



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 121 of 2011

TOSHIKE CONSTRUCTION COMPANY LIMITED PLAINTIFF

VERSUS

**HARAMBEE CO-OPERATIVE SAVINGS
AND CREDIT SOCIETY LIMITEDDEFENDANT**

JUDGEMENT

1. By a Plaint dated 1st April 2011 and filed in Court on 4th April 2012, the Plaintiff prays for Judgment against the Defendant for:-

a) An Order for specific performance of the agreement made between the Plaintiff and the Defendant dated 17th March 2006.

b) All necessary and consequential accounts, directions and inquiries.

c) Damages for Breach of contract in addition to specific performance.

d) Costs of the suit.

e) Any other or further relief deemed appropriate by this Honourable Court.

2. The Plaintiff's case is that by an Agreement dated 17th March 2006 (hereinafter referred to as "Said Agreement"), the Defendant agreed to sell to the Plaintiff a property referred to as L.R No. 209/7546 ("Suit Property") situated in the City of Nairobi together with all the developments contained therein. The purchase price for the suit property was agreed at Kshs. 20,100,000.00/=, with Kshs. 2,010,000.00/=, being a 10% deposit, payable to the Defendant by the Plaintiff upon execution of the said agreement. Other terms in the sale agreement included the fact that the suit property was to be sold with vacant possession on completion and should be free from all encumbrances. That the Defendant would subdivide the property into three distinct portions and acquire individual Freehold Titles of the same and transfer the three individual titles to the Plaintiff. Furthermore, it was the sole responsibility of the Defendant to procure and obtain Title documents for the said property, the requisite Transfers, valid land rent and rates clearance certificates together with the necessary consents to transfer. Further, if the completion of the transaction was delayed due to reasons that were beyond the Defendant's control, the said agreement would continue in force until actual completion took place and the Vendor would not be liable for any loss or damage suffered by the Purchaser as a result of the delay.

3. Pursuant to the provisions of the Said Agreement, the Plaintiff paid the Defendant a sum of Kshs. 2,010,000.00/= as 10% deposit. The same was duly acknowledged by the Defendant. On or about 7th September 2007, the Plaintiff duly informed and notified the vendor of its intentions to renovate and

occupy the suit premises pending completion of the sub-division and transfer of the three subsequent individual titles to the Plaintiff. There being no objection, the Plaintiff proceeded to renovate the premises erected on the suit property and even moved into the three maisonettes in occupation. The Plaintiffs contend that in breach of the said agreement, the Defendant failed to adhere to the completion date of the transaction, that is, 17th March 2006, even after several requests and demands from the Plaintiff to adhere to the terms and conditions of the Said Agreement. This is what led to the instant suit and prayers sought by the Plaintiff. On being served the Defendant failed to enter appearance and interlocutory Judgment was entered on 16th September, 2011.

4. The Suit therefore proceeded for formal proof before me on 5th November, 2011. The Plaintiff called two witnesses, namely Felisters Bochaberi Onkware (PW1) and Kennedy Obutu(PW2), both Directors of the Plaintiff Company.

5. PW1 described herself as a Business lady and a Councilor residing at Parklands Area Nairobi. She stated that she is also a director of the Plaintiff Company, which is primarily in the business of construction and property investment. According to her evidence vide a Sale Agreement dated 17th March, 2006 produced as Exhibit 1, the Plaintiff and Defendant entered into an agreement for the sale and purchase of the suit property known as LR. No. 209/7546 for Kshs. 20,100,000.00/=. She stated that the completion date for the transaction was fixed at 90 days. A 10% deposit amounting to Kshs. 2,010,000.00/= was paid to the Defendant in accordance to the said agreement, after which the Defendant was obliged to release the completion documents to the Plaintiff. The Completion documents according to clause 2 of the Said agreement included the title documents to the suit property, transfer, consent to transfer, valid rates and rent clearance certificates and receipts for any levies paid in relation to the property. The vendor failed to forward these documents on or before the lapse of the 90 day completion date. Further, PW1 swore that without the completion documents it was impossible to complete the process of transfer of the property, even though the Plaintiff was willing to complete the purchase. The Defendants did not give any reasons for the failure to supply the completion documents despite numerous attempts and correspondences from the Plaintiff. PW1 also indicated that the property had three (3) Residential houses, which the Plaintiff undertook to repair pending the subdivision of the Property. The division was meant to create three individual titles after mutation. After the renovation, the premises were occupied by the Plaintiff's tenants; two Blocks were however occupied by the Plaintiff's nominees. PW1 reiterated that the Defendant was aware of this renovation and occupation. She also told the court that the Plaintiff's Advocates wrote several letters to the Defendant urging it to finalize on the survey and sub-division of the suit property. That however, the Defendant did not respond to any of these correspondences and it appeared that it was not interested in completing the said transaction. Her evidence was that the delay subjected the Plaintiff to unnecessary damage and loss, as the Plaintiff was in the process of securing a Bank Loan to finance and finalize the sale. She urged the Court to heed to the Plaintiff's request and grant the orders sought.

6. PW2 was Kennedy Obutu. He described himself as a resident of Nairobi and a director of the Plaintiff in charge of investments and development activities. He relied on his sworn witness statement dated 2nd November, 2012. He told the court that, the Company, through a resolution decided to participate in the purchase of properties advertised for sale by the Defendant in 2004. The properties for sale included the suit property situated along Limuru Road Nairobi and had been advertised in the Daily Nation Newspaper of 8th January, 2004. Further, he stated that the Plaintiff entered into an agreement for sale dated 17th March, 2006 with the defendant for the purchase and sale of the suit property. The Purchase price was Kshs. 20,100,000/=. The Purchaser paid 10% of the Purchase price amounting to Kshs. 2,010,000/= as deposit to the Defendant as required under the said agreement. He stated that he was aware that the balance was to be paid on completion of the transaction. The completion date was to be 90 days from the date of execution of the Agreement. He stated that on the lapse of 90 days completion period, the Vendor did not forward the completion document as stipulated in the said agreement, which made it impossible to effect the transfer and registration of the suit property in the Plaintiff's name. That the said agreement had an extension term of the completion date, however that extension has been too long in light of the fact that it has been over seven years since the same lapsed. He noted that should judgment be entered against the Defendant as prayed, the Plaintiff has the capacity to pay the balance of the Purchase price amounting

to Kshs. 18,090,000/=.

7. As the other parties did not participate in the hearing of this case, the above evidence from the Plaintiff's witnesses was not subject to cross-examination. The evidence was uncontroverted. From this evidence, it appears to me that the genesis of this transaction was a Sale Agreement dated 17th March, 2006 where the Defendant agreed to sell the suit property L.R. No. 209/7546 to the Plaintiff for Kshs. 20,100,000/=. The deposit of Kshs. 2,010,000/= was duly paid by the Plaintiff as required by the terms and conditions of the said agreement. The Defendant, however, did not live up to the end of its bargain as it failed to release to the Plaintiff the completion documents to facilitate the transfer process of the suit property. No explanation have been given as to this apparent ineptness on the part of the Defendant, as the Plaintiff's numerous correspondence on the delay in the completion date did not elicit any response.

8. I have read the Sale Agreement, and I find that both parties are bound by the same. A party is bound to comply with the obligations set out in a contract it has entered into. Parties are bound to their bargain whether good or bad. This was clearly endorsed by the court of Appeal in the case of **National Bank of Kenya Limited v Pipeplastic Samkolit (K) and Another [2001] KLR 112 at p.118** wherein it stated:-

“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 in regard to the terms of the charge. As was stated by Shah, JA in the case of FINA BANK LIMITED VS SPARES & INDUSTRIES LIMITED (Civil Appeal No.51 of 2000) (unreported).

It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain; it is ordinarily no part of equity's function to allow a party to escape form a bad bargain.”

I therefore find that the Defendant is bound by the terms of the Sale Agreement and should have observed the said terms throughout the transaction.

9. The Plaintiff also alludes to the fact that the Defendant seems to rely on clause 3 of the special conditions of the Agreement. The said clause provides that:-

“In the event that completion is delayed beyond the completion date for any reason outside the control of the Vendor, this Agreement shall continue in force until actual completion can take place and the Vendor shall not be liable for any loss or damage suffered by the Purchaser as a result of the delay”

To leave the transaction as it is for so long is neither fair nor just as the Plaintiff puts it. Indeed, it has been correctly pointed out that the Plaintiff has waited for far too long for the completion, a delay that has adversely affected the Plaintiff. The Plaintiff has also stated that it is willing and able to pay the balance of the purchase price, but the Defendant has refused to accept such an offer. From the foregoing, I must say that this is a Court of Equity, and a Court of Equity will not sit back and watch a person who has freely and voluntarily entered into a legally binding contract turn around, deliberately breach the contract, and get rewarded for doing so. To deny the Plaintiff the Order of specific performance would amount to giving an imprimatur to the breach of that contract. As the eye of equity frowns upon those who would want to steal a march on others, I find it fair and proper that the continuing breach of the said agreement by the Defendant should not be sanctioned, as it has failed to take the appropriate steps in either terminating or upholding the Agreement. The Defendant should be disallowed from holding the Plaintiff in limbo.

10. For the above reasons, I am satisfied that the Plaintiff has proved its case on a balance of probability and is entitled to the prayers sought. I shall however not award damages, as the Plaintiff has pointed out that it has been in occupation of the suit premises and even leased the same to tenants, a move that must have been sanctioned by the Defendant. This goes to show that the Plaintiff has been enjoying some benefits from the suit property.

11. In the foregoing, I accordingly make the following orders:-

- a) The defendant do specifically perform the sale agreement dated 17th March, 2006 and transfer to the plaintiff the suit property known as LR. 209/7546 after the subdivision of the same into three distinct portions within 90 days from the date of this Judgment.
- b) That the Plaintiff do pay to the Defendant the balance of the purchase price of Kshs. 18,090,000/= within 7 days of the Registration of the Transfer of the suit property in its name.
- c) The prayer for damages for breach of contract is hereby dismissed.
- d) The Plaintiff is awarded the costs of this suit as against the Defendant and interest thereon.

12. Decreed accordingly.

DATED and **DELIVERED** in Nairobi this 19th day of December, **2012**.

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A. MABEYA

JUDGE