



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL CASE NO. 25 OF 2009**

**PAMELA AKINYI WANANDA.....PLAINTIFF**

**-VERSUS-**

**BERNARD KIBE NGUNJE..... DEFENDANT**

**JUDGMENT**

**THE PLAINTIFF'S CASE**

1. The Plaintiff's case is that by a written agreement dated 1st March 2007 (hereinafter the “**Agreement**”) between the Defendant as the Vendor and the Plaintiff as the Purchaser, the Plaintiff agreed to buy and the Defendant agreed to sell to the Plaintiff a three-bedroomed house which was to be built on a subdivision No. B31 of Plot Subdivision No 4069 (Original No. 3241/12) (hereinafter the “**suit property**”).
2. The Plaintiff avers that the purchase price of the suit property was Kshs. 2,800,000/=. The plaintiff states that being an employee of Kenya Ports Authority, she was to procure a loan of Kshs. 2,430,000/= which was to be paid to the Defendant as the balance of the consideration of the suit property.
3. The Plaintiff states that she was to pay a deposit of Kshs. 370,000/= on or before 15th April 2007. That upon payment of the said deposit, the Defendant was to finish construction of the house as per the specifications. That the completion date was ninety (90) days from 1st March 2007.
4. The Plaintiff further avers that it was agreed impliedly and/or expressly that the Plaintiff was being financed by Housing Finance Company of Kenya Limited (“**the financier**”). That the financier was to register a charge in their favour before releasing the balance of the consideration to the Defendant.
5. The Plaintiff claims that she paid the deposit of Kshs. 370,000/= on time, proceeded to have her loan application approved by the employer and the financier but the financier could not register the charge and register the balance of the consideration to the Defendant because the house was not complete as per the agreed specifications.
6. The Plaintiff claims that the financier was however willing to register the charge even though the house was not complete. That before the charge could be registered, the Defendant through his advocate, M/s Muriu Mungai & Co. Advocates (who were also acting for the Plaintiff), wrote a letter dated 25/3/2009 in which the Defendant alleged that he had repudiated the contract by issuing a 21 day notice to rescind the contract.

7. The Plaintiff stated that she was sent a cheque for Kshs. 370,000/= by the Defendant's advocates on 13/3/2009 being refund for the deposit paid.

8. The Plaintiff blames the Defendant for breaching the Agreement by *inter alia*:

i) Failing to complete the construction of the house within 90 days.

ii) Failing to avail completion documents to the joint advocates for the financier to complete registration of the charge so as to release the balance of the consideration.

iii) Failing to serve the notice of intention to terminate the agreement on the Plaintiff. The Plaintiff stated that she did not receive the Defendant's letter of 24/1/2009 via her postal address which is 95009 Mombasa. On this Plaintiff's evidence is not clear because she alleged that the notification by the Post Office about that letter was posted through Box 95001, Mombasa although the address on the envelope was Box 95009, Mombasa.

### **THE DEFENDANT'S CASE**

9. The Defendant denied the Plaintiff claim against him. He called two witnesses, himself and the advocate who acted for him (and the Plaintiff) in the transaction.

10. The Defendant admitted that the house was completed in January 2008 and not within 90 days but attributed the delay to the following reasons:

i) The Plaintiff was slow in choosing the materials (such as tiles and colours) to be used in the construction.

ii) The Plaintiff delayed in making the deposit of Kshs. 370,000/= which she made a month later than the agreed time.

iii) The construction took place during the rainy season which led to the delay in the plastering process.

iv) Completion was also affected by the Post Election violence of the year 2007 and 2008.

11. The Defendant testified that the delay in completion was communicated to the Plaintiff via the joint lawyer and that the extension was per Clause 13 of the Agreement which permitted the extension.

12. The Defendant stated that when the completion certificate was sent to the Plaintiff, she had not completed the balance of the purchase price and as such she could not take possession of the suit property.

13. The Defendant's case is that since the Plaintiff did not pay up the balance in time, he was entitled to repudiate the agreement. That vide a letter dated 24/1/2009, the Defendant through the joint advocate, gave the Plaintiff a 21-day notice to complete failure to which he would rescind the agreement. That upon expiry of the 21 days the Defendant did rescind the agreement after which he refunded to the Plaintiff the deposit of Kshs. 370,000/=, even though he was not obligated to make the refund.

14. The Defendant's stated that he subsequently entered into contract with a third party, to whom he has since transferred title of the suit property.

### **THE ISSUE**

15. The main issue for court's determination is whether there was breach of the Agreement, by whom the breach was committed and what are the consequences of such breach, if any.

### **ANALYSIS/DETERMINATION**

## **Was there breach of the Agreement and by whom?**

16. The parties are blaming each other for breach of the Agreement. The Plaintiff blames the Defendant for failing to complete the construction within the stipulated time; for failing to avail to the Plaintiff the completion documents; and for failing to give the Plaintiff adequate notice before rescinding the Agreement.

17. The Defendant, on the other hand, admits that there was delay in completion of the construction but avers that completion time was extended in accordance with Clause 13 of the Agreement. The Defendant blames the Plaintiff for failure to pay the deposit within the agreed time and failing to pay the balance of the purchase price within the agreed time. The Defendant's case is that the Plaintiff was duly informed when the house was completed and that she was given a 21 day notice to complete before the Defendant rescinded the Agreement.

## **Completion time of the construction**

18. The agreement for sale under Clause 4(c) provided that completion date was to be 90 days from 1<sup>st</sup> March 2007. Further under Clause 13(b) the latest date the completion of construction of the house could be extended was a further three months from the date of completion aforesaid. Time table of the completion as provided under the agreement was 1<sup>st</sup> June 2007 and that period could only be extended upto 1<sup>st</sup> September 2007. Defendant stated and it was not controverted by the Plaintiff that actual completion of construction was early 2008. He however did not produce evidence before Court of the completion document but stated that their mutual lawyer had possession of those documents and that the Plaintiff was in constant contact with their lawyer. Plaintiff while being cross examined confirmed that she was in constant communication with their lawyer when she stated-

**“I visited the firm several times ...”**

This therefore confirmed the Defendant's evidence.

19. The Plaintiff did not at any time seek to enforce the Clauses on completion of construction. In other words Plaintiff did not make a demand for completion of construction to be done by the Defendant according to the contractual guideline. Further for the Plaintiff to have sought to enforce the contract she had to prove she was ready with the balance of the purchase price on the date fixed for payment such under the contract. There was no such evidence before Court.

20. Plaintiff confirmed having visited the site several times and she noted that the construction was progressing slowly.

21. The learned author Treitel in the book **“The Law of Contract”** Eleventh

Edition at page 102 discussed circumstances under which a party may be regarded to have waived their right., The learned author stated:

**“Where a party promises to relinquish some or all of his rights under a contract, he is sometimes said to have “waived” those rights.”**

The learned author proceeded to state that the word waiver covers a variety of situations. The situation relevant to the fact before me is where waiver means forbearance. In this regard the learned author stated-

**“If the varied performance is actually made and accepted, neither party can claim damages on the ground that performance was not in accordance with the original contract.”**

22. As stated before Plaintiff confirmed that she was aware that construction had delayed beyond the contractual period. DW2 the Advocate who acted for both the Plaintiff and Defendant in evidence stated

that he was in constant contact with both parties on telephone and physically and updated them, more particularly the Plaintiff, on the progress of the construction. The Advocate on being cross examined by Plaintiff's learned Counsel in regard to completion of construction stated-

**“There was no written extension but parties agreed mutually, the unit was completed in mid 2008, all the while the Plaintiff was visiting the site ... She was aware of delay.”**

23. It is clear from the evidence before Court that the Plaintiff and Defendant made and accepted variation of the date of completion of construction and accordingly neither of them can claim damages under that head.

24. The Defendant did not therefore breach the contract.

25. Completion of construction was in early 2008. The mutual Advocate of the parties stated in evidence in chief that when the construction was completed and the Defendant availed to him the title the Plaintiff indicated to him that she was experiencing difficulties in obtaining financing through her employer. The Plaintiff in her evidence in chief acknowledged that difficulty when she stated-

**“My application to HFC was about a year after the agreement expired.”**

By that statement it would seem that Plaintiff after failing to get financing from her employer applied through HFC for a loan but that was round about September 2008.

26. The Plaintiff's allegation that the Defendant failed to avail completion documents and blamed that failure to her inability to get financing. That was however not put the mutual Advocate in cross examination. It was after all that Advocate who was to prepare such documents and was to hold them on behalf of his client the Plaintiff. There was no obligation under the agreement to forward such documents to the Plaintiff personally. Further in the letter sent by the Advocate to the Plaintiff dated 24<sup>th</sup> January 2009 the Advocate confirmed the transfer documents were ready for execution by the Plaintiff at his chambers.

#### **Defendant's alleged failure to give the Plaintiff adequate notice**

27. The Plaintiff avers that the Defendant did not give her adequate notice before rescinding the agreement. The Defendant, on the other hand, states that his advocate served the Plaintiff with a 21-day notice through a letter dated 24/1/2009. The Plaintiff denied that she received the said letter saying that the same was posted to a postal address that did not belong her. The certificate of posting dated 25/2/2009 is evidence that the said letter was posted to P.O. Box 95009 Mombasa. It is that very address that the Plaintiff used in the Agreement and therefore she cannot deny that the same belonged to her. After all Clause 16 of the Agreement of Sale provided-

**“Any notice required to be given hereunder shall be sufficiently served... on the purchaser if forwarded to their last known address by Registered Post.”**

The address the Plaintiff used in the agreement of sale was Box 95009 Docks Mombasa.

28. It is therefore clear from the evidence adduced that the Plaintiff failed to comply with the obligations under the agreement, in that she was unable to provide the balance of the purchase price even after receiving the written 21 days notice to do so. The consequences of that breach was that the Defendant was entitled as he did to rescind the contract.

29. Accordingly the Plaintiff's case has no merit and the same is hereby dismissed with costs to the Defendant.

**DATED and DELIVERED at MOMBASA this 20<sup>TH</sup> day of MARCH, 2014.**

**MARY KASANGO**

**JUDGE**