Catholic Diocese of Nakuru Registered Trustees v Letizia & another (Enviromental and Land Originating Summons 62 of 2020) [2025] KEELC 3426 (KLR) (29 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3426 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIROMENTAL AND LAND ORIGINATING SUMMONS 62 OF 2020

FM NJOROGE, J

APRIL 29, 2025

BETWEEN

CATHOLIC DIOCESE OF NAKURU REGISTERED TRUSTEES ...... PLAINTIFF

AND

LA CARRUBBA LETIZIA .... 1ST DEFENDANT

TRIPALDI MASSIMILLIANO .... 2ND DEFENDANT

JUDGMENT

Pleadings

The Originating Summons

1. By way of an Originating Summons dated 29/7/2020, the Plaintiff herein sought the following reliefs against the Defendants: -

    1. Refund of Three Million Five Hundred Thousand Shillings (Kshs. 3,500,000/-) to the Plaintiff by the Defendants jointly and severally and interest thereon at court rates from 25/6/2020 till payment in full;

    2. General damages for breach of contract for sale by the Defendants jointly and severally;

    3. Costs of this suit;

    4. Interest on prayers (2) and (3) from the date of judgment till payment in full.

2. Briefly, the Plaintiff's case was that it entered into an agreement for sale dated 27/9/2019, to purchase all that property known as LR No. 1636, situate at Mnarani Plot 7 within Kilifi (the suit property) for a consideration of Kshs. 33,500,000/- (the purchase price). According to the agreement, the Plaintiff was to pay a deposit of Kshs. 3,500,000, which it did on 2/10/2019, receipt of which was acknowledged by the Defendants; the completion period was set at 90 days. The plaintiff avers

that as at 27/1/2020 (completion date) the Defendants had not furnished the Plaintiff with the completion documents, instead, the Defendant sought to vary the agreement on account of the title document being incomplete, by which proposed variation, completion would be held in abeyance indefinitely. About six months after the completion date, that is on 25/6/2020, the Plaintiff rescinded the agreement and sought a refund of the deposit as per the agreement. The Defendants failed to refund the deposit prompting a demand notice and subsequently the present suit.

3. The Originating Summons is premised on the grounds stated on the face of it as well as the supporting and further affidavit sworn by Fr. Simon Kamau on 30/7/2020 and 11/3/2022 respectively.

Response to Originating Summons.

4. Ordinarily it is expected that only a replying affidavit is filed in opposition to an Originating Summons. However, in addition to a replying affidavit, the 1st defendant filed what she calls the "Answer to the O.S. dated 29th July 2020" which is dated 12/10/2021.

5. In The 1st Defendant's answer to the OS, the existence of the sale agreement is admitted and receipt of the deposit from the Plaintiff acknowledged. The 1st Defendant denied giving any instructions to the firm of MS. Balala & Abeid to vary the agreement as alleged by the Plaintiff. She averred that the agreement was drawn by the firm of MS Mwavichi & Company Advocates, and was the only firm versed with any knowledge about the transaction. The 1st Defendant denied having been served with a letter to rescind the agreement and a demand letter and also denied the claim for refund. She raised a counterclaim stating that the completion documents as described in the agreement were clear that the suit property had no title deed but an agreement for sale dated 3/9/1991 and registered on 25/11/1992. The 1st Defendant averred that the Plaintiff was thus in breach of the agreement for failing to complete the purchase price within the completion period. The 1st Defendant sought judgment against the Plaintiff for general damages for breach of contract and costs and interest at court rates.

6. The 1st Defendant also swore a replying affidavit in response to the OS. The affidavit is dated 25/7/2022 and reiterates the contents of the aforementioned response and counterclaim. I therefore need not reproduce the same here.

Evidence

7. Fr. Simon Kamau (PW1) testified on behalf of the Plaintiff. He relied on his affidavits as part of his evidence-in-chief and produced the annextures attached to his affidavits as P. Exh 1 -14. On cross-examination by Ms. Otieno, counsel for the Defendants, he told the court that the Defendants were to conduct a search and avail the plaintiff with all completion documents. He stated that the Plaintiff did not pay the balance of the purchase price within the completion period since the completion documents were not availed. He was not sure as to the existence or otherwise of a title document at the time of signing the agreement. When re-examined, PW1 stated that the plaintiff initiated contact with the Defendants' advocates regarding the regularization of the ownership documents and that P. Exh 4(a) is evidence of such contact.

8. La Carrubba Letizia, the 1st Defendant (DW1) adopted her affidavit dated 25/7/2022 and witness statement dated 15/5/2023 as her evidence-in-chief. She told the court on cross-examination that she would have transferred the suit property had the Plaintiff completed the purchase price. She stated that the agreement was drawn by the Plaintiff's advocate and that she has never had any other advocate prior to her current advocates, MS. K Lughanje & Company Advocates. The witness added that the Plaintiff at some point asked her to donate the property to the church as they did not have the balance of the purchase price. She testified that she did not serve the Plaintiff a completion notice as she thought they

would reach an agreement. In re-examination, the 1st Defendant added that she has always had the trust title and that she had only received Kshs. 10,000,000/-. She maintained that she would only give the church title to the land when it completed payment of the consideration.

Submissions

Plaintiff's Submissions

9. The Plaintiff identified three issues for determination- (a) whether there was a valid and enforceable agreement for sale between the Plaintiff and Defendants; (b) whether the Defendants breached the terms of the said agreement for sale dated 27/9/2019; and (c) whether the Plaintiff is entitled to a refund of the deposit of Kshs. 3,500,000/- and damages for breach of contract.

10. In relation to the first issue, counsel submitted that the elements of a valid contract are offer, acceptance, consideration and intention to create legal relationship. These elements, counsel submitted, were noted in Garvey v Richards [2011] JMCA 16 cited in Omar Gorhan v Municipal Council of Malindi (Council Government of Kilifi) v Overlook Management Kenya Ltd [2020] eKLR. In that regard, counsel argued that the agreement for sale dated 27/9/2019 fits the bill, and since the same has not been challenged, the same is valid and enforceable.

11. Counsel further submitted that as per clause 2 of the agreement, the Defendants did not have a title to the suit property and expressly undertook to procure the same and have it registered in favour of the Plaintiff on or before the completion date. To counsel, having paid the deposit, the Defendants were then under an obligation to provide the completion documents in line with Clauses 7 and 8 of the agreement; that they failed to do so until on 11/6/2020 when by a letter the Defendants' advocates, Balala & Abeid wrote to Mwavichi & Company Advocates expressed the Defendants' intention to vary the agreement. Counsel further submitted that the Plaintiff has adduced uncontroverted evidence to show that the Defendants were in breach of the agreement by failing to avail completion documents and attempting to vary the completion date and price.

12. On whether the Plaintiff is entitled to a refund of the deposit, counsel argued that parties to a contract are bound by its terms and it is not within the jurisdiction of the court to rewrite such contracts, as was held in National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd [2011] eKLR.

Defendants' Submissions

13. Counsel for the Defendants urged the court to dismiss the letter said to have been served by the firm of MS. Balala & Abed, intending to introduce variations to the sale agreement, for failure to comply with Section 106B of the *Evidence Act*. Counsel further submitted that as per Clause 9 of the agreement, the Plaintiff was to first complete the purchase price that the Defendants could forward the completion documents. To counsel therefore, the breach was on the Plaintiff's part and the plaintiff is therefore not entitled to the orders sought. To support these arguments, counsel relied on a case he referenced as ELC Case No. 8 of 2021 (formerly Narok ELC Case E003 of 2020).

Analysis And Determination

14. From my analysis of the pleadings, documentary and oral evidence, and the submissions filed by both parties, I deduce the following as the main issues for determination;

    i. Whether there was breach of the agreement for sale dated 27/9/2019 and if so, by which of the parties;

    ii. Whether the Defendants' counterclaim is merited;

iii. Whether the Plaintiff is entitled to the reliefs sought in the Originating Summons.

15. There is no dispute as to the existence of the agreement for sale dated 27/9/2019. It is also not disputed that the purchase price was Kshs. 33,500,000 and that a deposit of Kshs. 3,500,000/- was remitted to the vendor. On the one hand, it was the Plaintiff's averment that the Defendants were in breach of the above agreement by failing to furnish the completion documents within the stipulated time; on the other hand, it is the Defendants' case that the breach was occasioned by the Plaintiff's failure to complete the purchase price within the completion period of 90 days.

16. It is therefore pertinent for the court to analyze the terms of the agreement between the parties. Clause 2 of the said agreement reads as follows: -

> " The vendors undertakes (sic) to procure the title for Land Reference Number 1636 situate at Mnarani Plot 7 in Kilifi District containing by measurement Nought Decimal Five Four Five Hectares (0.545Ha) and have it registered in purchaser name on or before completion."

17. Clause 6, 7 and 8 further provide:-

> " 6. The Vendor undertakes (sic) procure the title for Land Reference Number 1636 situate at Mnarani Plot 7 in Kilifi District containing by measurement 0.545Ha with a Villa in (sic) purchaser's name.
>
> 7. The completion of the sale and purchase and payment by the Purchaser to the Vendors of the balance of the purchase price shall take place on the 27th January, 2020 (Completion date) at the offices of the Purchaser's Advocates.
>
> 8. The completion time (sic) shall be ninety (90) days from the date of signing this agreement or sooner and in exchange with (sic) the cheque of Kshs. Thirty Million One Hundred Fifty Thousand (Kshs. 30, 150,000) only, the vendor shall hand over to the purchase the following completion documents;
>
> i) original transfer document of title over title no Land Reference Number 1636 situate at Mnarani Plot 7 in Kilifi District containing by measurement Nought Decimal Five Four Five Hectares (0.545Ha) or thereabout more particularly described in the sale agreement/instrument of transfer dated 3rd day of September 1991 and registered on 25th day of November 1992 at Mombasa Land Registry situated in Kilifi County in the Republic of Kenya.
>
> ii) a duly executed but undated transfer signed by the vendors in triplicate.
>
> iii) three passport photos of the vendors together with their personal identification number (PIN) Certificate.
>
> iv) vacant possession.
>
> v) Rent Clearance Certificate, Commissioner's Consent to transfer and Rates Clearance Certificate...

vi) any other document that may be relevant in registering the transfer.”

18. According to the agreement, the joint advocate for both parties was the firm of MM Mwavichi & Company Advocates. The completion was therefore to be done in the said firm’s offices on 27/1/2020. Neither party demonstrated that they communicated to the other about being ready for completion. There is however a letter dated 11/6/2020 from the firm of Balala & Abed Advocates to Mwavichi & Company Advocates. The contents of the said letter reveal that the former advocate was under the instructions of the Defendants, and communicated as below: -

> “ Dear madam,
>
> We refer to the above matter.
>
> Further to your last communication with Mr. Balala on this matter, it appears our clients’ document of title for the subject property is incomplete.
>
> We are taking the necessary steps to regularize the ownership documents. Once completed, we shall avail the same to you for purposes of moving the matter forward.
>
> In the meantime, we attach herewith the draft variation of the addendum to the agreement for sale for your review. Should the amendments be agreeable do let us know further for our further action.”

It was this letter that prompted the Plaintiff to rescind the agreement through their present advocates on record, Muchiri Kimani & Associates Advocates. From the contents thereof, it appears that the vendor secured the services of Balala & Abed Advocates to follow up, under Clause 2 of the agreement, and secure title on her behalf which would be part of the completion documents bundle. The importance of the expected title document is seen in a reiteration in Clause 6 of the need to secure it. According to Clause 6, it was to be procured in the purchaser’ name. A conflict is noted here in that Clause 8(ii) still sought the furnishing of the “duly executed but undated transfer signed by the vendors in triplicate”. Since completion documents forwarded to a purchaser’s advocate are usually for registration of suit property in the purchaser’s name, it may be presumed that the intent of Clause 6 was that the title availed was to be in the vendor’s name, which title would then be passed on to the purchaser for registration on or before the completion date. When viewed in the context of customary conveyancing practice, the apparent error in Clause 6 ceases to be of any great impact to the contract.

19. A glimpse of the Replying Affidavit of the defendant dated 25/7/2022 reveals a spirited attempt on the part of the vendor to save the transaction from rescission. Paragraphs *5* stresses that the completion documents were the ones stipulated in Clause 8(i) up to 8(vi). Paragraph *6* urged that in clause 8(i) clearly indicated that what was registered at the Mombasa Land Registry on the 25th November 1992 was the sale agreement /instrument of transfer dated 3rd September 1991. Paragraph *7* states of that document as follows:

> “ That this is what was in the lands office Mombasa and that there was no original title to this land as the mother plot is Plot No 7 Mnarani; and the fact that the sale agreement was the one registered in the lands office Mombasa was clear in the knowledge of the plaintiffs when they entered into this transaction.”

20. Can that argument in those paragraphs hold sway?

21. A court must always construe the intent of the parties from the text in a contract document and not from any external documents unless those are by reference categorically included in the contract document. The National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd [2011] eKLR case is emphatic that the court can not rewrite a contract on behalf of the parties. They must therefore endure the terms that they included in it.

22. Halsbury's Laws of England 4th Edn, Vol 9 (1) at para 622 states as follows: -

> "Where the intention of the parties has in fact been reduced to writing, under the so-called parol evidence rule, it is generally not permissible to adduce extrinsic evidence whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms."

23. I think in this case it is this court's considered opinion that the understanding of the parties under the contractual terms was that notwithstanding the existence of the documents listed in Clause 8(i) -8(vi), there was a title that was to be issued by the title issuing authorities to the vendor and which would be relied on by the purchaser in the completion of the transaction. This was a mutual understanding even the vendor believed in, hence her execution of the agreement while it clearly bore those terms. However, the significance of that understanding by the two parties would later come to vary to a great degree when that quintessential document called the title became unavailable.

24. For the vendor, her subsequent belief was that since it turned out that the documents she held were the only documents available, then the transaction should be completed without the expected title. This court considers that belief to have been of a latter day birth, conceived of the father frustration at not being able to obtain title in the vendor's names, and the mother desire to bring the contract to fruition at whatever cost, including, as is later seen, extending time for completion.

25. For the Purchaser, absence of the expected title was sufficient ground on which it could rescind the contract. The purchaser's apprehensions at lack of title in the vendors' names should be placed in the context of a recent, phenomenal increase in land fraud in this country which this court takes judicial notice of, as well as the established canons of due diligence inherent in conveyancing law and practice. In the event a title transferred to it was ever was challenged, or in the event of multiple claims to title by third parties, which is not uncommon in this country, a question as to whether the purchaser conducted due diligence normally arises. In the present case, the purchaser's concerns were evidenced by the statement of PW1 when he stated as follows in cross examination by Ms Otieno:

> "We did not pay the full purchase price within 90 days since the completion documents were not availed. I am not sure whether there was a title to the property at the time of the agreement. we went and saw the land and inspected it. then they asked from us some 10%. We tried all we could to find out from them about the title. we sent our legal officer to Mombasa and found that there was no legal document."

26. According to the purchaser, the proposed variation deed if executed would have held the completion of the sale in abeyance indefinitely according to ground No 3 of the Originating Summons.

27. In the oft quoted case of Housing Finance Co. of Kenya Limited vs. Gilbert Kibe Njuguna Nairobi HCCC No. 1601 of 1999 it was held: -

> "...Courts are not for as where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to the parties and they are at liberty to negotiate and even vary the terms as and when they choose and this they

must do together and with meeting of the minds. If it appears to the Court that one party varied terms of the contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, the Court will say no to the enforcement of such contract."

28. It is thus the case that a party can not be allowed to rely on an interpretation contradicting what is the sole and obvious, literal interpretation of a contract he executed.

29. In the present case there is no difficulty in arriving at the conclusion that the agreement between the parties has to be held null either due to breach on the part of the vendor to provide the original title in their names, or owing to a genuine mistake on the part of the parties that title would be available, which eventually could not be secured in the vendor's names as expressly desired by the purchaser. I hold that such a contract was voidable for breach by the purchaser at its election, and that was its eventual fate: the purchaser rescinded the contract in writing within 14 days of receipt of the request for contract variation.

30. While neither party adduced evidence to demonstrate they communicated on the completion date, the Plaintiff asserted that it made it clear to the Defendants that the balance of the purchase was available for completion. What is certain is that way after the completion date, the Defendants had not acquired the completion documents as required, and most especially the title document. Further, from a reading of the clauses set out verbatim and the letter captioned herein above, it is evident that the Defendant was not in a position to complete the transaction admittedly owing to the fact that the document of title to the suit property was incomplete, and that they were taking necessary steps to regularize the ownership documents.

31. The Defendants denied ever instructing the firm of Balala & Abed Advocates to write the said letter or even initially represent them in this suit. This however remained a mere denial. The Defendants did not produce any evidence to establish that they never hired that firm to follow up on the issuance of title or to communicate the intention to vary the contract. The reliance on Section 106 B of the *Evidence Act* to challenge the authenticity of the letter dated 11/6/2020 founders in the face of the fact that it appears to be an afterthought arrived at long after discovery within the context of originating summons was concluded; further, the defendant's counsel can not justify why only that letter is challenged and not the others, including Balala & Abed Advocates' letter of 29/6/2020. In fact, the events following that letter of 11/6/2020 confirm that Balala & Abed were indeed instructed by the defendants: when the purchaser's advocate wrote a letter dated 25/6/2020 seeking a refund upon rescission, Balala & Abed responded to the refund request vide their letter dated 29/6/2020 confirming receipt thereof and indicating that they have informed their client and sought instructions. That Balala & Abed Advocates filed a memorandum of appearance for the defendants in the present suit evinces not merely a casual acquaintance between the defendants and that legal firm but also an engagement agreement for provision of professional services.

32. I have examined the proposed deed of variation. It differs from the body of the letter forwarding it in that it mentions nothing of the status of title conveyed by the letter. Instead, it appears to phenomenally elasticize the completion period by placing the determination of the completion date solely in the discretion of the purchaser, depending on when the latter would be ready to pay the price. If that was meant to placate the purchaser and secure completion of the transaction, then it miserably failed owing to the fact that by the letter of 25th June 2020, the contract was rescinded for breach by the purchaser, and in my view, the rescission was legal because by their omission to avail title as per the contract the vendors were not only in breach but had also admitted to be in such breach through letters written on their behalf by Balala & Abed Advocates dated 11/6/2020 and 29/6/2020.

33. I must also examine the vendor's counsel's submissions that under Clause 9 the plaintiff should have paid the entire balance which payment would trigger the transmission of the completion documents. First, even on a very literal interpretation basis, that of "grammatical and ordinary meaning" following the decision in the Coopers and Lybrand 1995 SA case cited and passionately espoused counsel in his submissions the "must make arrangements to pay…" expression in Clause 9 cannot be assigned the same meaning with "must pay…"; reason for that will be evident in this court's analysis of Clauses 8 and 9 as herein below. Secondly, even if the interpretation of the vendor's counsel were taken as correct, this clause is clearly adversely affected by the admitted lack of the envisaged title as described above which would make delivery of a complete completion bundle of documents impossible. Thirdly, the contract document in this case must, as in all others before courts of law, be construed wholistically and not by way of whimsical cherry picking and distracting flourish of certain darling items. What the vendor's counsel has evidently failed to do in his submission is to juxtapose Clause 9 with Clause 8 which states clearly that

> " The completion time (sic) shall be ninety (90) days from the date of signing this agreement or sooner and in exchange with (sic) the cheque of Kshs. Thirty Million One Hundred Fifty Thousand (Kshs. 30, 150,000) only, the vendor shall hand over to the purchase the following completion documents…"

34. It is the case therefore that the purchaser was not obliged to pay the balance of the purchase price before the delivery of all envisaged completion documents but was supposed to pay by way of a cheque in exchange therefor, and the argument of the vendor's counsel to the contrary is grossly erroneous and unsupported by contractual terms.

35. As regards the plaintiff's claim for general damages for breach of contract, the Court of Appeal in the case of Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR restated the general rule for award of general damages for breach of contracts as follows:

> " 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 vs. 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. and so it would be. See also Securicor (K) vs. Benson David Onyango & Anor [2008] eKLR. The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent "had suffered serious damages" (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof-based judicial determination."

36. In Consolidated Bank of Kenya Limited v Ken Muriuki & Peter Kirimi Mbogo t/a Mbogo & Muriuki Advocates [2021] eKLR the court stated as follows:

> “ 14. It is thus not the law that no general damages are ever awardable where a clear breach is established. My appreciation of the law is that every time there is a breach of a contract, the innocent party is, from the onset, entitled to nominal damages but will also get general damages where he proves an injury flowing as a natural consequence from the breach. I find this to be the congruent position in both text books and stare decisis.”

37. In this case I do not find that the plaintiff has established an injury flowing as a natural consequence from the breach and general damages are therefore undeserved.

38. The upshot of the foregoing analysis if that the Defendants were in breach of the agreement dated 27/9/2019 and the plaintiff is thus entitled to the reliefs sought in the Originating Summons save prayer No 2 which was not proved. In the circumstances, I am inclined to enter judgment for the plaintiff. The counterclaim lacks merit and is in turn dismissed. For the avoidance of doubt I issue the following final orders:

    1. Judgment is hereby entered for the plaintiff in the following terms:

        a. The defendants’ counterclaim is hereby dismissed;

        b. The defendants jointly and severally shall forthwith refund Kshs. 3,500,000/- (Kenya Shillings Three Million Five Hundred Thousand) to the Plaintiff and interest thereon at court rates from 25/6/2020 till payment in full;

        c. The claim for general damages for breach of contract for sale by the Defendants jointly and severally is declined;

        d. The defendants shall meet the costs of this suit and counterclaim;

        e. The defendants shall pay interest on costs of this suit and counterclaim from the date of judgment till payment in full.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 29TH DAY OF APRIL 2025

MWANGI NJOROGE

JUDGE, ELC, MALINDI