



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC 161 OF 2011

PETER KIRIMI MWINDI.....PLAINTIFF

VERSUS

DOROTHY SEYANOL MOSCHION DEFENDANT

JUDGEMENT

Background

1. The Plaintiff's claim is for the sum of Kshs. 7,618,880/= and general damages for breach of contract.
2. The Plaintiff avers that on 21st December 2008, he entered into a written agreement with the Defendant in respect of the parcel of land known as LR No. 5892/26 (hereinafter referred to as the suit premises). The Defendant agreed to sell the suit premises to the plaintiff for a sum of Kshs. 8,500,000/=.
3. In accordance with the said agreement, the plaintiff paid to the Defendant a sum of money totaling Kshs. 7,618,880/=. The balance of the purchase price was to be paid upon successful transfer of the title to the suit premises to the Plaintiff.
4. The Defendant however, despite receiving the stated amount of money, did not transfer the title to the suit premises to the Plaintiff. The Plaintiff discovered that the Defendant had instead sold and transferred the suit premises to a third party in violation of their agreement.

The Plaintiff's Case.

5. The Plaintiff testified in person in this case. He adopted his witness statement dated 4th April 2021 as his evidence in chief. The Plaintiff's testimony was that he paid the defendant a total sum of Kshs. 7,618,880/=. Out of the aggregate amount paid, Kshs. 3,448,880/= was paid in form of cash while the rest was paid in kind. The Plaintiff sold to the Defendant two motor vehicles being registration numbers KAZ 946S and KAZ 522X for the sum of Kshs. 2,370,000/= and Kshs. 1,800,000/= respectively. The price of the motor vehicles was to be applied towards the purchase of the suit premises.
6. A schedule of payment was made and counter signed by both parties confirming the amounts paid. The Plaintiff produced it in evidence in support of his case.
7. The transaction for the sale of the suit premises was however not completed because the Plaintiff realized that the Defendant had contrary to their agreement, sold and transferred the suit premises to a third party.
8. The Plaintiff then demanded a refund of the monies paid from the Defendant but the Defendant failed to refund necessitating the filing of this suit.
9. In support of his case, the Plaintiff produced the documents listed on his Plaintiff's list of documents as his exhibits. The documents include a copy of the agreement dated 21st December 2008, copy of banker's cheque drawn in favour of the Defendant evidencing the payments made to the Defendant and the summary of payments made and acknowledged by the Defendant amongst others.
10. The Defendant despite having been served with summons to enter appearance did not enter appearance and or file a statement of defence. This matter was therefore set down for hearing in accordance with the provisions of order 10 rule 9 of the civil procedure Rules.

Issues for Direction.

11. In this court's opinion, there are 3 issues for determination in this matter, as follows:

- a. Whether the Plaintiff is entitled to the claim of Kshs. 7,618,880/=.*
- b. Whether the Plaintiff is entitled to the claim for general damages for breach of contract.*
- c. Whether the plaintiff is entitled to the costs of the suit.*

Analysis and determination

A. Whether the Plaintiff is entitled to the claim of Kshs. 7,618,880/=.

12. It is trite law that special damages must not only be specifically pleaded but must be specifically proved before they can be awarded by the court (**Hahn Vs Singh (1985) KLR 716**).

13. In this case, the Plaintiff claim is for the specific figure of Kshs. 7,618,880/=. The Plaintiff produced documentary evidence in support of the claim. The schedule of payment produced as PE 4 is counter -signed by both the Plaintiff and the Defendant. It amounts to an acknowledgement of payment by the Defendant.

14. I am satisfied that the Plaintiff has proved the claim of Kshs. 7,618,880/=. I award him the same.

B. Whether the Plaintiff is entitled to the claim of general damages for breach of contract.

15. As a rule, **general damages** cannot be awarded in cases of breach of contract. The Court in the case of **Consolata Anyango Ouma Vs South Nyanza Sugar Company Ltd (2015) eKLR** explained the reason why general damages are not awarded in cases of breach of contract. it stated that:-

*“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase ‘restitutio in integrum’ (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). **Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR)).”***

16. Accordingly, I disallow the Plaintiff's claim for general damages for breach of contract.

C. Whether the Plaintiff is entitled to costs of the suit.

17. Costs follow the cause. I see no reason for deviating from this rule. Accordingly, I award the plaintiff, the costs of this suit.

D. Whether the plaintiff is entitled to interest at court rates from 3.10.2007 until payment in full.

18. The Plaintiff in his pleadings has not explained the basis of the date, 3.10.2007. Neither did he explain it in his testimony.

19. The contract that forms the basis of the Plaintiff's case was entered into on 21st December 2008. Why would the Plaintiff be claiming for interest from a date even beyond the date of the contract?

20. The Court's discretion to award and fix the rate of interest is based on section 26 of the Civil Procedure Act. Judicial discretion, as has been aptly stated must at all times be exercised judiciously.

21. I agree with Justice Joel Ngugi in the case of, **Jane Wanjiku Wambu Vs Anthony Kigamba Hato & 3 Others (20180 eKLR)**, where he stated that the court's discretion under section 26(1) of the Civil Procedure Act to award and fix the rate of interest is twofold:-

- i. From the date of filing suit to the date of judgment.*
- ii. From the date of judgment to the date of payment of the decretal amount.*

22. Further, that for interest before the date of filing suit, Section 26 has no application. Interest in such instances would only be payable, prior to the date of filing suit, 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. Finally, only where there is a statutory right to interest or where an agreement to pay interest is implied from the course of dealing between the parties.

23. In this case, the Plaintiff did not offer any evidence or justification in support of his claim for interest from 3.10.2007.

24. This Court, exercising its discretion under Section 26(1) of the Civil Procedure Act and having in mind the circumstances of this case awards the Plaintiff interest on the sum of Kshs. 7,618,880/- at court rates from the date of filing suit until payment in full.

25. In summary, the Court allows the Plaintiff's claim in the following terms:-

A. Kshs. 7,618,880/- with interest at court's rate from the date of filing suit until payment in full.

B. Costs of the suit.

It is so ordered.

Dated, signed and delivered at Nairobi this 21st day of April 2022.

M.D MWANGI

JUDGE

In the Virtual Presence of:-

Ms. Swaka h/b for Mr. Njenga for the Plaintiff

N/A for the Defendant

Court Assistant: Hilda

M.D MWANGI

JUDGE