



REPUBLIC OF KENYA



**Rombey v Summerbreeze Developers Limited & another (Environment & Land  
Case 745 of 2017) [2022] KEELC 3213 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELC 3213 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 745 OF 2017  
LC KOMINGOI, J  
APRIL 28, 2022**

**BETWEEN**

**ROSE POMPEO SUBE ROMBEY ..... PLAINTIFF**

**AND**

**SUMMERBREEZE DEVELOPERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**JAMES KIPKEMEI T/A KIPTUI KIPKEMEI & CO**

**ADVOCATES ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By a plaint dated 8<sup>th</sup> December 2017, the Plaintiff prays for judgement against the Defendants, jointly and severally for:-
  - a. An injunction restraining the 1<sup>st</sup> Defendant from evicting her from the apartment.
  - b. An order of specific performance against the 2<sup>nd</sup> Defendant to carry out his obligations.
  - c. General damages for the loss and injury incurred.
  - d. Costs of the suit.
  - e. Any other relief as the court may deem fit in the circumstances.
2. The Plaintiff contended that she entered into an agreement with the 1<sup>st</sup> Defendant for the sale of apartment No.B4 on L.R No.2/174 and procured the services of the 2<sup>nd</sup> Defendant to represent her in the transaction. She further stated that she paid into the 2<sup>nd</sup> Defendant's client accounts the full purchase price of Kshs.40 million for onward transmission to the vendor's advocates.
3. She contended that that pursuant to the agreement, the 2<sup>nd</sup> Defendant on her behalf paid to the 1<sup>st</sup> Defendant's Advocates the deposit of Kshs.12 Million and a further Kshs.10million towards the purchase price of the apartment. She further contended that in the course of the transaction about May



2017, she was allowed by the 1<sup>st</sup> Defendant to move into the apartment and live there in anticipation of the transaction being finalized and she paid rent until October 2017 when she stopped paying.

4. It is her case that the 2<sup>nd</sup> Defendant failed to pay the balance of the purchase price in spite of repeated demands by the 1<sup>st</sup> Defendant and its agents and as a result of the 2<sup>nd</sup> Defendant's negligence, she now finds herself and her family threatened with eviction and loss of her monies due to the 2<sup>nd</sup> Defendant's actions that have threatened to frustrate the contract.

#### **The 1st Defendant's case**

5. The 1<sup>st</sup> Defendant filed the amended defence and counterclaim dated 18<sup>th</sup> January 2021. It admitted to having offered to sell to the Plaintiff apartment No.B4 erected on L.R No.2/174 in Nairobi and having received kshs.12,550,00/= being the agreed deposit of the purchase price. It also admitted to receiving rent from the 2<sup>nd</sup> Defendant but contended that it was not aware of the internal agreement between the Plaintiff and the 2<sup>nd</sup> Defendant.
6. It was its case that the Plaintiff and the 2<sup>nd</sup> Defendant both failed to perform their obligations under the contract causing it to suffer loss. It added that the Plaintiff took possession of the suit property without paying the balance of the purchase price of kshs.28Million together with interest or rent.
7. The 1<sup>st</sup> Defendant seeks a declaration that it is entitled to rescind the contract and the purchaser should forfeit 10% deposit of the purchase price plus kshs.100,000/= as legal costs to the vendor as specified in clause 6(a) of the sale agreement dated 24<sup>th</sup> March, 2017. It also sought an order directing the Plaintiff to vacate the suit apartment forthwith and pay rent, service charge and utility charges for the period she has been in occupation of the apartment.
8. In the alternative, it sought an order allowing the Plaintiff a fixed period time within which she should fulfill her obligations as per clause 7 of the sale agreement and pay the balance of the purchase price together with interest at the rate of 20% per annum from the date the balance was due till payment in full.

#### **The 2nd Defendant's case**

9. The 2<sup>nd</sup> Defendant neither entered appearance nor filed a defence.

#### **The Plaintiff's evidence**

10. PW1, Rose Pompeo Sube Rombey, the Plaintiff, testified on 1<sup>st</sup> July 2021. She told the Court that she is a Sudanese national residing in Kenya at Kilimani Summer Breeze apartment No.B4 where she has lived from 2017. She asked the court to adopt her bundle of documents dated 8<sup>th</sup> December 2017 and her witness statement dated 26<sup>th</sup> October 2018. She stated that pursuant to a revised letter of offer for sale of apartment No.B4 on L.R No.2/174 dated 27<sup>th</sup> February, 2017 from the 1<sup>st</sup> Respondent, she decided to purchase the suit apartment at a price of Kshs.40 Million and procured the services of the firm of M/S Kiptui Kipkemei and Company Advocates, through James Kipkemei, for purposes of the transaction.
11. She further stated that she received through the 2<sup>nd</sup> Defendant, on 1<sup>st</sup> March 2017, a response from the 1<sup>st</sup> Respondent's advocates attaching a draft sale agreement and on 22<sup>nd</sup> March 2017, she deposited kshs.40 million into the client account of the 2<sup>nd</sup> Defendant being the purchase price for apartment No. B4 at summer breeze estate on L.R No.2/174. On 28<sup>th</sup> March 2017, the 2<sup>nd</sup> Defendant paid kshs.12 Million to the 1<sup>st</sup> Defendant's Advocates as deposit of the purchase price. She added that on 5<sup>th</sup> April 2017, the 1<sup>st</sup> Defendant through their Advocates wrote to the 2<sup>nd</sup> Defendant sending the said sale



- agreement duly executed by the directors of the 1<sup>st</sup> Defendant company together with communication on the remaining balance of purchase price of Kshs.28,254,000/=.
12. She stated that on 24<sup>th</sup> March 2017, she signed the sale agreement for the purchase of the suit apartment and on 18<sup>th</sup> April 2017, the 1<sup>st</sup> Defendant's Advocates wrote to her through the 2<sup>nd</sup> Defendant seeking the balance of the purchase price which the 2<sup>nd</sup> Defendant promised to pay.
  13. She further stated that in May 2017, with the consent of the 1<sup>st</sup> Defendant, she took possession of the apartment in anticipation that the purchase would go uninterrupted. She added that on 12<sup>th</sup> May 2017, the 1<sup>st</sup> Defendant's Advocates wrote to the 2<sup>nd</sup> Defendants giving their professional undertaking that they would pay the balance and on 18<sup>th</sup> May 2017, the 2<sup>nd</sup> Defendant showed her a receipt indicating that he had remitted Kshs.10 million by way of RTGS to the 1<sup>st</sup> Defendant's Advocates being part balance of the purchase price. She added that Kshs.18,000,000/= remains outstanding but despite demands to pay, the 2<sup>nd</sup> Defendant has failed, neglected and or refused to pay.
  14. When cross-examined, she stated that the sale agreement is dated 24<sup>th</sup> March 2017 and she was represented by the 2<sup>nd</sup> Defendant in the transaction and completion date was thirty (30) days. She also stated that the purchase price was Kshs.40 million and Kshs.22million has been paid.
  15. When referred to clause 6(a) of the agreement, and the 1<sup>st</sup> Defendant's statutory notice dated 27<sup>th</sup> June 2017, her response was that the agreement has not been terminated. She stated that she moved into the house in June 2017, the balance of the purchase price which stands at Kshs.18million has not been paid and she has not been paying rent.
  16. On reexamination, she stated that the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant negotiated on the rent issue and that she has no obligation to pay rent.

#### **The 1st Defendant's evidence.**

17. DW1, Sailesh K. Hirani, a director of the 1<sup>st</sup> Defendant, testified on 1<sup>st</sup> July 2021. He produced the 1<sup>st</sup> Defendant's bundle of documents dated 27<sup>th</sup> March 2018. His witness statement dated 27<sup>th</sup> March 2018 was adopted as part of his evidence in chief. He stated that the 1<sup>st</sup> Defendant offered to sell to the Plaintiff a 3 bedroomed apartment No.B4 erected on the plot known as Land Reference Number 1/174 in Nairobi County. He further stated that the Plaintiff paid the deposit of the purchase price and the 1<sup>st</sup> Defendant executed the sale agreement. He stated that the completion date was set and agreed as thirty (30) days from the date of execution but after lapse of 30 days and despite many reminders to the Plaintiff and her Advocates, the Plaintiff has ignored or refused to complete the contract as stipulated.
18. On cross-examination on the letter dated 17<sup>th</sup> July 2018 addressed to the Plaintiff, he stated that he signed it. He further stated that the 1<sup>st</sup> Defendant got into an agreement for the payment of rent with the 2<sup>nd</sup> Defendant as an agent and that it received rent for 2 months from the 2<sup>nd</sup> Defendant. He stated that he had no agreement with the Plaintiff over rent and that he could not confirm the full amount was deposited with the 2<sup>nd</sup> Defendant as there are no documents. He stated that the balance of the purchase price is kshs.18 million but the 1<sup>st</sup> Defendant also claims interest in default and if it is paid, it has no problem.
19. On re-examination, he stated that the agreement for sale is between the 1<sup>st</sup> Defendant and the Plaintiff and that the 1<sup>st</sup> Defendant performed all its obligations under the agreement but the Plaintiff did not pay the full purchase price. He prayed that the terms of the sale agreement be effected.
20. The 2<sup>nd</sup> Defendant did not tender any evidence.



21. At the close of oral testimonies, parties tendered written submissions.

### **The Plaintiff's written submissions**

22. They are dated 19<sup>th</sup> October 2021. Counsel for the Plaintiff framed issues for determination as follows:-
- a. Was there a breach of agreement by the Plaintiff?
  - b. Who bears /should bear the burden of any such breach?
  - c. What is the just and fair cause of action in the circumstances?
23. Counsel submitted that there was no breach of contract on the Plaintiff's part. He argued that the Plaintiff fulfilled her obligations as per the agreement when she remitted the full purchase price for the apartment to her Advocate's account. It was his submission that the deposit of funds has been proved by production of RTGS receipt, a signed acknowledgement by the 2<sup>nd</sup> Defendant of having received the full purchase price and an official receipt issued by the 2<sup>nd</sup> Defendant's firm for the full purchase price.
24. He urged the court to find that the role of the 2<sup>nd</sup> Defendant in the subject transaction was not negligible and that his mistake, error or outright theft ought not to be visited upon the Plaintiff who is innocent and did not breach the agreement.
25. It was his submission that if any breach is attributable to the Plaintiff, any such breach falls squarely on the shoulders of the 2<sup>nd</sup> Defendant who should wholly indemnify the Plaintiff since evidence adduced in court clearly shows that the cause of action arose as a result of the negligence of the 2<sup>nd</sup> Defendant herein whose conduct amounts to professional misconduct.
26. He relied on the case of *Diamond Star General Trading LLC v Ambrose D.O Rachier carrying on business as Rachier & Amollo Advocates* [2017] eKLR and the case of *Patrick S.K Kimiti v John Ngugi Gachau & Another* [2015] eKLR to submit that since the 2<sup>nd</sup> Defendant wrote to the 1<sup>st</sup> Defendant's Advocates promising to pay the balance of the purchase price and he was indulged by being given more time, the promises amounted to a professional undertaking capable of enforcement against the 2<sup>nd</sup> Defendant.
27. He also put forward the case of *Kettleman v Hansel Properties Ltd* [1988] 1 ALL ER .3 to submit that the burden of this matter should be borne wholly by the 2<sup>nd</sup> Defendant who through malice and /or sheer negligence has deprived the Plaintiff of her right to property. He added that by dint of Section 55 of the *Advocates Act*, the 2<sup>nd</sup> Defendant is an officer of the court and is subject to its jurisdiction and is also subject to be disciplined by the court as per section 56 of the *Advocates Act*. He also submitted that the 2<sup>nd</sup> Defendant should bear consequences of his omission which constitute professional misconduct for an advocate to apply funds in any other way apart from that which they have been entrusted by the client.

### **The 1st Defendant's written submissions**

28. They are dated 24<sup>th</sup> August 2021. Counsel for the 1<sup>st</sup> Defendant framed issues for determination as follows:-
- a. Which party breached the agreement?
  - b. Consequences of breach as per the agreement.
  - c. Remedies available to the aggrieved party.



29. Counsel submitted that the sale agreement executed by the parties herein should be upheld since a court of law cannot re-write a contract between parties as held by the court of appeal in [National Bank of Kenya Limited v Pipeplastic Samkolit \(K\) Limited](#) [2001] eKLR. He urged the court to find that the Plaintiff was in breach of the agreement therefore the consequences of breach should apply to her.
30. It was his submission that the agreement provided for the issuance of 21 days statutory notice which was issued to the Plaintiff but she did not comply. He cited the case of *Sagoo v Dourado* [1983] KLR to submit that since the 1<sup>st</sup> Defendant complied with all procedures relating to completion and making time of essence, it is entitled to rescind the contract.
31. He cited the case of *Alghussein Establisbemnet v Elton College* [1991]1 ALL ER 267 to submit that the Plaintiff having breached the agreement should not be allowed to benefit from the breach. He urged the court to adopt the principle of restitution in integrum; that is all the parties be restored to the position they would have been had that particular damage not occurred.
32. He also submitted that the Plaintiff's clam to have remitted the purchase price to her advocates is a matter that is between her and her advocates and the 1<sup>st</sup> Defendant is not privy to the private agreement and cannot therefore be expected to be bound by it. The relied on the case of [Saving & Loan \(k\) Limited v Kanyenje Karangaita Gakombe & Another](#) [2015] eKLR.
33. It was his submission that the Plaintiff should have paid the balance then lodged disciplinary action against the 2<sup>nd</sup> Defendant for professional misconduct under Section 60(1) of the [Advocates Act](#). He prayed for judgement against the Plaintiff.
34. I have considered the pleadings and the evidence on record. I have also considered the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-
  - a. Which party breached the agreement for sale in respect of the suit property?
  - b. What is the consequence of breach?
  - c. Whether the plaintiff is entitled to the reliefs sought in the plaint.
  - d. Whether the defendant is entitled to the reliefs sought in the counter-claim.
  - e. Who is liable for the costs of the suit?
35. The Plaintiff and the 1<sup>st</sup> Defendant entered into the sale agreement dated 24<sup>th</sup> March 2017 with the Plaintiff as purchaser of the suit apartment and the 1<sup>st</sup> Defendant as vendor. The purchase price of the suit apartment was Kshs.40 Million. The 2<sup>nd</sup> Defendant was the vendor's Advocate in the transaction.
36. This court is guided by the decision in [National Bank Of Kenya Ltd v Pipeplastic Samkolit \(K\) Limited](#) [2001] eKLR where the Court of Appeal held that:-"A Court of law cannot re-rewrite a contract between the parties... ." The court is also guided by the decision of the court in [William Kazungu Karisa v Cosmas Angore Chanzeru](#) [2006] eKLR where the Court held that, "The basic rule of the law of contract is that the parties must perform their respective obligation in accordance with the terms of the contract executed by them".
37. The Plaintiff was bound to pay the 1<sup>st</sup> Defendant the full purchase price of the suit apartment of kshs.40 Million within 30 days from 24<sup>th</sup> March 2017. Parties do not dispute that the Plaintiff has so far paid ksh.22 Million and kshs.18 Million remains unpaid to date. As per the sale agreement, the Plaintiff is in breach for failure to complete the contract.



38. However, the Plaintiff argued that she paid the entire purchase price of Kshs.40 Million to the 2<sup>nd</sup> Defendant for onward transmission to the 2<sup>nd</sup> Defendant, thus she met her obligations in the sale transaction and if there is fault, then it rests with the 2<sup>nd</sup> Defendant for failing to transmit the entire purchase price to the 1<sup>st</sup> Defendant. In other words, it was the 2<sup>nd</sup> Defendant's failure to remit the balance of Kshs. 18 Million that is the cause of action in this suit.
39. In *Cork v Kirby Maclean, Ltd* [1957] 2 ALL ER 402 cited in *Juma Muchemi v Charles Waweru Gatonye t/a Waweru Gatonye & Company Advocates* [2006] eKLR Denning, L.J. stated in his judgement: "Subject to the question of remoteness, causation is, I think, a question of fact. If you can say that the damage would not have happened but for a particular fault, then that fault is in fact a cause of the damage; but if you can say that the damage would have happened just the same, fault or no fault, then the fault is not a cause of the damage.....if is always a matter of seeing whether the particular event was sufficiently powerful a factor to bring about the result as to be properly regarded by the Law as a cause of it."
40. There is evidence that the Plaintiff deposited Kshs.40 Million to the 2<sup>nd</sup> Defendant's client account on 22<sup>nd</sup> March 2017 to be held on her behalf basis and the 2<sup>nd</sup> Defendant paid ksh.22 Million as part purchase price on behalf of the Plaintiff. The 2<sup>nd</sup> Defendant also issued the 1st Defendant with an undertaking that they would pay the balance of the purchase price. It is therefore evident that 'but for' fault of the 2<sup>nd</sup> Defendant, the transaction would have gone smoothly. However, I agree with the 1<sup>st</sup> Defendant's submissions that the sale agreement was between the Plaintiff and the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant was not party to the agreement dated 24<sup>th</sup> March 2017. The said agreement does not stipulate consequences of breach on the part of the 2<sup>nd</sup> Defendant. It is the Plaintiff who must face the consequences of breach as agreed between the parties.
41. The consequences of breach of the sale agreement between the Plaintiff and the 2<sup>nd</sup> Defendant is to be found at clause 6(a) of the sale agreement dated 24<sup>th</sup> March 2017. The 2<sup>nd</sup> Defendant is entitled to rescind the contract and to forfeit 10% deposit of the purchase price plus kshs.100, 000/= as legal costs to the vendor. However, the 2<sup>nd</sup> Defendant contended that It would allow the Plaintiff to pay the balance within a period specified by the court and interest at 20% from the date the balance fell due till payment in full. I would grant the Plaintiff 90 days within which to fulfill her obligations considering she had paid the entire purchase price but her Advocates failed to remit it.
42. The court notes that the 2<sup>nd</sup> Defendant is in breach of the professional undertaking it issued to the 1<sup>st</sup> Defendant to pay the balance of the purchase price and it has also retained the Plaintiff's money since 2017 thus committing gross misconduct that must be called out by this court. Advocates are officers of the court required to uphold professional ethics. The 2<sup>nd</sup> Defendant did not bother to file a defence in this matter despite being served. The Plaintiff ought to pursue disciplinary action against the 2<sup>nd</sup> Defendant.
43. Having found that the Plaintiff was in breach of the sale agreement, I am guided by the decision in *Lamare vs Dixon* 1873 L.R. 6HL 414 cited in *Anne Mumbi Hinga v Gaitbo Oil Limited* [2019] eKLR where it was held that, "the court will not grant specific performance if the person is in breach of a particular undertaking then the court will not entertain his request that the other party be compelled to complete his part of the contract." to find that the Plaintiff is not entitled to an order of specific performance and damages for loss and injury.
44. In its counterclaim, the 1<sup>st</sup> Defendant sought an order directing the Plaintiff to vacate the suit apartment forthwith and pay rent, service charge and utility charges for the period she has been in occupation of the suit apartment. The Plaintiff should not be evicted provided she pays the balance



of the purchase price and interest within the 90 days. If the balance and interest are not forthcoming within 90 days, the 1<sup>st</sup> Defendant is entitled to rent, service charge and utility charges to be paid by the Plaintiff for the period she has been in occupation of the suit property after the breach to the sale agreement occurred.

45. I agree with the Plaintiff's submissions that the 2<sup>nd</sup> Defendant did not file any response to the pleadings herein. He appeared in person but did not cross examine the Plaintiff. He did not deny the allegations made against him by the Plaintiff. I find that he is solely to blame for the turn of events. He will bear the costs of this suit in addition to carrying out his obligations.
46. It is clear that the Plaintiff released the full purchase price to her lawyers, the 2<sup>nd</sup> Defendant who neglected to forward the same to the 1<sup>st</sup> Defendants Advocates.
47. In conclusion, I find that the Plaintiff is entitled to an order of permanent injunction. She has been on the suit premises since 2017. The 1<sup>st</sup> Defendant is also entitled to be paid the balance of the purchase price with interest.
48. Accordingly, I make the following orders:-
  - a. That a permanent injunction is hereby issued restraining the 1<sup>st</sup> Defendant from evicting the Plaintiff from apartment B4-Summer Breeze Apartments on LR No 2/174.
  - b. That an order of specific performance is hereby issued against the 2<sup>nd</sup> Defendant to carry out his obligations.
  - c. That the Plaintiff do liaise with the 2<sup>nd</sup> Defendant to ensure that the balance of the purchase price of Kshs.18,000,000 together with interest from 24<sup>th</sup> April 2017 is released to the 1<sup>st</sup> Defendant's Advocates within ninety (90) days form the date of this Judgment. In Default the 1<sup>st</sup> Defendant will be at liberty to use lawful means to evict the Plaintiff from the suit premises.
  - d. That the 2<sup>nd</sup> Defendant shall bear costs of this suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED NAIROBI THIS 28TH DAY OF APRIL 2022.**

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**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

Mr. Wangai for the Plaintiff

No appearance for the 1st Defendant

No appearance for the 2nd Defendant

Steve - Court Assistant

