



**Muita & another v Ngure (Environment & Land Case E221 of 2021)
[2022] KEELC 2773 (KLR) (30 June 2022) (Judgment)**

Neutral citation: [2022] KEELC 2773 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E221 OF 2021**

EK WABWOTO, J

JUNE 30, 2022

BETWEEN

DAVID NJUGUNA MUITA 1ST PLAINTIFF

ANDERSON MATHEKA 2ND PLAINTIFF

AND

DAVID WAIGANJO NGURE DEFENDANT

JUDGMENT

Introduction

1. On 16/08/2012, the 1st Plaintiff on one part and the Defendant on the other part entered into an agreement for the purchase of property, villa No. 2 Coco Bahari Villas situated on Land Reference Number MN/111/1848 Kilifi District having executed a letter of offer in 2011.
2. Subsequently to the same date, the 1st and 2nd Plaintiff also entered into a sale agreement for the purchase of property villa No. 7 Coco Bahari Villas situated on Land Reference Number MN/111/1848 Kilifi District having executed a letter of offer in 2011.
3. In accordance with the terms of the agreement, the Plaintiffs paid the Defendant Kshs 21,000,000/- and Kshs 16,000,000/- respectively. The Plaintiffs contended that the Defendant breached the terms of the agreement by failing to deliver the completed villas as agreed.
4. The Plaintiffs further contend that the Defendant refused to refund the sum of Kshs 37,000,000/= which was the purchase price despite demand being made and as a consequence of which they initiated this suit through a plaint dated 21st June 2021 seeking Judgment against the Defendant for:-
 - a) A declaration that the Defendant is in breach of the contract in relation to the construction of Villas Coco Bahari erected on property Land Reference Number MN/111/1848



- b) Refund of Kshs 37,000,000/- plus interest.
 - c) Damages for breach of contract.
 - d) Any other orders that the court may deem fit.
 - e) costs of this suit.
 - f) Interest on (a) and (b) above
5. The Defendant upon being served with summons never filed any response prompting the Plaintiffs to request for Interlocutory Judgment in default which was endorsed on 28/02/2022 in terms of prayer (b) of the plaint for refund of Kshs 37,000,000/-. The matter was set down for formal proof hearing in respect to the other prayers sought and subsequently proceeded on 6th June 2022.

Plaintiffs case

6. The 1st Plaintiff David Njuguna Muita testified as PW1 and he also testified on behalf of the 2nd Plaintiff. He adopted his witness statement and produced documentary evidence as per his list and bundle of documents both dated 21st June 2021 in support of the plaintiffs claim.
7. It was his testimony that the Villas were not completed within the agreed time since the completion date was to be on 15th February 2012. He further stated that each villa was going for Kshs 25,000,000/- and they paid Kshs 21,000,000/- and Kshs 16,000,000/- respectively as purchase price. However, the Defendant never availed the completed units despite being paid.
8. PW1 reiterated that the Defendant clearly breached the terms of the contract and they had no choice but to seek for refund of the same. It was his testimony that they have been engaging the Defendant since 2012 but the refund has not been forthcoming and hence the filing of this suit.

The Plaintiffs submissions

9. The Plaintiffs filed written submissions dated 14th June 2022 through the firm of Karanu Kanai & Co. Advocates. In their submissions Counsel outlined the main issue for determination being whether the Defendant was in breach of the terms of the contract.
10. Counsel argued that the sale agreement entered between the parties herein provided that the completion date was 15th February 2012. The Defendant did not complete the construction of the villas stipulated in the Sale Agreement.
11. Counsel referred to clause 11 of the Sale agreement dated 16th August 2012 which had been produced as part of the evidence in this case. It stipulated as follows:-

“If the vendors fail to comply with the obligations under the agreement, the purchaser may give to the vendor twenty one (21) days’ notice in writing to comply with obligations and such notice shall specify the default and require the vendor to make good within the twenty one (21) days’ Notice and if the vendor then fails to comply with the notice, the purchaser may at its discretion and without prejudice to this other rights and remedies rescind this Agreement and the vendor shall within seven (7) days thereafter return all monies paid by the purchaser to this agreement”

It was submitted that the two notices was issued on 13th may 2021 and 9th June 2021 but still there was no compliance from the Defendant.



12. Relying on the case of *Joseph Kangethe Irungu-Vs- Peter Ng'ang'a Muchoki* (2018) eKLR where the court quoted the Black's law Dictionary definition of a breach as:-

“A violation of a contractual obligation by failing to perform one's own promise by repudiating it or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustain no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has atleast a claim for nominal damages”

Counsel urged the court to allow the Plaintiffs' claim against the Defendant.

Analysis and Determination

13. I have considered the Plaintiffs pleadings, evidence and submissions. In my view the key issues falling for determination are:-

- i) Whether there was a breach of the contract by the Defendant.
- ii) Whether the Plaintiffs are entitled to the reliefs sought.

Issue No I

Whether there was a breach of the contract by the Defendant.

14. It is common ground that the Plaintiffs entered into an agreement with the Defendant. It is after the execution and payment of the purchase price that the Defendant did not hand over the completed units contrary to the provisions of the sale agreement.

15. It is trite law that in deciding dispute regarding contracts, it is the duty of the court to give effect to the intention of the parties that is discernible from the documents and conduct of the parties. However complicated or vague an agreement may be, the court's duty is to give effect to it. In the case of *Smith-v- Cook* (1891) AC 297 at 303 the court held:-

“The duty of the court is to give the natural meaning to the language of the deed cites it involves some manifest absurdity or would be inconsistent with some other provision of the deed and would therefore be contrary to the intention of the parties as appearing upon the face of the deed”

16. I have paid attention and due regard to the agreement of the parties herein and it showed the parties intention was to proceed with the sale and purchase of the villas to which the Plaintiffs accepted clearly as demonstrated by the execution of the agreements. Both parties were bound by the terms of the said agreement. This is a position that was held by the court of Appeal in *National Bank of Kenya Ltd -vs- Pipe Plastic SamKolit (K) Ltd & Another* (2001) eKLR, where the court stated that: -

“A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved”

17. Clause 11 of the agreement provided as follows: -

“If the vendors fail to comply with the obligations under the agreement, the purchaser may give to the vendor twenty one (21) days' notice in writing to comply with obligations and



such notice shall specify the default and require the vendor to make good within the twenty one (21) days' Notice and if the vendor then fails to comply with the notice, the purchaser may at its discretion and without prejudice to this other rights and remedies rescind this Agreement and the vendor shall within seven (7) days thereafter return all monies paid by the purchaser to this agreement”

18. The Plaintiffs case is that the Defendant breached the terms of the agreement by failing to avail the completed units as was agreed. The defendant was issued with a notice on 13th May 2021, and another one issued on 9th June 2021 but chose not to comply.
19. In the circumstances, I find that the Defendant was in breach of the agreements dated 16th August 2012.

Issues No 2

Whether the Plaintiffs are entitled to the relief sought.

20. This suit is undefended, interlocutory judgment was entered against the defendant in respect to the refund of Kshs 37,000,000/- on 28th February 2022. In the absence of any defence and or controverting evidence, the court is satisfied that the Plaintiffs have proved their case against the Defendant to the required standard.
21. Is the Plaintiff entitled to damages? Having held that the Defendant is guilty of breach of the contracts, the next thing I need to determine is the question of damages. In the case of *Hadley & Another v Baxendale & Others* [1854] EWHC J70 where it was stated as follows:

“Where two parties have made a contract which one of them has broken the damages which the other ought to receive should be such as may fairly and reasonably be considered either as arising naturally i.e according to the usual course of things, from such breach itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made a contract as the probable result of a breach of it.”
22. Further in the case of *Millicent Perpetua Atieno vs Louis Onyango Otieno* (2013) eKLR, the Court of Appeal quoted with approval Halsbury's Law of England, Volume 12, 4th Edition at paragraph 1183 on the type and measure of damages recoverable by a purchaser upon breach by a seller of land. The court stated: -

“where it is the vendor who wrongfully refuses to complete the measure of damage 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.....”
23. In the instant case, the Plaintiffs did not lead any evidence or make submissions relating to damages neither did they equally quantify any figure for consideration by the court. Damages are to put a party wronged in the same position as before. In the circumstances I decline to award any damages.



24. The Plaintiffs have also prayed for interest on the purchase price that ought to be refunded by the defendant. Section 26 of the Civil Procedure Act provides as follows:
- 1) Where and in so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.
 - 2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the court shall be deemed to have ordered interest at 6 per cent per annum.
25. In the circumstances, I will proceed to grant interest on the sum of Ksh 37,000,000 which will be applied from the time of filing this suit.
26. On costs, I am guided by the provisions of Section 27 (1) of the Civil Procedure Act (Cap 21) and the decision in Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others SC. Petition No. 4 of 2012: [2014] eKLR. The Supreme Court held that costs follow the event and that the Court has the discretion in awarding such costs. The Plaintiffs herein have succeeded in making their case and considering the anguish they have been through for all this time and further the being the successful litigants herein, it is not in doubt that they are entitled to costs of this suit which will be borne by the Defendant herein.
27. On interest on costs, the authority and discretion of a Court to award interest on costs is provided for in Section 27(2) of the Civil Procedure Act. Where it is provided that the court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such. In view of the foregoing, I will also grant the Plaintiffs the costs of this suit and equally grant interest on costs which shall be paid by the Defendant.

Disposition

28. In conclusion, the court makes the following disposal orders in the suit.
- a) A declaration that the Defendant is in breach of the contract in relation to the construction of villas erected on property Land Reference Number MN/111/1848.
 - b) Refund of Kshs 37,000,000/-
 - c) Interest on (b) above at court rates from the time of filing suit until payment in full.
 - d) Interest on costs of the suit to be paid from the date of delivery of this judgment until payment in full.
 - e) The Defendant shall bear all costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JUNE 2022.

E. K. WABWOTO

JUDGE



In the presence of: -

Ms. Karanu for the Plaintiff.

N/A for the Defendant.

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE

