REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Suit 554 of 2011

CATHERINE NYAGAH NYAWIRA……..……..……PLAINTIFF

VERSUS

CHURCH OF GOD EAST AFRICA……..……DEFENDANT

JUDGMENT

1. The facts of this case as per the Plaint dated 22nd August 2011 and filed on 8th December 2011 are that through its marketing agents, known as Villa Care Limited, the Defendant offered the Plaintiff a 3 bed-roomed apartment with DSQ on L.R. No 1/308 Block B Unit B6 hereinafter referred to as "the suit property".
2. The letter of offer dated 4th December 2007 from the said marketing agents to the Plaintiff showed that the purchase price of the suit property as Kshs 9,800,000/=. The said purchase was subject to certain terms and conditions. These were the payment plan and acceptance of the offer by the Vendor. Upon appending her signature in the said letter of offer, the Plaintiff confirmed acceptance of the following payment plan:-

i. On execution of letter of offer- Kshs 250,000/= which was paid.

ii. On or before 7th January 2008- Kshs 500,000/=

iii. On or before 31st March 2008- Kshs 750,000/=

iv. On or before 31st July 2008- Kshs 500,000/=

v. Upon conclusion- Kshs 7,800,000/=.

1. The Plaintiff testified that vide a letter dated 10th November 2009, M/S Munikah & Co Advocates for the Defendant in the said transaction returned 3 cheques in the sum of Kshs 1,900,000/= to M/S Tobiko, Njoroge & Co Advocates for the Plaintiff on the ground the mode of payment of the purchase price was not acceptable to the Vendor. She pointed out that she needed to pay the balance of the purchase priced of the suit property as the same was now complete. She stated that she was all material times ready and willing to complete the conveyance. She produced copies of the Agreement for sale and Lease that she had duly signed in support of her case.
2. During cross-examination, the Plaintiff admitted that she did not have an agreement of sale signed by both herself and that she made the offer of the payment plan after looking at her pockets. She

stated that she was business minded and taking the monies in 2009 would have made no business sense as would have invested the same way back in 2008 and earned interest. She denied ever having dealt with Muthoni Wagenga, the in house legal counsel for the marketing agents on the issue of the letter of offer.

3. In her re-examination by Mr Arimi Kimathi, the Plaintiff was categorical that taking the cheques would have compromised her position as she was ready to complete the transaction. She averred that she only spoke to the said Muthoni Wagenga in respect of another property that she was purchasing through the said marketing agents and who were the developers of the project. She stated that she would have known what offer the Defendant had wanted had the same been communicated to her and it was not.
4. On its part, the Defendant filed its Statement of Defence on 8th August 2012. Its case was that the aforesaid letter of 4th December 2007 was an invitation to treat because the offer was subject to the acceptance by the Defendant. It contended that it did not sign the said Agreement for Sale and the Lease for the reason that the Plaintiff's mode of payment was not acceptable to it and consequently, there was no agreement for sale between it and the Plaintiff that was capable of being revoked or rescinded. It therefore denied the particulars of fraud, illegality and breach of contract as alleged in the Plaint.
5. Muthoni Wagenga testified on behalf of the Defendant. She stated that the Defendant had wanted the purchase price spread throughout the transaction with 20% of the purchase price been paid at the end of the transaction. It was her evidence that there was a lot of back and forth of consultations between her firm and the Defendant to see if the mode of payment could be re-negotiated to accommodate the Plaintiff who had by this time lost her job.
6. She added that her firm tried to trace the Plaintiff to inform her that the Defendant had refused her offer. They subsequently established that the Plaintiff had re-located to South Africa, a fact that the Plaintiff admitted during her cross-examination. The firm then wrote to her then advocates requesting her to collect the cheques from their firm which she had not done as at the time the matter came up for hearing.
7. During cross-examination by Mr Arimi Kimathi, she conceded that she did not know whether the monies the Plaintiff had paid had been utilised by the Defendant. She was emphatic that she was doing the Plaintiff a favour by trying to re-negotiate the payment plan and she did this for a lengthy period of time. Her firm never received any further communication from the Plaintiff on a different offer on the mode of payment. She did not, however, have any minutes to prove the same because these were informal discussions.
8. In her re-examination, she contended that it was the Plaintiff's duty to have enhanced her offer of payment and that the Plaintiff stood to lose if she did not do so.
9. During the hearing, counsel for both parties consented that I could consider the documents that had been submitted during the Plaintiff's Notice of Motion application dates 22nd August 2011. In the said application, the Plaintiff had sought an injunctive orders to restrain the Defendant, is employees, agents, assigns, servants and any other persons howsoever acting on behalf of the Defendant from selling, offering for sale, transferring, charging, mortgaging and/or in any way dealing in any manner whatsoever with the suit property. The Plaintiff annexed copies of several letters between her then advocates and those of the Defendant which culminated in the letter dated 10th November 2009 in which the Plaintiff was requested to collect her cheques being a refund of the deposit she had paid. In response thereto, the Defendant filed Grounds of Opposition on 24th April 2012.
10. In his ruling dated 26th July 2012, Musinga J (as he then was) dismissed the said Notice of Motion application on the ground that the Plaintiff had failed to satisfy the tests spelt out in the celebrated case of **Geilla vs Cassman Brown & Co Limited [1973] E.A. 358**. He added that she had failed to demonstrate that she stood to suffer irreparable loss if the injunctive orders were not granted. In the said ruling, the said learned judge also held that there was no agreement that had been signed by the parties as was required under Section 3 (3) of the Law of Contract Act. Consequently, the Plaintiff could therefore not bring a suit for disposition of the suit property.
11. The Plaintiff's List of Issues for determination by the court was filed on 27th September 2012. The said issues were as follows:-

i. Was the letter from the Defendant's agents authorised agents, Villa Care Limited to the Plaintiff, dated 4th December 2007 a letter of offer or an invitation to treat?

ii. Did the Defendant through its authorised agents aforesaid, offer to sell the suit property and did the Plaintiff accept and communicate acceptance of the said offer to the Defendant?

iii. Did the Plaintiff pay to the Defendant or its agents a sum of Kshs 1,900,000/= being a deposit and consideration for the sale of the aforesaid property?

iv. Did the Defendant or its agents retain the said deposit until November 2009?

v. Did the Defendant or its agents otherwise represent that they were ready and willing to perform under agreement until the purported unilateral rescission of the same in November 2009?

vi. Was there a binding contract for sale of property between the parties herein?

vii. Was the Defendant's purported unilateral rescission of the said agreement lawful?

viii. In the circumstances was the Plaintiff therefore entitled to the reliefs sought in the Plaint?

ix. Who would bear the costs of the suit?

1. The court observes that the Plaintiff's written submissions were very sketchy. They did not attempt to answer the issues that the Plaintiff put to the court for consideration and determination. The Defendant, on the other hand, submitted on each and every issue.
2. I will address issues No 1, 2 and 6 as they are related. The Defendant argued that the letter of 4th November 2007 was an invitation to treat. It submitted that the Defendant was not bound by the said letter because it was subject to its acceptance of the Plaintiff's offer as was shown by clause 11 of the said letter. The Defendant relied on the case of **HCCC No 1670 of 2001 Ladopharma Company Limited vs National Hospital Fund [2005] eKLR** in which the trial court held as follows:-

"…A statement is clearly not an offer if it either expressly provides that the person who makes it is not to be bound merely by the other party's notification of assent but when he himself has signed the document in which the statement is contained or that statement sets out the terms under which the parties are to be bound…"

1. This issue was addressed by the aforesaid said learned judge when he found that there was no valid contract between the Plaintiff and the Defendant. I therefore have no hesitation in finding that the said letter did not bind both the Plaintiff and the Defendant as it was subject to acceptance by the Defendant.
2. The court has noted the Plaintiff's and Defendant's submissions in respect of issue nos 3 and 4 but will not make a determination of the same. This is because from the evidenced adduced by both parties, it is not in dispute that the Plaintiff paid a deposit in the sum of Kshs 1,900,000/= for the purchase of the suit property and that the Defendant retained the said sum until November 2009.
3. **What should have been an issue in contention is whether or not the Defendant had any legal basis in keeping the same until November 2009. This is important as it has a bearing on the amount of interest**
4. This court finds issues No 5 and 7 in the Plaintiff's List of greed Issues to be related. The same will therefore be addressed together. The Plaintiff argued that the Defendant failed to produce minutes of the meetings it held with the Plaintiff discussing the change of the mode of payment. On the other hand, the Defendant contended that the discussions were informal and consequently, no such minutes were kept. It becomes a situation of one person's word against the other.
5. In the absence of any such documentation, this court will fall back on the documentation that is on record in the court file to answer these two questions. This court has perused the documents annexed to the Plaintiff's Notice of Motion application. It is evident that there was regular

communication between the then advocates for the Plaintiff and the Defendant. On 2nd December 2008, the then advocates for the Defendant informed advocates for the Plaintiff that there had been some changes in the structure of the partners developing the suit property necessitating the re-drawing of the Agreement for Sale and the Lease title.

6. The former advocates forwarded the revised documents vide a letter of 9th December 2008. The Plaintiff's advocates then forwarded the said documents on 18th February 2009. Communication between the said advocates appeared to have progressed well until 10th November 2009 when the then advocates for the Defendant informed the Plaintiff's then advocates that the Defendant would not execute the Agreement for Sale and Lease because the mode of payment of the selling price by the Plaintiff was unacceptable to the Defendant.
7. The court noted the Plaintiff's admission that she re-located to South Africa. However, it is evident that her then advocates were in constant communication with the then advocates for the Defendant. The Defendant carried itself in a manner to suggest to the Plaintiff that the Agreement for Sale which the court notes contained the terms of the aforesaid letter of offer were acceptable to it.
8. If the Defendant rejected the Plaintiff's proposals on the payment plan, it ought to have indicated the same and ought not to have instructed its advocates at the time from sending a draft Agreement for Sale and Lease to the then Plaintiff's advocates for approval and subsequently sent revised documents of the same which the Plaintiff duly executed. Accordingly, from the documentation on the court record, this court finds that the Plaintiff was ready and willing to perform under the contract until November 2009.
9. On the question of whether or not the purported rescission was lawful, this would have been resolved by considering the rescission clause in the Agreement for Sale. However, this court having agreed with the ruling of the aforesaid learned judge, this court finds that the issue of unlawfulness of the purported rescission or otherwise would not arise. The Plaintiff cannot enjoy any rights under the said Agreement for Sale because as the Defendant successfully argued before the said learned judge and this court, there was no valid and binding enforceable contract for sale between the Plaintiff and the Defendant.
10. Issue No 8 in the Plaintiff's List of Issues related to the reliefs that she sought. It was the Defendant's submission that the Plaintiff had failed to prove its case. The Plaintiff had sought the following reliefs:-

a. A permanent injunction restraining the Defendant from alienating, transferring and/or selling the suit property;

b. An order for specific performance of the contract between the Plaintiff and the Defendant;

c. In the alternative to (a) above, General damages for breach of contract, and an order that the Defendant refund the deposit paid together with interest thereon at the prevailing commercial rates from 4th July 2007 until the date of payment;

d. Mesne profits; and

e. Costs of this suit plus interest thereon.

1. In her written submissions filed on 28th January 2013, the Plaintiff submitted that the issue of specific performance was dealt with by the aforesaid learned judge and that the only issues the court was to determine were the issues of mesne profits and costs of the suit.
2. The Plaintiff urged this court to decipher serious *mala fides* on the part of the Defendant for having accepted a deposit of Kshs 1,900,000/= and purported to refund the same after having utilised it for several years.
3. She submitted that fraud was evident when she forwarded the duly signed Agreement for Sale and Lease and that she was entitled to damages. She relied on **Civil Appeal Case No 42 & 45 of 2008 (Consolidated) Kirkdale Ltd vs Mount Agencies & others.** In the said case, the court held that because the agreement therein was in its initial stages and in which money was refunded, it was

not sure whether the 1st Respondent therein had a basis for insisting that it entered into a valid sale agreement with the Appellant therein. This case provides little or no comfort to the Plaintiff as it is in all fours with the findings of the aforementioned learned judge.

4. Consequently, having found that there was no valid and enforceable contract between the Plaintiff and the Respondent, this court is persuaded by the Defendant's submissions that reliefs sought in prayer nos (a), (b) and the claim for General damages for the breach of contract cannot be granted.
5. Although the Plaintiff claimed mesne profits, she did not submit or demonstrate to this court that she was entitled to the same. As was rightly pointed out by the Defendant, the Plaintiff did not have any registrable interests in the suit property for the same reason that there was no valid and enforceable contract between the Plaintiff and the Defendant. For that reason, this court finds that mesne profits cannot also be granted to the Plaintiff.
6. The Defendant argued that it had at all material times been willing to refund the sum of Kshs 1,900,000/= to the Plaintiff. During her cross-examination, she conceded that that is what she was claiming in this matter. Having found in no 23 hereinabove that the Plaintiff was at all material times his court, however, finds that the Plaintiff is entitled to a refund of the sum of Kshs 1,900,000/=.
7. The Plaintiff further submitted that she was entitled to interest at commercial rates as the suit property was intended for commercial purposes to support her family. She relied on the case of **Amina Abdul Kadir Hawa vs Rabinder Nath Anand & Another [2012] eKLR**. This court has looked at the said case and noted that the trial court declined to award the Plaintiff therein interest at commercial rates because no reasons were adduced to justify why the court could award interest at commercial rates. It is evident that this case does also not assist the Plaintiff in any way but rather buttresses the Defendant's arguments that she was not entitled to interest at commercial rates.
8. In her examination-in-chief, the Plaintiff testified that she instructed her advocates not to bank the cheques that were issued to her as a refund of the deposit she had paid. She had still not done so as at the time of the hearing of the case on 17th February 2013. These facts were not in dispute as she admitted the same during her cross-examination by Mr Gachugi, the Defendant's advocate. In its submissions, the Defendant argued that the Plaintiff ought to have mitigated her loses by collecting and banking the cheques in November 2009. She would then have invested as she had pointed out during her examination in chief. In addition, the Defendant raised the issue of the Plaintiff having filed the suit on 8th December 2011.
9. Quite part from stating that the Defendant had kept her money from 4th December 2007, the Plaintiff did not demonstrate to this court why she was entitled to interest at commercial rates. Courts ordinarily award simple interest unless a contract between parties provides that interest should be at commercial rates or an applying party justifies that it is entitled to the same. The Plaintiff has not provided this court with any evidence to justify it awarding interest at commercial rates. This court finds that the only interest awardable would have to be simple interest.
10. The Plaintiff prayed for costs of this suit. It will be awarded one relief. The Defendant argued that it was not necessary for the Plaintiff to have filed suit to recover the sum of Kshs 1,900,000/= when it had all along requested her to collect the cheques and banked them. It submitted that she should bear her own costs and those of the Defendant.
11. The Plaintiff was strung along by the Defendant's actions that it was all along ready and willing to proceed with the transaction herein. It is understandable that she have been very upset. Indeed, she would have been entitled to nominal damages. The court's hands are, however, tied as she did not plead for the granting of any other relief that this court would have deemed fit to grant. A party is bound by its pleadings. Consequently, this court, though, sympathising with the Plaintiff, it is unable to award her any such nominal damages.
12. Taking all the facts of the case into consideration and bearing in mind that the Plaintiff would only have been entitled to a refund of the sum of Kshs 1,900,000/= which the Defendant had already accepted to do, this court takes the view that this is a claim that ought not to have been filed in the first place. Without a written agreement that would have entitled the Plaintiff to file a suit for disposition of an interest in land as provided in Section 3(3) of the Law of Contract, the odds were very much against her from the very beginning.
13. However, in view of the fact that the Defendant was guilty of inordinate delay in advising the Plaintiff that it had rejected her offer immediately she forwarded the duly signed letter of offer in

2007, this court has no option but to depart from the general rule that costs follow the event and order that each party bears its own costs.

14. Accordingly, this court hereby orders that the Defendant refunds the Plaintiff the sum of Kshs 1,900,000/=. The said amount will accrue simple interest at court rates from the date of judgment until payment in full. Each party will bear its own costs.

DATED and **DELIVERED** at **NAIROBI** this 31st day of May 2013

J. KAMAU

JUDGE