synergy Industrial Credit Limited (2010) eKLR** in which the Judge stated thus;

"In my view the Arbitrator was not in order to make the above finding. As stated therein, the report was prejudicial to the Applicant as it updated the claim of interest. The court cannot therefore uphold the introduction of the said report at the submission stage. The introduction of the report at this stage was against the law as the applicant did not get an opportunity to interrogate the same nor cross-examine the author"

In the premises aforesaid it's the finding of this court that the plaintiffs cannot be entitled to general damages and interest at 32% or at any other rate, as the same are claimed too late in the day. They ought to have been factored in when the consent filed in court on 22nd November, 2010 was crafted and later filed in court. That consent effectively compromised the suit.

In the premises foregoing, the court finds that the plaintiffs claim on interest, general damages and costs is unfounded and it cannot be sustained.

The same is dismissed.

Dated, Signed and Delivered at Nairobi this 22nd day of November, 2018

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L. NJUGUNA

JUDGE

In the presence of:-

..... **For the Appellant**

..... **For the Respondent**