



Nyeri Teachers Investment Co. Ltd v Solio Ranch Ltd & another (Environment and Land Case Civil Suit 1538 of 2014) [2022] KEELC 2400 (KLR) (26 April 2022) (Judgment)

Neutral citation: [2022] KEELC 2400 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1538 OF 2014**

MD MWANGI, J

APRIL 26, 2022

BETWEEN

NYERI TEACHERS INVESTMENT CO. LTD PLAINTIFF

AND

SOLIO RANCH LTD 1ST DEFENDANT

TYSONS LIMITED 2ND DEFENDANT

JUDGMENT

Background

1. The Plaintiff initiated this case by way of a Plaint dated 11th December 2014. In the said plaint, the Plaintiff was pursuing 5 prayers against the Defendants jointly and severally, namely: -
 - a) A permanent injunction order restraining the Defendants either by themselves, their servants, agents, any other body or authority from alienating, disposing, effecting any transfer, dealing in any other way or offering for sale the property known as plot A10, also known as L.R No. 11571/39 (11571/6/21) to any other party whatsoever save the plaintiff;
 - b) An order of specific performance directed at the 1st Defendant, to compel it to sign all documents and do all acts for the purposes of completing the contract between the Plaintiff and the Defendant for sale by the 1st Defendant and purchase by the Plaintiff of the property known as plot No. A 10, also known as L.R No. 11571/39 (11571/6/21);
 - c) General damages;
 - d) Costs of the suit; &
 - e) Interest on (c) and (d) at court rates.



2. However, the Plaintiff, after a ruling by the late Justice Onguto (as he then was), amended its Plaintiff on 2nd April 2015. In the amended Plaintiff, the Plaintiff's claim against the 1st and 2nd Defendants jointly and severally was for:-
 - i. Kshs.6,000,000/= being a refund of the purchase price deposit;
 - ii. Interest on (i) above at the rate of 13% from 11th September 2013 until payment in full;
 - iii. Kshs.4,604,166.66/= being the accrued lost earnings and interest;
 - iv. General damages;
 - v. Costs of the suit;
 - vi. Interest on (iv) and (v) at court rates; &
 - vii. Any other or further relief that this court may deem fit to grant.
3. On 27/2/2019, the Plaintiff's Advocate, Mr. Nderitu informed the court that the matter had been particularly settled. The agreement which had been reduced into writing in form of a consent between the parties was adopted as an order of the court on the same date. In accordance with the said consent order, the deposit of Kshs.6,000,000/= that was held by the 2nd Defendant was released to the Plaintiff. Parties were further directed by the Court to discuss and agree on the remaining issues for determination by the court.
4. On the same day, the Plaintiff with leave of court, further orally amended its claim as follows: -
 - i. Amended paragraph 16 (d) of the plaintiff to read Kshs. 566,041.00 instead of Kshs. 4,170,833.33; and
 - ii. Amended prayer (iii) in the plaintiff to read Kshs.999,374.33 instead of kshs.4,604, 166.66/=.
5. With the above developments, the remaining plaintiff's claim was for the following orders only: -
 - i. Spent
 - ii. Interest on (i) above at the rate of 13% from 11th September 2013 until payment in full;
 - iii. Kshs. 999,374.33 being the accrued lost earnings and interest;
 - iv. General damages;
 - v. Costs of the suit; and
 - vi. Interest on (iv) and (v) at court rates.
 - vii. Any other or further relief that this court may deem fit to grant.
6. The 1st Defendant had filed a statement of defence and counter claim dated 3rd August 2015. The 1st Defendant in its counter claim against the Plaintiff, prays for:-
 - a) General damages;
 - b) Punitive Damages;
 - c) Interest on (a) & (b) from 24th October 2014 when the caveat was illegally lodged until payment in full;



- d) Indemnity against loss and action that may result as a consequence of the illegally lodged caveat; and
 - e) Costs of the suit.
7. The 2nd Defendant too filed a statement of defence against the Plaintiff's claim.
 8. The case proceeded to hearing with the Plaintiff and the 2nd Defendant calling I witness each. The 1st Defendant did not call a witness.

The Plaintiff's case

9. The Plaintiff avers that on or about 5th September 2013, the 1st Defendant's agent wrote a letter of offer to the Plaintiff indicating willingness to sell the Plaintiff a portion of the suit property measuring 200 acres at kshs.60 million. The 2nd Defendant was the agent of the 1st Defendant.
10. The Plaintiff affirms that the letter of offer required that the Plaintiff signs it and returns it to the 2nd Defendant together with 10% payment of the stated purchase price, within 14 days. The Plaintiff complied by signing the letter and returning it with proof of payment of 10% deposit (of the purchase price) on 12th September 2013.
11. Thereafter, as the Plaintiff alleges in its plaint, the 1st Defendant advocates started corresponding with its advocates and agreed on the terms of a formal agreement that was to be executed by the Plaintiff and the 1st Defendant. However, this did not come to be.
12. According to the Plaintiff, when it pursued the signing of the agreement, the 1st Defendant's advocates stated that they had not received any further instructions from their client. The Plaintiff indicates that it later learnt that the 1st Defendant had sold the land to other purchasers.
13. The Plaintiff insists that there was a collateral contract between it and the 1st Defendant to enter into an agreement for sale of plot No. A10. The plaintiff avers that the refusal by the 1st Defendant to complete the agreement for sale of plot A10 was a violation of the Plaintiff's and its member's Constitutional Rights guaranteed under articles 27(1) & (5), 40(1) and 57 of *the Constitution* of Kenya.
14. The Plaintiff further terms the 1st and 2nd Defendants' actions and omissions as callous, actuated by malice, fraudulent and intended to cause the plaintiff maximum loss and damage. The plaintiff therefore claims damages.
15. The Plaintiff avers that to enable it pay the deposit that it did, and in preparation to pay for the balance of the purchase price, it was compelled to discontinue a lucrative investment plan with British – American (Britam) Asset Managers Ltd, thereby suffering loss of earnings and interest. The Plaintiff has tabulated the alleged loss at paragraph 16 of its amended Plaint.
16. The Plaintiff called 1 witness during the hearing of its case one, John Mwangi Kariuki who adopted his written witness statements as his evidence in chief. In cross examination, the witness (PW1) confirmed that at all times, the Plaintiff dealt with the 2nd Defendant whom they were informed was the agent of the 1st Defendant. He confirmed that no contract was signed between them and the 1st Defendant. The 1st Defendant too did not sign the letter of offer. Clause 10 of the said letter of offer stated that the letter would only be binding if signed by all the parties.
17. The Plaintiff's witness also confirmed that under clause 4 of the letter of offer, the deposit paid was refundable on demand and would attract no interest.



18. The witness confirmed knowledge of a letter sent via email and dated 31.10.2013 that stated that the 'would be sellers' (1st Defendant) were unable to complete the sale agreement since they had not received the approved subdivisions. The decision by the Plaintiff therefore to liquidate its investment was made despite the fact that the Plaintiff had not received a signed letter of offer or a duly executed agreement for sale.
19. The witness finally agreed that the caution lodged by the plaintiff was against the entire block of land owned by the 1st Defendant despite the fact that they were only interested in a portion of it.

The Defendants' case.

20. As earlier stated, the 1st Defendant did not call any witness despite having a counter claim against the Plaintiff.
21. The 2nd Defendant on his part called one witness by the name of Wycliffe Ongwae. He adopted his witness statement as his evidence in chief.
22. In cross examination, the 2nd Defendant's witness (DW 1) affirmed that the Plaintiff never asked for a refund of the deposit paid despite being informed that the 1st Defendant was unwilling or unable to complete the transaction in the terms contained in letter of offer. The deposit was returnable on demand and without interest.
23. DW 1 further stated that upon being served with summons to enter appearance issued in this case, the 2nd Defendant instructed its advocates to confirm willingness to refund the sum of Kshs.6 million paid to them by the Plaintiff as a deposit, but the Plaintiff declined to accept the money. In regard to the claim for lost earnings, DW 1 stated that the Plaintiff wasn't entitled to the same since they had not at any one time requested them to pay the balance of the purchase price or any additional monies for that matter. In essence, the Plaintiff had no reason to liquidate its investments, if at all.
24. It was the evidence of DW 1 that the Plaintiff insisted on completion of the sale transaction.
25. DW 1 confirmed that Tysons Ltd (the 2nd Defendant) was indeed the agent of the 1st defendant with instructions to identify buyers for the suit property alongside the other portions of land owned by the 1st Defendant.
26. Finally, DW 1 affirmed that the 2nd Defendant was holding the Deposit of Kshs.6 million as a stakeholder ready to release it upon completion of the transaction.

Court's Directions.

27. Upon close of the hearing of the case, the court directed parties to file written submissions. All the parties have complied. The court has had the opportunity to peruse the submissions as well as the authorities cited by the parties in support of their respective positions.

Issues for Determination.

28. After a careful perusal of the pleadings by the parties, the evidence adduced and the submissions filed, the court is of the view that the issues for termination in this case are as follows: -
 - a) Whether the Plaintiff is entitled to interest on the sum of Kshs. 6 million at the rate of 13% per annum from 11th September 2013 until payment in full.
 - b) Whether the Plaintiff has made a case for lost earnings.



- c) Whether the Plaintiff is entitled to general damages.
- d) Whether the 1st Defendant is entitled to the orders sought in the counter claim.

Analysis and Determination.

A. Whether the Plaintiff is entitled to interest on the sum of KShs.6,000,000/= at the rate of 13% from 11th September 2013 until payment in full.

29. Justice Joel Ngugi in the case of *Jane Wanjiki Wambu vs Anthony Kigamba Hato & 3 others* (2018) eKLR, held that the discretion of courts to award and fix the rate of interests under section 26(1) of the *Civil Procedure Act* is two-fold:-
- i. From the date of filing suit to the date of judgement.
 - ii. From the date of judgement to the date of payment of the decretal amount.
30. As for interests before the date of filing suit, section 26 of the *Civil Procedure Act* has no application. Interest before filing suit will only be payable where under an agreement there is stipulation for the rate of interest, i.e. the contractual rate of interest or where by custom and usage, it is allowable.
31. I am in agreement with the interpretation of Justice Ngugi on the application of section 26(1) of the *Civil Procedure Act* and on the issue of costs before the filing of a suit.
32. The Plaintiff's claim herein is based on the letter of offer dated 15th September 2013. Clause 4 of this letter of offer had a clear proviso which categorically stated that the deposit received (Kshs.6,000,000/=) was 'refundable on demand' and would 'attract no interest'.
33. As explained above, interest before filing suit would be payable only where under an agreement there such a stipulation for its payment and the rate at which it would be payable or where by custom and usage, interest is payable in such a scenario.
34. In this case, there was no agreement providing that interest was payable or stipulating the rate at which it would have been payable. The Plaintiff on the other hand did not adduce any evidence of any custom and usage to justify payment of interest as prayed, before the date of filing suit. So, there is no basis for the grant of that prayer up to the point of filing the suit.
35. The Plaintiff filed the suit in court on 11th December 2014, by way of a plaint of the same date. In the said plaint, the plaintiff did not include a prayer for the refund of the sum of Kshs. 6,000,000/- paid as deposit to the 2nd Defendant. The Plaintiff only brought the claim upon amending the plaint much later on 2nd April 2015.
36. The sum of Kshs.6,000,000/- was refunded to the Plaintiff in the year 2019 after the parties recorded a consent dated 22nd February 2019. The said consent was adopted as an order of the court on 27th February 2019. The consent by the parties was silent on the aspect of interest. The consent merely stated that: -
- “By consent, the deposit of Kenya Shillings six million (Kshs. 6,000,000/=) held by the 2nd Defendant herein be released to the Plaintiff within 7 days of service of the executed court order.”
37. What was the intention of the parties in writing this consent and in the manner in which they did?



38. It has been said that even the devil does not know what is in a man's mind. I will not speculate. I will go ahead to consider whether there is any justification to award the Plaintiff interest on the sum of Kshs. 6 million from the date of filing the amended Plaintiff, 2nd April 2015 until the time it was released by the 2nd Defendant.
39. I will once again refer to the letter of offer dated 5th September 2013 (PE 1). Clause 4 of the letter of offer provided that the sum of Kshs. 6,000,000/- being 10% deposit was to be paid to the 2nd Defendant to be held by them "as stakeholders pending completion."
40. The Court of Appeal in the case of *Nelson Mutai t/a Kandie Mutai & Co. Advocates v Benson Mbuvi Kathenge* (2019) eKLR, while looking at the responsibility(s) of a stakeholder referred to its earlier decision in *George Muriaini Muhoro t/a A.M Muhoro Advocate v George Ndungu Kamiti* (2019) eKLR. In the said case, the court had stated that "a stakeholder is a person with whom money is deposited pending the decision of a bet or a wager or one who holds money or property which is claimed by rival claimants but in which he himself claims no interest."
41. The court observed that, "a stakeholder has a duty to deliver the money or property to the owner(s) once the right to legal possession or ownership had been established; by judgement or by an agreement between competing parties."
42. The 2nd Defendant's duty as a stakeholder in this case was to deliver the money to the owner on completion of the agreement or upon demand under the proviso to the clause 4 of the letter of offer.
43. In cross examination by the Advocate for the 2nd Defendant, the plaintiff's witness (PW1) confirmed that the plaintiff had not at any one time demanded a refund of the deposit of Kshs.6,000,000/- from the 2nd Defendant despite the offer not having crystalized into a legally binding contract.
44. An agreement was only reached by the parties in form of the consent dated 22nd February 2019. The agreement required the 2nd Defendant to refund the money within 7 days of service of the order extracted after the consent was adopted by the court. The plaintiff through his witness confirmed receiving the money as contemplated by the consent order.
45. From the foregoing, I find no reasonable justification whatsoever to award the plaintiff the claim of interest at 13% or any other rate of interest in the sum of Kshs. 6,000,000/=.

B. Whether the plaintiff has made a case for lost earnings.

46. The Plaintiff in the amended Plaintiff at paragraph (iii) prays for a specific sum of Kshs.999,374.33 being the accrued lost earnings and interest. The tabulation is on paragraph 16 of the amended plaintiff. It is particularized as follows: -
- a. The sum of Kshs.433,333.33 being interest on the sum of Kshs.40,000,000/= at a rate of 13% per annum from 3rd January 2014 to 3rd February 2014; &
 - b. The sum of Kshs.566,041/- being interest on the sum of Kshs.55,000,000/= at a rate of 6.5% per annum from 4th February 2014 until 31st March 2014.
47. The Plaintiff in his submissions at paragraphs 66, 67, 68 thereof explains that prior to investing in the purchase of plot No. A 10, it had previously applied its savings in various investment schemes and particularly one with Britam. The investment with Britam guaranteed the plaintiff a return of 13.5% per annum. The plaintiff submits that it would not have broken the investment rather would have made more money were it not for the transactions it was engaged in with the Defendants.



48. The plaintiff avers that in preparation to raise the balance of the purchase price of Kshs. 54 million, it had on 3rd January 2014, discontinued its investment plan with Britam and recalled the sum of Kshs. 40 million. This amount (Kshs. 40 million) was then deposited in an account with Co-operative Bank of Kenya earning interest at the rate of 6.3 % per annum.
49. One of the exhibits the Plaintiff produced in evidence in support of its case, more specifically, 'PE 7' was the email correspondences. The email communication dated 31st October 2013 to a Mr. Sam Nderitu copied to amongst others Tysons and the Plaintiff was from the Advocates for the 1st Defendant communicating their inability to complete the sale transaction for the reason that they were yet to receive the approved subdivisions plans.
50. The Plaintiff's witness, in cross examination by the Advocate for the 1st Defendant confirmed the email communication. Further, he re-affirmed that the Plaintiff and the 1st Defendant had not entered into a formal sale agreement.
51. One would then wonder why the Plaintiff despite receiving the communication of the inability by the 1st Defendant to complete the transaction would go ahead to discontinue its investment plan with Britam. What was the basis for that decision? The discontinuation of the investment, as alleged by the Plaintiff's witness was on 3rd January 2014; after and in spite of the communication from the 1st Defendant.
52. The conclusion is that the Plaintiff can only blame itself for the decision to discontinue the investment with Britam. There wasn't even an agreement to justify their action. There was no demand from either the 1st or 2nd Defendant to the Plaintiff to pay any more money.
53. Consequently, the court finds that the claim for lost earnings by the Plaintiff against the defendant is not only unjustifiable but without any factual or legal basis as well.

C. Whether the Plaintiff is entitled to general damages.

54. The Plaintiff claims general damages against the 1st and 2nd Defendants, jointly and severally.
55. At paragraph 55 of its submissions, the Plaintiff clarifies that its claim is for general damages for the Defendant's fraudulent, malicious, reckless and negligent conduct on the basis of the relationship the parties had established and the fact that the defendants were aware of the financial implication of their conduct to the Plaintiff.
56. The Plaintiff referred to the case of *Central Bank of Kenya v Giro Commercial Bank Ltd & 3 Others* (2019) eKLR where the court cited with approval the holding in the case of *Obongo & Another's Vs Municipal Council of Kisumu* (1971) EA 91 to the effect that, where damages are at large and a court is making a general award, it may take into account factors such as malice or arrogance on the part of the Defendant and this is regarded as increasing the injury suffered by the Plaintiffs.
57. The Plaintiff too cited the case of *Bank of Baroda Kenya Ltd v Timwood Produces Ltd* (2008) eKLR where the Court of Appeal allowed an award of Kshs. 3 Million for loss of business and profits in case of negligence.
58. The Plaintiff's submissions is that this court should award it Kshs. 1.5 million as compensation for the Defendants' conduct.
59. In its amended plaint, the plaintiff at paragraph 14A averred that the 1st Defendant's refusal to complete the agreement for sale of plot No. A10 was a violation of the Plaintiff's and its members' Constitutional Rights guaranteed under articles 27(1) & (15), 40 (1) and 57 of *the Constitution*.



60. At Paragraph 15 of the amended Plaintiff, the Plaintiff averred that the 1st and 2nd Defendants' acts and omissions in regard to the intended sale were callous, actuated by malice, fraudulent and intended to occasion the Plaintiff maximum loss and damage. The Plaintiff went ahead to particularize the Defendants' acts of fraud and malice.
61. The late Justice J.L Onguto in his ruling of 16th March 2015 in this matter, at paragraph 21 thereof observed the various discrepancies in the Plaintiff's claim. One can tell that he was at actually at a loss. He could not exactly place his finger on what the plaintiff's case was. I find myself in the same situation.
62. The good Judge observed that, at one point "the plaintiff avers that there is existence a contract to enter into an agreement. The plaintiff blames the 1st Defendant for meticulously and maliciously failing to execute a sale agreement. For this, the Plaintiff claims damages."
63. It is not in dispute that the parties in this case did not enter into a legally binding contract. It its particulars of fraud and malice, the Plaintiff accrues the 1st Defendant amongst other things failing to execute the sale agreement in favour of the Plaintiff, denying the fact that it had received monies from the Plaintiff as consideration for the sale of plot No. A10, knowingly misrepresenting to the Plaintiff that the 1st Defendant intended to sell Plot No. A10 to the Plaintiff while in fact it had no intention of doing so, which misrepresentation, the Plaintiff acted upon to its detriment, dishonestly retaining and or failing to refund Kshs. 6 million paid by the Plaintiff on 11th September 2013, to the Plaintiffs detriment, failing to supply the Plaintiff with a sale agreement, transfer, Deed plan and other documents and failing to respond to the Plaintiff's enquiries regarding the completion of the transaction.
64. In the case of *Moses Parantai & Peris Wanjiku Mukuru suing as the legal representative of the estate of Sospeter Mukuru Mbeere (deceased) v Stephen Njoroge Macharia* (2020) eKLR, the Court of Appeal, referring to its earlier decisions, reiterated that 'the onus to prove fraud is on the party who alleges it.' Further that where fraud is alleged, it is not enough to simply infer it from the facts. Fraudulent conduct 'must be distinctly alleged and as distinctly proved', and it is not allowable to leave fraud to be inferred from the facts (per Tunoi J, in *Vijay Morjaria v Nansingh Madhusingh Darbar & Another* (2000) eKLR.)
65. The defendants in their submissions cited other cases in in regard to the allegations of fraud.
66. The standard of proof of allegations of fraud is beyond the balance of probabilities but not beyond reasonable doubt. In the case of *Central Bank of Kenya Ltd v Trust Bank Ltd & 4 Others* (1996) eKLR, the Court of Appeal held that "Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in an ordinary civil case".
67. The Plaintiff in this case, needed not only to plead and set out the particulars of fraud but also lay the basis upon which the court would have made a finding in its favour and award damages. That was not so. The plaintiff made unclear, ambiguous and merely general allegations of fraud against the Defendants which were not supported by any evidence anyway. I find that the allegations were not proved as explained above.
68. I therefore dismiss the plaintiffs claim for general damages.

D. Whether the 1st Defendant is entitled to the orders sought in the counter claim.

69. The 1st Defendant despite having a counter claim did not call a witness to give evidence on its behalf.



70. What are the consequences of the 1st Defendants' failure to adduce evidence in support of its Counter-claim?
71. Justice Odunga, in the case of *Linus Nganga Kiongo & 3 others v Town Council of Kikuyu* (2012) eKLR, while considered a similar situation stated that the consequence of failure by the Defendant to call evidence meant that the claims made by the Defendant in his statement of defence and counter claim were unsubstantiated and in those circumstances the counter claim had to fail.
72. A similar holding was arrived at by Lady Justice Lessit in the case of *Trust Bank Ltd & 2 Others Universal Bank Ltd & 2 Others*, where the court held that:-
- “It is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of facts since in so doing, the party fails to substantiate its pleadings.”
73. I agree with the above decisions on consequences of failure to call evidence. Accordingly, and on that reason alone, the 1st Defendant’s counter claim must fail. I need not go farther. The 1st Defendant’s Counter-claim is therefore dismissed.

Conclusion.

74. The upshot is that the plaintiff’s case against the 1st and 2nd Defendants is dismissed. The 1st Defendant’s claim against the Plaintiff is also dismissed.
75. On the issue of costs and considering the above conclusion, the court decision is that each party shall bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26TH DAY OF APRIL 2022.

M.D. MWANGI

JUDGE

In the Virtual Presence of:-

Ms. Wairima h/b for Nderitu for the Plaintiff

Ms. Kithinji h/b for Muthui for the 1st Defendant

Ms. Murigu h/b for Wandago for the 2nd Defendant

Court Assistant: Hilda

M.D. MWANGI

JUDGE

