



**Noorani v Ochieng & another (Environment & Land Case
319 of 2008) [2022] KEELC 2888 (KLR) (12 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2888 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 319 OF 2008**

**LN MBUGUA, J
MAY 12, 2022**

BETWEEN

AHMED NOORANI PLAINTIFF

AND

JOYCE AKINYI OCHIENG 1ST DEFENDANT

ONESMUS GITHINJI T/A ONESMUS GITHINJI & CO.

ADVOCATES 2ND DEFENDANT

JUDGMENT

1. The 1st Defendant is the owner of a Parcel of land No. 3734/223 situated in Lavington Area of Nairobi. Vide a Plaint dated 21.7.2008, the Plaintiff sued the 1st Defendant averring that he had agreed to purchase a lease interest known as Villa Unit No.5 which was to be constructed amongst 5 other Villas on the aforementioned parcel 3734/223 (suit property). The purchase price was Ksh. 17,000,000 of which the Plaintiff apparently paid Kshs.4,400,000 towards the purchase to 1st Defendant's advocate who is the 2nd Defendant. Plaintiff claims that he never got the villa, nor the refund.
2. The Plaint has been severally amended and finally via a notice of motion dated 8.2.2013, the Plaintiff was on 14.5.2013 allowed to bring on board the 2nd Defendant. In the said pleadings titled Re-amended Plaintdated 14.5.2013, the Plaintiff prays for the following;
 - a) An order for specific performance.
 - b) A permanent injunction prohibiting the 1st Defendant by herself, her servants, agents assignees or any person claiming under her restraining her from putting up constructing developing and or erecting Two (2) more Villa Units and or constructing more than six (6) Villa Units on the same property known as L.R. No. 3734/233, Lavington, Nairobi.



- c) A permanent injunction prohibiting the 1st Defendant by herself, her servants, agents assignees or any person claiming under her restraining her from selling, disposing off and or transferring ownership of a Villa Known as Villa No.5 erected on the suit property whether by private treaty or by public auction to any third party and or her estranged husband.
 - d) In the alternative special damages for KES 4,400,000.00 being the deposit paid by the Plaintiff towards the purchase of the Villa Unit to the 2nd Defendant.
 - e) General and exemplary damages for breach of contract in lieu of or in addition
 - f) Cost of this suit.
 - g) Interest of KES.4,400,000.00 at commercial rates from the 2nd day of October, 2007 being date of payment of the same till payment in full.
 - h) Any other relief this honourable court may deem fit to grant in the circumstances of this case.
3. The 1st Defendant did file a statement of defence dated 18.9.2008 generally denying the Plaintiff's claim save an admission that she is the registered owner of the suit Parcel No. 3734/233. She did not file any statement of witnesses or documents in support of her claim, and she did not turn up for the trial.
 4. The 2nd Defendant filed a statement of defence through his firm of advocate dated 1.7.2013 where he avers that at all material times, he was the advocate for the 1st Defendant in respect of the sale of the suit land Villa Unit No. 5 on L.R. 3734/233. He averred that he cannot be compelled to divulge anything concerning his client as that was privileged communication. He urged the court to dismiss the suit. The 2nd Defendant too (just like his client the 1st Defendant) did not file any statement of witness or documents in support of his claim though he is an advocate. He was however robustly present in filing or opposing various interlocutory matters in the lifespan of the suit, but he was absent on the day of the trial (4.11.2021).

Interlocutory matters

5. For the better part of the lifespan of this suit, the applications and preliminary objections were galore right upto the date of hearing on 4.11.2021 (this happened to be the 1st day I handled the file). Of particular importance are the applications filed by the Plaintiff to compel the Defendants to Deposit the sum of Kshs 4,400,000 in an independent separate account. To this end, the court gave an order on 28.7.2010,in the following terms;
 1. That the Defendant/Respondent be and is hereby ordered to deposit the amount totalling to Kenya Shillings four million and four hundred thousand only (Kshs.4,400,000/=) in an independent and separate interest earning account to be held by Messrs Okongo Omogeni & Co. Advocates, as stakeholders within 30 days of this ruling.
 2. That the interest accruing from the said account from the contractual completion date until the final determination of this suit form and or constitute part of the balance of the purchase price for the suit premises herein.
 3. That costs of the application be in the cause.”



6. The aforementioned order was not complied with triggering contempt proceedings through various applications filed by the Plaintiff all the way to the Court of Appeal. In a ruling delivered on 31.3.2017, the Court of Appeal ordered the 1st Defendant to be committed to Civil jail for a period of 30 days unless she otherwise purges the contempt.
7. To-date, there is no evidence of compliance with the orders of the trial court and the Court of Appeal requiring the Defendants to deposit the sum of Ksh.4,400,000 in a separate account.
8. The 2nd Defendant was to file a Preliminary Objection dated 12.6.2019 seeking an order of dismissal of the suit on grounds inter alia that he could not be compelled to divulge privileged communication between him and his client. In a ruling delivered on 20.5.2021, the Preliminary Objection was dismissed and the matter was set down for hearing on 4.11.2022. Even at this late stage, the court on 20.5.2021 still gave the parties an opportunity to prepare adequately for the trial by giving the following orders:
 - “ 1) Hearing of the main suit on 4.11.2021
 2. Each party shall file and serve a single bound paginated and indexed bundle containing pleadings witness statements and documentary evidence within 30 days from today.”
9. Come the date of hearing on 4.11.2021 and the 2nd Defendant was at it again, coming up with an application dated 28.10.2021 seeking orders to have the suit struck out and averring that there will be a travesty of justice if their application was not determined. This court took into account the prayers sought by the 2nd Defendant, that directions for the hearing had been given way back on 20.5.2021 and that the suit was old having been filed in year 2008. Thus I gave directions for the application to be heard alongside the main suit on the same date of 4.11.2021.

The Evidence

10. The Plaintiff AHMED NOORANI testified as PW2, and he adopted his statement dated 6.6.2018 (on page 6-8 of his bundle) as his evidence. His case is that sometime in September 2007, he requested his father (PW1) to identify a suitable house to purchase. The father scouted and found a suitable property in the market. On 28.9.2007, they received an offer from 1st Defendant for the sale of a leasehold interest in respect of Villa Unit No. 5, by then under construction on L.R. 3734/233 situated in Lavington Nairobi on terms set out in letter of offer, the brochure advertising the sale and a draft sale agreement.
11. Plaintiff duly accepted the offer on 1.10.2007 and executed the same. He then paid a sum of Kshs.4,400,000 to 1st Defendant through 2nd Defendant and that by then, the latter was acting for both the vendor and purchaser. Plaintiff later engaged the services of A.F Gross & Company Advocate in order to engage the 2nd Defendant to pursue completion of the transaction.
12. The Plaintiff avers that the 1st Defendant failed to complete the transaction while 2nd Defendant released the monies to 1st Defendant which act was prejudicial to Plaintiff. Plaintiff avers that no refund was made and Defendant did not comply with the court orders to deposit the money. He contends that he has been deprived of the benefit of the property he was to buy thus losing an economic opportunity and he has been deprived of the use of Kshs.4,400,000 from 2007 without any justifiable cause.
13. PW1 is the father of the Plaintiff. He adopted his statement dated 6.6.2018 on page 9-12 of their bundle as his evidence. His testimony is more or less similar to that of his son adding that he accompanied his



son in the transactions. He also made reference to the list of documents in their bundle. He also added that though 1st Defendant was to construct 6 Villas on Parcel 3734/233, she went ahead to construct two more Villas thus making a total of 8 villas which fundamentally altered the face of the suit land thus limiting common areas meant for children, playgrounds, car parks and recreational facilities, making the place more crowded, thus lowering the value of the premises.

14. Although there was an advocate representing 2nd Defendant on 4.11.201 when the trial took off, he did not present any witnesses, nor did he prosecute their purported application as directed by this court.

Submissions.

15. It was submitted for the Plaintiff that there was a valid sale agreement between the protagonists vide the letter of offer dated 28.9.2007 of which the Plaintiff accepted the offer on 1.10.2007 culminating in the payment of deposit of Ksh.4,400,000 by the Plaintiff.
16. It was submitted that the Plaintiff had signed his part on the sale agreement but 1st Defendant failed and or neglected to execute the same.
17. It is further contended that in the letter of offer, 2nd Defendant was to act as both advocate for the Vendor and the purchaser. Thus 2nd Defendant owed the Plaintiff a duty of care to ensure that his (Plaintiff) funds were safe and were not to be released to 1st Defendant unless with express authority of the Plaintiff.
18. The Plaintiff contends that the Defendants have not explained the whereabouts of the deposit of Kshs.4,400,000 and that the 2nd Defendant has chosen not to offer any explanation, whether the money is with one of them or both hence Defendants should be held liable jointly and severally.
19. In support of his case, the plaintiff has relied on the following cases; *Kinluc Holdings Limited v Mint Holdings Limited & Another* (1998)eKLR, [*Captain Ingo Bernard Rauer v Teresia Murugi & Another*](#) (2019) eKLR, [*Patrick S. K. Kimiti v John Ngugi Gachau & Another*](#) (2015)eKLR, *Samson Owino Gor v. Marmanet Forest Co-operative & Credit Society Limited* (1988)eKLR.
20. For the 2nd Defendant, it was submitted that this court has no jurisdiction as the claim is of a commercial nature.
21. On the issue of the deposit of Kshs 4,400,000, it was submitted that the 2nd Defendant received the same for onward transmission to the 1st Defendant and that 1st Defendant in the defence dated 18.9.2008 in paragraph 7 has admitted having received the monies. He contends that the monies were lawfully released to the 1st Defendant and the same was used for construction of the villas. Further, 2nd Defendant, avers that 1st Defendant was entitled to utilize the deposit paid for purposes of completing the construction.
22. In support of his case, 2nd Defendant relied on the cases of; *In the Matter of Interim Independent Electoral Commission* (2011)eKLR, [*Co-operative Bank of Kenya Limited vs. Patrick Kangethe Njuguna & 5 Others*](#) (2017)eKLR, [*Lucy Muthoni Muthumbi v. Shamira Chepkemoi Chelanga & 2 Others*](#) (2020)eKLR.

Determination

23. I have considered the pleadings, the evidence, the rival submissions and I deem it fit to frame the issues for determination as:

-Whether this court has jurisdiction to determine the dispute,



- Whether there was a valid agreement between the Plaintiff and Defendants,
- Whether the agreement was breached,
- Whether the orders sought by the Plaintiff are merited.

Jurisdiction

24. The 2nd Defendant contends that the claim of the plaintiff relates to the manner in which 2nd Defendant handled the deposit of Kshs 4,400,000 hence the dispute is a commercial one. However, in paragraph 9 of his statement of defence, the 2nd Defendant has admitted the jurisdiction of this court to hear and determined the matter. Further, the 2nd Defendant had ample time to raise the question of jurisdiction noting that he filed his defence in year 2013. He also filed a preliminary objection dated 12.6.2019 raising such issues as res-judicata but he was mute on the issue of jurisdiction. Raising the issue at the final submission stage is unacceptable as the rival party will not have a chance to canvas the issue. In the circumstances, the court will proceed to determine the dispute.

Whether there was a valid agreement

25. On whether there was a valid agreement between the Plaintiff and Defendants, the fall back is the letter of offer dated 28.9.2007. Plaintiff accepted the offer by signing the document on 1.10.2007 and this gave rise to a contractual relationship between the parties. In any event, the 1st Defendant has admitted in paragraph 7 of the defence that there was such a letter of offer. The 2nd Defendant too has not outrightly denied that there was such an offer and acceptance which prompted Plaintiff to make a payment of Kshs.4,400,000 towards the purchase of Villa No. 5. I find that indeed there was a valid agreement between the parties.

Whether there was breach of the Agreement

26. Again in paragraph 7 of the 1st Defendant's defence, she admits that Plaintiff made the payment of Kshs.4,400,000. but that the offer was subject to the execution of a valid and enforceable agreement. The 2nd Defendant has pleaded that he cannot be compelled to divulge privileged communication between him and 1st Defendant.
27. It is however not disputed that Plaintiff never got the Villa, nor the refund of Kshs 4,400,000. Efforts to have the sum of Kshs.4,400,000 deposited in court in line with the order of Judge Mbogholi Msagha (as he then was) dated 28.7.2010 were futile. It is pertinent to note that the defiance of the 1st Defendant in relation to the aforementioned order culminated into the Court of Appeal ruling dated 31.3.2017 whereby 1st Defendant was to be committed to Civil jail. Still she did not comply.
28. Neither the 1st Defendant nor the 2nd Defendant gave evidence as to why the Plaintiff did not get the Villa or a refund.
29. The 2nd Defendant had attempted to offer an explanation as to how the money was utilized but this was done through submissions which is not acceptable. Disputes before courts should be determined based on pleadings and evidence – see the Court of Appeal case of *Rachel Wairimu v Hannab Wambui Githere & 5 Others* (2014)eKLR. In the matter at hand, the 2nd Defendant was practically mute on everything citing privileged communication. He also did not tender any evidence. He is therefore estopped from advancing a defence through submissions.



30. What is clear is that in the letter of offer dated 28.9.2007, the 2nd Defendant presented himself as the advocate for both the Vendor and Purchaser (see clauses 7 and 8). The said letter of offer states that:
- “The Vendor’s Lawyer will prepare the same agreement and the purchaser agrees to execute the same within 7 days of presentation”
31. The Plaintiff apparently paid a sum of Kshs.3,400,000 on 2.10.2007 and Kshs.1000,000 on 21.11.2007 to the 2nd Defendant (see documents on pages 20 and 21 of Plaintiff’s bundle). Thereafter, the Plaintiff wrote a letter dated 7.3.2008 to 2nd Defendant (see page 20 of Plaintiff’s bundle) which reads:
- “Sir I signed the letter of offer in the above matter on 1/10/07 and you agreed to act for me together with the Vendor.
- Though you gave me a copy of the sale agreement which I signed before you, you have failed to give me a copy of the sale agreement which has been signed by the Vendor.
- Further though I paid you a sum of Kshs.4,400,000 the same is still being held by you and the sale agreement was never completed within six (6) months as you had promised. I now feel cheated and I want the full refund of my Kshs.4,400,000 immediately plus interest as you have not protected nor even acted for me as your client.
- I want the full refund of my money within seven (7) days plus the signed copy of the sale agreement I left with you as I am entitled to it as your client. Please act before I complain against you to the relevant authorities and file suit against you”
32. What resonates from the above is that the Plaintiff did that which was required to be done in order to effectuate the transaction. The 2nd Defendant having been the advocate for the purchaser too as at the time of the execution of the letter of offer owned the Plaintiff a duty of care to ensure that his funds were safe.
33. As clearly submitted by the Plaintiff in reference to the case of Kinluc Holdings Limited v Shint Holdings Limited & Another [1998]eKLR (supra), the law implies that an advocate would protect the interests of his clients.
34. As the matter stands now, the Plaintiff never got the Villa and the sum of Kshs. 4,400,000 appears to have gone down the drain. I do find that Defendants were in breach of their contractual obligations, in relation to the contract.

The Relief

35. Having established that the Plaintiff did pay Kshs.4,400,000 decades ago towards the purchase of the Villa, that the money was never refunded, nor was a Villa given to the plaintiff, then the logical conclusion to make is that Plaintiff is entitled to the refund.
36. The Plaintiff has prayed for both general and exemplary damages in lieu or in addition to other awards. An award of damages entails exercise of judicial discretion which should be exercised judiciously, upon reason and principles and not upon caprice or personal opinion- see [*Rael Kendi Mbae \(suing as the legal representative of the estate of Patrick Mbae M’Muruga \(Deceased\) v. OCS Nkubu Police Station & 2 Others*](#) (2019)eKLR.
37. This is a case whereby the conduct of the Defendants from the word “go” (including the manner in which they prosecuted or failed to prosecute this case, and the disregard of the court orders particularly those of the trial court dated 28.7.2010 and the Court of Appeal dated 31.3.2017) is appalling. It is



as if the Defendants are above the law or untouchables! in such circumstances, I find that exemplary damages are appropriate in the circumstances noting that the deposit was made way back in year 2007.

38. In the case of *Nation Media Group v Gideon Mose Onchwati & Kenya Oil Company Limited* (2019) eKLR, the court state thus:

“....Now exemplary damages are awarded in very rare instances where the conduct of the Defendant is deserving of punishment, and they are meant to vindicate the law..”

39. In the case of *Godfrey Julius Ndumba Mbogori & Another v Nairobi City County* (2018) eKLR, it was held that:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter...”

40. This is a situation whereby the Defendants have acted in a callous manner towards the Plaintiff not to mention the disregard of the court orders. I find that an award of Kshs 3,000,000 is appropriate as exemplary damages.

41. I therefore enter judgment for the Plaintiff against the Defendants jointly and severally in the following terms:

1. The Defendants are to refund the Plaintiff a sum of Ksh. 4,400,000.
2. The Defendants are to pay to the Plaintiff exemplary damages to the tune of Kshs. 3,000,000.
3. In terms of Section 26(1) of the *Civil Procedure Act*, the Defendants are condemned to pay interest on order (1) above at the rate of 14% from the date of 21.11.2007 (when last payment was made) until when the full payment is made.
4. The Defendants are condemned to pay costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MAY, 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Opondo holding brief for Michuki for the Plaintiffs

M/S Kokaine for the 2nd Defendant

Court Assistant: June Nafula

