REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL CASE NO.93 OF 2010

MARGARET ATIENO

MASHASHI & ANOTHER.....PLAINTIFFS

VERSUS

THE ARCH DIOCESS OF KISUMU & 3 OTHERS.....DEFENDANT

J U D G M E N T

1. This suit was filed here on 15/6/2010 vide a plaint dated 4/6/2010. The two plaintiffs – **MARGARET ATIENO MASHASHI** and **GEORGE MASHASHI** (hereafter 1st and 2nd plaintiffs respectively) felt aggrieved after a house sale transaction they had allegedly entered into with the defendants went awry. They blame the defendants – **THE ARCH DIOCESS OF KISUMU** (1st defendant), **THE RIGHT REVEREND BISHOP ZACHEUS OKOTH** (2nd defendant), **TUMSIFU AGENCY** (3rd defendant) and **ERASTUS IAN KHANDIRA** (4th defendant) – for what went wrong.

2. The plaintiffs seek the following remedies:

(a) An order of specific performance of the contract of sale or in the alternative refund of the purchase price plus interests.

(b) Costs of the suit.

(c) Interests.

3. From the plaint, it is clear the defendants are closely inter-related, with second defendant, being the head of 1st defendant while 4th defendant headed 3rd defendant. The 3rd defendant seems to the development arm of the 1st defendant. While 2nd defendant and 4th defendants are human beings, the 1st and 3rd defendants are legal entities headed by the two.
4. It seems clear that during the material period, the 3rd defendant had houses it was offering for sale. The plaintiffs decided to buy one and approached the 1st and 2nd defendants who in turn referred them to the 3rd defendant. The 3rd defendant agreed to sell a house to the plaintiffs. The agreed purchase price was 3,600,000/= and the construction of the house was meant to be complete by 15/6/2010. The plaintiffs were expected to have paid at least 80% of the purchase price by completion date.
5. The plaintiff made various payments on different dates, ultimately completing the purchase price of 3,600,000/=. In the course of these payments, the plaintiffs were allocated a house – **SIFA GARDENS BLOCK 6/591, KISUMU.**
6. In between however, there seems to have arisen supervening circumstances leading to an increase

of the purchase price to 6.5 million shillings. According to the plaintiffs, this increase was unilateral and was not part of the agreement. The plaintiffs also alleged that the house was not completed as agreed and the variation of the price came after they had already completed payment for the house. The crux of the matter then is the variation of price.

7. The defendants filed their defence on 18/8/2010. According to the defendants, they didn't advertise to sell houses and didn't offer any house to plaintiffs to buy. Instead, the plaintiffs applied to purchase the suit property for Kshs.3,600,000. The purchase was to be through 3rd defendant. A sale agreement was to be the basis of such purchase but no sale agreement was ever written or executed. The defendants argue that in absence of the sale agreement, there is no enforceable contract between the parties.
8. The plaintiffs are also accused of various defaults, including failure to pay at least 2,880,000/= as purchase price during construction and a further 42,000/= as application fees, conveyance, and survey. In fact it is alleged that the plaintiffs had not completed paying for the house by the time they instituted this suit.
9. The Court started hearing the matter on 19/2/2013. The plaintiff said she dealt with 4th defendant to buy a house that the defendants were constructing here in town. The price was 3.6 million shillings and she first paid 20% deposit as required. Then a letter of allotment was issued to her. She continued paying and completed payment. She then asked to be put in possession of the house. She received communication that the price of the house had been reviewed upwards. The price had shot up to 6.5 million shillings from 3.6 million shillings.
10. She went for clarification to 4th defendant who told her he was only an agent and couldn't do much. She then went to 1st defendant who advised her to get her money back and forget the house. The plaintiff then decided to come to court. This case then started and attempts at out-of-court settlement have not been successful.
11. The plaintiff would like to get the house but should the court decide otherwise, she wants a refund amounting to the price that a similar house would cost.She also wants costs of the suit and interests.
12. In the course of hearing the plaintiff, the following exhibits were availed:

- Application form for the house (plf Ex.No.1).

- Allotment letter given to the plaintiff after paying initial deposit (plf EX.No.2).

- Bank statement showing payment of the stated price of Kshs.3.6 million (plf Ex.No.3)

- A letter demanding to be given the house after full payment (plf Ex.No.4).

- A letter to plaintiff intimating that the price of the house had been increased to 6.5. million shillings (plf Ex No.5).

- Demand letter written by plaintiff's counsel before the matter came to court (plf Ex No.6).

- A letter from defendant's counsel proposing an out-of-court settlement (plf Ex.No.7)

- A letter from the plaintiff to 1st defendant pleading to be given the house (plf Ex No.8.

13. During cross examination, the plaintiff was asked about the sale agreement. She said the agreement was contained in the application form (plf Ex No.1) which spelt out the terms of engagement. When asked if she had receipts to show payment, she said she had and even showed some of them. She explained that she didn't produce them as exhibits as she had not been asked to do so. She was then asked about non-payment of the legal fee of 30,000/=, stamp duty which was 4% of the sale price, and Kshs.9000 as survey fee. She explained that 4th defendant had told her she would pay when the house was being handed to her, which never happened.
14. Two witnesses testified on the defence side. The 1st to testify was Zachary Odongo Oditi (DW1). He worked, he said, as a Development Co-ordinator for 1st defendant. He admitted that 3rd defendant was doing construction of houses for sale. This witness however has not had any

dealings with the plaintiff; he didn't know them either; and was not aware of any dealings between the plaintiffs and any of the defendants.

15. The other witness is an accountant with 1st defendant. He has records of the plaintiffs and knows them as custumers who were buying a house in a house project then being undertaken by his employer. At the time this witness was employed, the plaintiff had already paid 2.6 million shillings for the house. The house itself, he said, was to cost 3.6 million at the time. That was during 2008/2009 period.
16. DW2 then said that during the post-election violence, the prices of materials went up and this was communicated to the buyers. The price of the houses was then increased from 3.6 million shillings to 6.5 million shillings. Some customers agreed to pay the new prices, others disagreed. The plaintiffs were among those who refused to pay. A decision was also made that those who had finished paying for the houses by May 2009 would get them at 3.6 million shillings. Those who had not finished paying would get them at the new price of 6.5 million shillings. The witness said the plaintiff cleared payment for the house but outside the period stipulated for payment of the old price. And by the time the plaintiffs were finishing payment, the house earmarked for them had already been allocated to another person.
17. During cross-examination, this witness reiterated that the plaintiffs have already paid 3.6 million shillings. Their house, he also said, was allocated to another person. According to this witness, by 31/5/2009, the plaintiffs had paid 2,610,000/= instead of 2,880,000/= which they were supposed to have paid. But the witness was shown a bank statement showing that the plaintiffs paid 500,000/= on 2/5/2009 making their total payment then to 3.1. million shillings. When confronted with this, the witness admitted misleading the court by insinuating that the plaintiffs were behind with payment at the time.
18. Both sides filed submissions. The plaintiff filed submissions on 19/9/2013. The defendants followed with their own submissions on 25/10/2013.
19. The plaintiff's submissions reiterate what the plaintiff told the court and what is contained in the plaintiff's pleadings. To the plaintiff's submission were attached two decided authorities viz:

- **RAMESH CHANDER DHINGRA VS CHARLES OTISO G.OTONDO:** (2005) Eklr (Rameshe's case).

- **SHIVJI NATHA PATEL VS SEIFEE SPARES & HARDWARE LIMITED:** (2004) Eklr (Shivji's case)

There was another case mentioned, **KENYA COMMERCIAL BANK LIMITED VS CHARLES OTISO & Another: HCC NO.99/09**. This authority was not availed. The authorities are meant to show that there was a binding contract between the parties; and there was a breach of contract by the defendants which is supposed to invite consequences as held in Ramesh's case (supra). The same position was emphasized in Shivji's case (Supra).

20. In sum, the defendants were faulted for varying the price without involving the plaintiffs. They acted unilaterally, it was said, and did such variation after the plaintiffs had a tready finished paying for the house. Such variation, it was submitted, was tantamount to introducing new terms in the contract.
21. The defendant submitted, interalia, that the issues in dispute concern whether there was a contractual obligation between the disputing parties; whether there was breach of contractual obligations and, if yes, who is liable? Who was the recipient of the sums paid by the plaintiff; and whether the sale application form constituted a valid contract as the plaintiff alleged.
22. According to the defendants, there was no valid contract between the parties as provisions of Section 3(3) of Law of Contract Act (Cap 23) were not complied with. The plaintiff is therefore non-suited against the defendants. In the court file, there are several decided authorities. Their relevance and applicability in this case is not explained. Indeed, save for the decided case of **CHUMO ARAP SONGKOK VS DAVID KIBIEGO ROTICH C.A.C.A NO.141 of 2004,** which is about the binding nature of the pleadings to the parties, the other authorities are not mentioned at all in the submissions. It seems to me it is not even very correct to say the defendant availed them. We can only assume so. It is not good practice to fail to explain the relevance of an

availed authority.

23. I have considered what each side availed. It seems to me that several issues commend themselves to the court as requiring determination. The issues are as follows:

(i) Was there a binding contract between the parties in the circumstances of this case.

(ii) Were the plaintiff's right to sue the defendants as they did or should they have sued only the 3rd and 4th defendants?

(iii) Were the defendants right to vary the alleged sale contract as they did?

(iv) Was there breach of the alleged contract and if there was, whch is liable?

(v) Are the plaintiffs entitled to the remedies they are seeking?

24. We now have to begin looking at the issues.

Issue 1 – Was there a binding contract between the parties?

According to the defendants the answer to this issue is No. It is No because Section 3(3) of the Law of contract Act (Cap 23) envisages a situation where there is a single document containing the agreement. Such document is supposed to be duly signed by the parties. Such single document is lacking in this suit. But the plaintiffs say there is an agreement and that agreement is contained in the application form that the plaintiff filled (plf Ex.No.1).

25. A look at the whole scenario shows that it is true that there is no sale agreement properly executed as a single document. But a scenario like this has been ventilated in courts before. In the case of **MUMIAS SUGAR CO. LTD VS FREIGHT FORWARDERS (K) LTD (2005) IKLR 403**, there was a lease arrangement contrived between the parties without a single document serving as an agreement. In the course of proceedings one side argued that there was no binding contract because of lack of such agreement. There were however written correspondences between the parties. The court held that the correspondence between the parties which was adduced in evidence was sufficient to prove the existence of a binding contract.
26. In this matter, there is the application form (plf Ex No.1) which the plaintiff filled. Then there is the allotment letter (plf EX No.2) given to the plaintiff by the defendants stating clearly that the purchase price was Kshs.3.6 million shillings. There is the bank statement showing payment of Kshs.3.6 million shillings into defendants accounts. I do not agree with the plaintiff that the application form alone shows a binding contract but all these documents cumulatively show a binding contract between the parties. The answer to **issue 1** therefore is that there was a binding contract between the parties. And this is so inspite of the defendants written protestations to the contrary.
27. **Issue 2**: Were the plaintiffs right to sue the 4 defendants as now sued or should they have sued the 3rd and 4th defendants only? According to the defendant, the plaintiffs dealt with 3rd and 4th defendants and should have sued only the two. This submission does not look serious in view of explanation given both in the pleadings and during hearing. The housing project was the brainchild of 1st defendant headed by 2nd defendant. The 3rd and 4th defendants were clearly under the first two defendants. Infact it appears clear that the 3rd defendant – **TUMSIFU AGENCY** – was the implementing arm of the housing project created to be directly under the 1st defendant. The 4th defendant headed the 3rd defendant. It is clear therefore that there are clear inter-relationships between the defendants and it was clearly proper for the plaintiffs to sue the defendants as they did.
28. In any case, even assuming that the plaintiffs were wrong, Order 1 rule 9 of Civil Procedure Rules protects them. That provision shows clearly that no suit can be defeated by reason of mis-joinder or non-joinder of parties. I therefore find that this issue is of no consequence. And the plaintiffs were right, given the inter-linked nexus among the defendants, to sue all the defendants as they

did.

29. **Issue 3:** Were the defendants right to vary the contract as they did?

DW2 explained that price variation came about because the post election violence of 2007 gave rise to increase of price of materials. But even as the prices were being varied, there was the decision taken that those who had paid the full price by May 2009 would get the houses on the basis of the old price. According to DW2, the plaintiff had paid about 2.6 million shillings by May, 2009. While she was supposed to have paid slightly over 2.8 million shillings. But this was countered by the plaintiffs who were able to show that the plaintiffs had paid 3.1 million shillings by May, 2009.

This witness (DW2) had no choice but to admit that he had mis-represented figures to the **COURT.**

30. But that is not all, when one considers the correspondence already accepted as constituting a binding contract, there is no mention at all of variation of prices. And even assuming the price had to be increased, it was not open to one side to unilaterally do so. Such variation necessarily required consultations and consensus.
31. A scenario like this arose in the decided case of **KANYORO VS WAKARWA PRINTERS LIMITED & Another (2005) 1KLR 127**. Like in this case, there was variation of terms of contract without involving one party – a guarantor or surety – who was supposed to be involved. The party argued that such variation was not binding. The court agreed and held that any material variation of the contract between the creditor and the principal debtor would discharge the guarantor/surety from liability. The answer to this 3rd issue is therefore obvious. The defendants were wrong to vary the price without involving the plaintiffs.

32. **Issue 4**: Was there breach of contract and if there was, who is responsible? I think the answer to this is obvious. The lack of consensus between the sides arose due to defendants unilateral variation of price. There may have been minor disagreements – like the plaintiffs falling behind in some payments or the defendants not completing the house on time. But the parties still moved along well and there was no fall out. The parting of ways was caused by the variation in price. As we have seen the defendants were wrong on this. And they were more wrong when they proposed to refund the same amount that the plaintiffs had paid without considering the market forces at play and how such forces would impact on the defendant. The defendants themselves were varying the price because of such market forces. It was not reasonable for them to propose to refund the same money the plaintiff had paid. She was bound to be affected by the same forces if she desired to use the money in a similar venture elsewhere. The answer to this issue therefore is that there was breach of contract and the defendants were responsible for it.
33. **Issue V**: Are the plaintiffs entitled to remedies sought. Yes, they are. The various answers given to the issues canvassed show clearly the defendants were in the wrong. They should not have treated the plaintiffs the way they did.
34. As an aside, I must observe that I found the submissions availed by the plaintiffs counsel and the authorities accompanying them more illuminating and helpful. This contrasts with the decidedly technical approach taken by the defendants counsel. The approach seemed to obscure the overall picture. It seemed to focus more on the dry letter of the law. It ignored the bigger picture, which is the desire to deliver substantive justice.
35. The plaintiff would like to get the house or be paid money that would secure another house for her. There is evidence that the house earmarked for her is already allocated to somebody else. My considered view is that an order that she gets the house is not a good option. That would inconvenience another party – the allocated owner – who is not part of the problem. The more prudent thing to do is to order that the plaintiff gets back her money with interests. The interests have to be those that reflect the current market realities. Accordingly, let the plaintiff get all the money she paid. There are the banks where the plaintiffs paid that money. These banks have rates that they apply when they lend out money to people. I deem it here that plaintiffs must be taken to have lent out money to the defendants to invest. Such money was paid through the banks where it was deposited. Let the interests rates applied by those banks apply. The plaintiff is also awarded costs of the suit.

A.K. KANIARU – JUDGE

23/6/2014

23/6/2014

A.K. Kaniaru – Judge

Dianga G. - Court Clerk

No party present

interpretation – English/Kiswahili

Mwamu for plaintiff

P.J Otieno for Wasuna for defendant

COURT: Judgment read and delivered in open COURT.

Right of Appeal – 30 days.

A.K. KANIARU – JUDGE

23/6/2014