



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 3933 of 1989

MILLICENT PERPETUA ATIENO WANDIGA.....1ST PLAINTIFF

LOUIS ONYANGO OTIENO.....2ND PLAINTIFF

VERSUS

JOHN CHEGE.....DEFENDANT

JUDGMENT OF THE COURT

The suit herein has a chequered history, with judgment having been previously delivered by Osiemo J. (as he then was) on 11th November 1998 dismissing the Plaintiff's claim. Upon appeal by the Plaintiffs, the Court of Appeal in its judgment delivered on 4th February 2011 set aside the said judgment of 11th November 1998, and ordered that the suit be remitted back to this court for assessment of damages. The main reason for the Court of Appeal's decision was that interlocutory judgment had already been entered in favour of the Plaintiffs at the time of dismissal of their claim, after the Defendant's Defence and Counterclaim was struck out in 10th March 1988.

The Plaintiffs initially brought the suit herein by way of a Plaint dated 4th September 1989 as amended on 18th September 1990, wherein they claimed that they entered into an agreement in writing dated 3rd November 1988 with the Defendant. Further, that it was agreed that the Defendant should sell and the Plaintiffs should purchase the piece of land known as L.R. No. 209/8292/37 situate in the City of Nairobi and measuring (0.0371) of a hectare being for a sum of Kshs.740,000/=. The said agreement provided that the sale should be completed on 15th December, 1988.

Pursuant to the said agreement, the Plaintiffs claim that they duly paid to Hayanya & Company as advocates for the Defendant Kshs.100,000/= on 2nd November, 1988, as part payment of the purchase price Further, that on 15th November, 1988 the Plaintiffs paid a further sum of Kshs.120,000/= to Hayanya & Company of which a sum of Kshs.23,086.20 was paid by the said Advocates to Housing Finance Corporation of Kenya. This payment was made in settlement and discharge of a mortgage debt owed by the Defendant to Housing Finance Corporation of Kenya so as to obtain the discharge of the mortgage.

The Plaintiffs stated that they have at all material times been ready and willing to fulfill and perform all their obligations under the said contract, and that in breach of the said contract the Defendant has wrongfully failed and/or refused and continues to neglect and refuse to complete the said sale or take any step towards such completion. By reason of the above-mentioned breach of contract the Plaintiffs contend that they lost the use of the moneys paid by them.

The Plaintiff's sought the following substantive prayers:

- a) Specific performance of the contract.
- b) Damages for breach of the contract in lieu of or in addition to specific performance
- c) Further or any other relief this Honourable Court would give.
- d) Costs.
- e) Interest

The formal proof hearing took place on 11th April 2013 in the absence of the Defendant, after I confirmed that service of the hearing notice had been effected on the Defendant's counsel on record. The Plaintiffs' counsel informed the court at the said hearing that the Plaintiffs had elected to pursue the prayer for damages, as the Defendant had already sold the suit property.

The 1st Plaintiff gave evidence on behalf of the Plaintiffs at the hearing. She testified that the 2nd Plaintiff was her nephew, and that she had previously given evidence in court, and had produced the original documents which were in the original court file which had since gone missing. The Plaintiffs had since been allowed by the court to reconstruct the court file, and the 1st Plaintiff requested the court and was allowed to produce copies of the documents she was relying upon.

The said bundle of copies was produced as the Plaintiffs' Exhibit 1, and included a copy of the sale agreement entered into by the Plaintiffs and Defendant dated 3rd November 1988 showing the purchase price for the suit property to be Kshs 740,000/= and that a deposit of Kshs 100,000/= had been paid to the Defendant. The 1st Plaintiff also produced a copy of the receipt for Kshs 100,000/= issued by Hayanga and Company Advocates dated 21/11/1988 and paid to the Defendant as part payment of the purchase price. She testified that Hayanga and Company Advocates was the Advocates for both the Plaintiffs and Defendant in the sale transaction. Also produced as evidence was a copy of a receipt no 4332 issued to the Plaintiffs by Hayanga and Company Advocates dated 15/11/1988 for Kshs 120,000/= paid as further part payment for the purchase of the suit property, and a copy of an acknowledgement of payment of valuation fees of Kshs 1,750/= by the 1st Plaintiff dated 28th November 1988.

The 1st Plaintiff referred the court to copies of letters in here Exhibit1 exchanged between Hayanga and Company Advocates and Housing Finance Company of Kenya between 17th November 1988 and 15th December 1988 and evidencing payment of Kshs 23,086/20 to Housing Finance Company of Kenya, which was the balance outstanding on the Defendant's mortgage. The 1st Plaintiff also produced a letter dated 21st December 1988 from Hayanga and Company Advocates indicating that the sale transaction could not be completed because the Defendant had intercepted the title to the suit property and had refused to release the same.

The 1st Plaintiff in addition produced a letter from the said Advocates dated 18th January 1989 in which a statement of accounts was enclosed together with a cheque of Kshs 83,984/= being the refund of the part-payment of Kshs 120,000/= the Plaintiffs had paid. The statement showed that the Advocates had retained 36,016/=. She referred the court to copies of letters dated 18th January 1989 and 31st March 1989 asking the Defendant to complete the sale transaction, and a copy of the caveat she lodged against the title on 11th August 1989 which was extended by court on 29th August 1990.

The 1st Plaintiff testified that on 25th June 1991 she went to visit the suit property, and found a Mrs. Jane Mungai therein, who informed her that her husband had bought the house from the Defendant. The 1st Plaintiff stated that she then informed her advocates of the development, who managed to procure the transfer of the suit property between the Defendant and one Gad Githengu Mungai dated 31st May 1991

for Kshs 1,400,000/=. The 1st Plaintiff produced a copy of the said transfer as well as a copy of the title to the suit property showing the registration of the property in name of Mr. Gad Githengu Mungai on 31st May 1991.

It was the 1st Plaintiff testimony that they could not as a result effect the transfer of the suit property, and had lost a total of Kshs 797,766/= made up of the following sums of money:

- a) Kshs 100,000/= being the initial Deposit paid
- b) Kshs 36,016/= being the money retained by Hayanga & Company Advocate
- c) Kshs 1,750/ being the valuation fees paid
- d) Kshs 660,000/ being the difference in the value of the property between the time of the sale agreement and transfer to Mr. Gad Mungai.

The 1st Plaintiff concluded her testimony by stating that they were claiming the said sum of together with interest from the time of filing of the suit.

The Plaintiffs' counsel in brief submissions stated that the Court of Appeal had already held that the damages be assessed, and asked that the amount of Kshs 797,766/= together with interest at court rates and costs be awarded.

I have considered the pleadings and evidence by the Plaintiffs. The main issue before the court is the type and measure of damages recoverable by the Plaintiffs. The principles governing the loss that is recoverable and the measure of damages upon breach by a seller of land are stated in **Halsbury's Laws of England, Volume 12, 4th Edition** at paragraph 1183 as follows:

“.. Where it is the vendor who wrongfully refuses to complete, the measure of damages is, similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain....”

The only exception provided is where a vendor fails to convey through a defect of title, in which case the purchaser will not recover any damages for loss of bargain. In the present case the Defendant had title to the suit property, which he failed to transfer to the Plaintiffs according to the sale agreement they entered into and which he instead proceeded to sell to a third party.

It is therefore clear that the Plaintiffs are entitled to restitution of the deposit they paid and expenses incurred, which they have shown in evidence to be the initial deposit paid of Kshs 100,000/=:, the amount retained by Hayanga and Company Advocates of Kshs 36,016/= from the second deposit paid, and the valuation fees they paid of Kshs 1750/= which makes a total of Kshs 137,776/=.

The only outstanding loss that needs to be assessed is the loss of bargain, and the normal measure of damages for loss of bargain is the market value of the property at the time of repudiation less the contract price. The contract price from the sale agreement between the Plaintiffs and Defendant dated 3rd November 1988 was Kshs 740,000/=. It is my opinion that the Plaintiffs had indicated their willingness to complete the sale even after the date of completion of 15th December 1988 as shown in the letters written by their Advocate to the Defendants dated 18th January 1989 and 31st March 1989. The said date of completion was accordingly waived by the parties.

The date of repudiation of the sale agreement by the Defendant was therefore 31st May 1991 when he

transferred the suit property to one Gad Githengu Mungai while having knowledge of the Plaintiffs desire and willingness to complete the sale transaction they had entered into. As at that date the Defendant sold the suit property for Kshs 1,400,000/=. The Plaintiff is therefore entitled to the loss of bargain of Kshs 660,000/= being the difference in value between the contract price and market price of the suit property at the date of repudiation.

Arising from the above-stated reasons, this Court enters judgment for the Plaintiffs as against the Defendant, and hereby orders the Defendant to pay the Plaintiffs damages of a sum of Kshs 797,766/= as assessed in the foregoing, with interest at court rates with effect from 4th September 1989 until the date of full payment.

The Defendant shall bear the costs of the suit.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___20th___ day of ___May____, 2013.

P. NYAMWEYA
JUDGE