REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT MOMBASA

ELC CASE NO. 232 OF 2011

JOSEPHIN NYEVU MWADZIWE

RAYMOND GONZI MWADZIWE.....PLAINTIFFS

VERSUS

FRANCIS MUJUMBA ALUHA

WYCLIFFE JIRONGO MUHANGANI.....RESPONDENTS

JUDGEMENT

The plaintiffs aver that they bring this suit on their own behalf and on behalf of the estate of the late Joseph Mwadziwe Mwinga who died on 17th April 2003 and at the time of his death co-registered owner together with the first plaintiff of Plot No. Nairobi Block 96/19 and the plaintiffs are jointly the Administrators of this estate. The Plaintiffs avers that sometime on the 5th day of February 1996 the 1st Plaintiff and the late Joseph Mwadziwe Mwinga entered into an agreement with the Defendants jointly to sell them property known as Block No. 96/19 House 18 Nairobi. The Plaintiffs avers that it was a term of the agreement that the Defendants pay the deposit and subsequently pay the entire balance on or before 30th day of April 1996.The Plaintiffs avers that it was a term of the said agreement that on receipt of the balance of the purchase price the Vendors were to clear the balance of the loan with the savings and loan Kenya Limited and execute a transfer in favour of the Defendants. The Plaintiffs avers that by 30th April 1996 the Defendant had not paid the balance and the Plaintiff had not cleared loan since the balance had not been released and or by the Defendants. The plaintiff avers that the Defendants had by their own action violated the terms of the agreement such that the agreement cannot now be enforced. The Plaintiff avers that prior to the Plaintiff property to buy this property the Defendants were in default of a monthly rent of Kshs 8,000/= per month and upon their failing to pay the balance purchase price as agreed in the Agreement the 1st Plaintiff and the late Joseph Mwadziwe Mwinga demanded that they continue paying rent at Kshs 8,000/= from May 1996 but the Defendants refused. The Plaintiffs avers that the Defendants have been so uncooperative such that they have completely refused to give the Plaintiffs audience and that at one point after the death of the 1st Plaintiffs husband the Defendants chased the Plaintiff away when she went asking for rent. The Plaintiffs aver that the Defendants have continued to be in illegal occupation and ask the Court to declare that (heir occupation is illegal. The Plaintiffs aver that based on the agreement which has long expired the defendants placed a caution on the property and the Plaintiffs now want it lifted. The plaintiffs avers# that despite numerous requests both oral and written to the Defendants to vacate or remain and paying rent, they have completely refused such that rent has remained unpaid from May 1996 to date and the same continues to accumulate. The plaintiffs pray for;

1. An Order to issue directing the Defendants to vacate Plot Block No. 96/19 and give vacant possession.
2. An Order to issue lifting and or removing the caution placed on Plot No. Block 96/19.
3. The Court to be pleased to issue any other Order it deems fit to grant in the circumstances of this case.
4. Costs of this suit to be provided for.

The defendants aver that the plaintiffs and or their predecessors are frustrating the contract. The agreement was to the understanding that upon payment of the deposit, receipt of a sum of Ksh.433,588/- is acknowledged by the plaintiffs in writing, the balance of the purchase price was to be financed by the bank. Consequently, the balance was to be released to the vendors upon the vendors executing and delivering to the financier bank's Advocates the transfer in favour of the purchasers in exchange of the professional undertaking. The financier, Savings and Loans Kenya Limited, Advocates issued a professional undertaking to the plaintiffs through their Advocate's but has not delivered the transfer of lease duly signed to date. The defendants aver that the contract can be carried to effect if the plaintiffs are willing to conclude the transaction arid the agreement is still valid and enforceable. The defendants aver that they had filed a suit for specific performance being NRB. HC Civil Case No.806 of 1997 (O.S) between the defendants herein and the plaintiffs which is still pending for determination. The defendants avers that upon entering the sale contract, they ceased being tenants and consequently their possession of the property is based on the contract dated 5th February 1996 and their occupation of the suit premises is founded on a sound in legal basis. The defendants acknowledge they placed a caution against the title to safeguard their purchaser's interest.

This court has considered the evidence and submissions therein. The Plaintiffs avers that sometime on the 5th day of February 1996 the 1st Plaintiff and the late Joseph Mwadziwe Mwinga entered into an agreement with the Defendants jointly to sell them property known as Block No. 96/19 House 18 Nairobi. The Plaintiffs aver that it was a term of the agreement that the Defendants pay the deposit and subsequently pay the entire balance on or before 30th day of April 1996.The Plaintiffs avers that it was a term of the said agreement that on receipt of the balance of the purchase price the Vendors were to clear the balance of the loan with the savings and loan Kenya Limited and execute a transfer in favour of the Defendants. The defendants have failed to pay the balance of the purchase price. In the case of **Nelson Kivuvani vs Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, where the Court held that;

> ***"the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract"***.

I find that the Sale agreement in the instant case has met the requirements between the Plaintiffs and the Defendants and therefore the sale agreement between the them is valid and it thus met the requirements of **Section 3(3) of Contract Act.** It then follows that the Court must further interrogate whether there was breach of the said Contract. *Blacks Law Dictionary, 9th Edition, page 213* defines a breach of Contract as;

> "*A violation of a contractual obligation by failing to perform one's own promised, by repudiating, or by interfering with another parties performance. A breach may be one by non-performance or by repudiation or both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or unable to show such loss with sufficient certainty he has at least a claim for nominal damages*".

In the said Sale agreement dated 5th February 1996 the plaintiff was to pay Kshs. 160,000/- on execution of the agreement and the entire balance was to be paid on or before the 30th April 1996. The balance was never paid as required. DW1, the 2nd defendant testified that the plaintiffs never demanded the balance and he has lived in the house since 1998 and was not supposed to pay rent. He admits that he entered into the sale agreement PEx1 and they was no other agreement. He never paid the balance because the bank never responded. DW2, the 1st defendant corroborated DW1's evidence. He has lived in the suit premises since 1983 and decided to buy it with DW1. They have made improvements on the same. They paid a total of Kshs 433,000/- before 30th April 1996. I find that from the reading of the Sale agreement the balance was to be paid on or before the 30th April 1996 and this is not disputed. In *Civil Appeal No. 61 of 2013, Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited (eKLR)* where the Court also cited with approval the decision in *Civil Appeal No. 23 of 2005, Prudential Assurance Company of Kenya Limited vs Sukhwender Singh Jutney and Another***,** the Court of Appeal expressed itself in the following manner;

> "*So that where the intention of 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. Courts adopt the objective theory of contract interpretation, and profess to have the overriding aim of giving effect to the expressed intentions of the parties when construing a contract. This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it.*
>
> *In Prudential Assurance Company of Kenya Limited V Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 the Court citing a passage in Odgers Construction of Deeds and Statutes (5th edn.) at p.106 emphasized that in construing the terms of a written contract;*
>
> "*It is a familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well to deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence."*
>
> *The supporting rationale for this rule is that, since the contracting parties have reduced their agreement to a single and final writing, extrinsic evidence of past agreements or terms should not be considered when interpreting that written contract agreement, as the parties had consciously decided to ultimately leave them out of the contract. In other words, one may not use evidence made prior to the written contract to contradict the ultimate contract that has been reduced into writing."*

The Court of Appeal in *Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited* went on to posit;

> "*The principle undergirding this rule flows from the notion of freedom of contract that is central to the law of contract; that it would be perverse and directly inconsistent with the intention of the parties after reaching a bargain and choosing to record that bargain in writing, for any court to resort to the prior history of exchanges and negotiations in order to resolve a dispute arising from the interpretation of the terms of the written bargain; and that the parties by consensus have themselves chosen not to give their prior negotiations contractual force and instead they have reached an agreement, and documented it."*

On consideration of the evidence at hand, the agreement is clear and the defendants breached the contract when they failed to pay the balance on the due date. No evidence of variation of the contract was adduced instead the defendants went to court in 1997. There was no attempt by the defendants to deposit the balance in court and no evidence that the plaintiffs frustrated the contracts as alleged. May I state that it is not the duty of courts to rewrite contracts entered into between parties. The only duty of the court is to interpret the terms of the contract as they are. This was the position taken by the Court of Appeal in the case of **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited (2017) eKLR** when it rendered that:

> ***"We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved."***

It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of **Rufale vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592, Scrutton L.J.** held as follows;

> *"The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract*."

Again in the case of **Attorney General of Belize et al vs Belize Telecom Ltd & Another (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609**, held as follows:

> *"The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."*

Based on the above decisions, the starting point for me will be the agreement that the parties signed and the terms therein. The term of the agreement that the Defendants pay the deposit and subsequently pay the entire balance on or before 30th day of April 1996 this was not done hence the contract was breached.

The plaintiffs in their submissions talk for compensation for breach of contract as they have lost rent of Kshs. 8000/ from May 1996 to date. They ask the court to assess damages and award the same. The Court in *Habib Zurich Finance (K) Limited vs. Muthoga & Another. (2002) 1 EA 81* cited with approval the decision of the Court of Appeal for Eastern Africa in the case of *Dharamshi vs. Karan* **1974, EA 41** where that court held as follows:

> *"This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified, they cease to be general…"*

Damages for breach of contract must be specifically pleaded and proved and the same cannot be awarded in this case. I find that the plaintiff has proved their case on a balance of probabilities and I grant the following orders;

1. The defendants are to vacate the suit property Plot Block No. 96/19 and give vacant possession within the next 90 (ninety) days from the date of this judgement.

2. An Order to issue lifting and or removing the caution placed on Plot No. Block 96/19 after 90 (ninety) days from the date of this judgement.

3. Costs to the Plaintiffs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18TH JANUARY 2022.

N.A. MATHEKA

JUDGE