



REPUBLIC OF KENYA



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**Igamba v Muchiri (Environment & Land Case 1352 of 2016)
[2022] KEELC 3257 (KLR) (28 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3257 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1352 OF 2016**

**LN MBUGUA, J
JULY 28, 2022**

BETWEEN

JAMES MBOCHI IGAMBA PLAINTIFF

AND

ESTHER NYAMUIRU MUCHIRI DEFENDANT

RULING

1. The issue coming up for determination emanates from the Consent dated November 11, 2021 which was adopted as a judgment of the court on February 7, 2022 and which reads as follows:

‘by Consent, the parties herein agree as follows:

1. that judgement be and is hereby entered in favour of the plaintiff against the defendant for the sum of Kshs. Eleven Million Six Hundred Thousand (Kshs. 11,600,000) which sum is to be unconditionally released to the Plaintiff within seven (7) days from the date hereof.
2. That parties canvass by way of written submissions as to whether the deposit being the sum of Kenya Shillings One Million Four Hundred (Kshs. 1,400,000) is refundable.
3. That parties to produce their respective set of filed documents.
4. That the plaintiff’s prayers c, d, e, f and g set out in the plaintiff’s amended plaint dated October 30, 2017 be canvassed by way of written submissions by the parties’ respective advocates on record.

2. The plaintiff’s prayers in the amended plaint dated October 30, 2017 mentioned here-above are as follows:



- a. A declaration that the agreement for sale dated August 27, 2012 is tainted with illegalities and thus void ab initio.
 - b. A refund of the purchase price of Kshs. 13,000,000.
 - c. A refund of legal costs incurred in the transaction in the sum of Kshs. 56,000.
 - d. Interest on (b) and (c) at court rates accruing from the date of demand being 22nd August 2013 until payment in full.
 - e. Damages for breach of contract.
 - f. Punitive or exemplary damages.
 - g. Costs of this suit.
 - h. Any other relief that this Honourable court will deem fit.
3. The plaintiff vide the amended plaint filed on October 30, 2017 claimed that by a sale agreement dated August 27, 2012, the defendant offered him two parcels of land known as LR No. 22718/5 and LR No. 22718/6 situated in Kiambu County for a valuable consideration of Kshs. 14,000,000 with the completion date slated for November 27, 2012. The said properties were in the name of the late Francis Kimani Muchiri but the defendant passed herself off as the sole administrator of the Estate of Francis Kimani Muchiri.
 4. The plaintiff stated that the purchase price was to be paid in three instalments with the last instalment being Kshs. 4,000,000 which was payable upon receipt of the Title Deeds in his name. Adding that in the event the defendant was to terminate the agreement, the plaintiff was entitled to refund of the purchase price within 30 days.
 5. The plaintiff indicated that in good faith, he paid the defendant Kshs. 13,000,000 and a further Kshs. 56,000 as legal fees. He was to pay the balance of Kshs. 1,000,000 upon transfer of the suit properties in his name. However, sometime in March 2013 way after the completion period, he discovered that the defendant was not the administrator of the Estate of the deceased and that the titles to the suit properties were encumbered by the Nairobi County Government which had laid down pipelines through the said properties to convey water from the Kiambu Dam to Nairobi City. As such, the properties were not fit for the purpose the plaintiff had purchased them for.
 6. The plaintiff thus claimed that the defendant had defrauded him while passing off as the administrator of the Estate of the deceased which was akin to intermeddling. Therefore the sale agreement was tainted with illegalities and thus void ab initio.
 7. The defendant in the Amended statement of defence dated January 15, 2018 affirmed that the purchase price was Kshs. 14,000,000 and the plaintiff had already paid Kshs. 13,000,000. However she contested having defrauded the plaintiff stating that he was fully aware of the status of the said properties regarding the succession cause and the way leave. To this end, the Plaintiff had not only inspected the wash out drains and pipes which were visible on the ground, but he had gone ahead and negotiated with the City Council about them. She added that she had been ready and willing to refund the plaintiff his Kshs. 13,000,000 without deductions but following the plaintiff's subversive acts she would exercise seller's rights and retain the 10% of the purchase price.



Plaintiff's submissions

8. Counsel for the plaintiff in the submissions dated March 11, 2022 stated that the issues for determination were whether: The deposit of Kshs. 1,400,000 was refundable as well as the refund of Kshs. 56,000 incurred as legal fees in respect of the transaction in issue; whether interest should accrue on the purchase price and the legal fees and the same be payable to the plaintiff; whether damages for breach of contract and or punitive or exemplary damages for breach of contract should be payable to the plaintiff and who is entitled to the costs of the suit.
9. On whether Kshs. 1,400,000 deposit was refundable, it was submitted that the plaintiff was entitled to the deposit noting that completion date for the transaction was November 27, 2012 as per the sale agreement and none compliance there of was occasioned by the defendant. To this end, the plaintiff duly notified the defendant's lawyer of his rescission of the sale agreement. That by the date of November 27, 2012, the Plaintiff had already paid Kshs. 13,000,000 to the defendant for the suit properties which was almost the entire purchase price.
10. It was further stated that if what was stipulated in the agreement was not carried out within the stipulated time, then the contract became voidable as held in *Thrift Homes Ltd v Kays Investment Ltd* [2015] eKLR noting that courts could not re-write parties' contracts as held in *National Bank of Kenya Ltd v Pipeplastic Samsolit (K) Ltd and another* [2001] eKLR and the defendant should refund the sums advanced as stated in *Millicent Perpetua Atieno vs Louis Onyango Otieno* (2013) eKLR.
11. On whether the Kshs. 56,000 incurred as legal costs by the Plaintiff should also be refunded, it was submitted that the Plaintiff would not have incurred those costs had the said property not been advanced to him for sale. Reference was made to the case of *Millicent Perpetua Atieno vs Louis Onyango Otieno* (supra) and *Joseph Kang'ethe Irungu v Peter Ng'ang'a Muchoki* [2018] eKLR.
12. On the issue of interest on the purchase price and legal fees, it was submitted that the defendant having failed to refund the amount of money advanced within 30 days as stipulated in the agreement, then the aforementioned amounts should be refunded with interest as was held in *Philip Wanjobi Kariuki vs Kennedy Njenga Nyambura & 2 others; Lazarus Sankori Karino (Interested Party)* [2020] eKLR. It was further submitted that it had been almost a decade since the defendant was paid the Kshs. 13,000,000 and had the said money been refunded within the stipulated time, the Plaintiff would have invested it in other similar properties which might have doubled or tripled in price by now.
13. On whether damages for breach of contract should be payable, it was submitted that the plaintiff was entitled to damages due to the length of time the defendant has had the money as well as the length of time taken in court. Reference was made to the English cases of *Wroth & another vs Tyler* [1973] 1 All E R 897 and *Malhotra vs Choudhury* [1979] 1 All E R 186. It was also submitted the plaintiff ought to be awarded exemplary damages as was held in the case of *Delilah Kerubo Otiso v Ramesh Chander Ndingra* [2018] eKLR.
14. Finally, it was submitted that since costs follow the cause, then the plaintiff was entitled to costs.

Defendant's submissions

15. The defendant in the submissions dated May 7, 2022 highlighted the following as the issues for determination: Whether there was fraud on the part of the defendant to sell and transfer the stated property; Whether there was justification to hold 10% being the deposit therein; Is the plaintiff eligible to be refunded his legal fees, interest thereon and damages; and Whether the plaintiff should be awarded costs.



16. On the issue of fraud, it was submitted that the plaintiff was aware of the status of the suit properties prior to the purchase including the fact that the title was in the name of the defendant's late husband. That having inspected the suit premises, again the plaintiff was aware of the pipes on the ground. Therefore, stating that he was not aware was being untruthful and the agreement failed due to his actions. Reference was made to the cases of *Suleiman Rabemtulla Omar & another v Musa Hersi Fabiye & 5 others* [2014] eKLR and *Samuel Kamere vs Land Registrar Kajiado* Civil Appeal No. 28 of 2005.
17. It was also highlighted that the Plaintiff caused the Defendant to be charged in Criminal Case Number 889 of 2014 with a criminal offence of obtaining money by false pretence where she was acquitted and the court indicated that the Plaintiff had sought the criminal process as an intimidation tactic.
18. On the issue of justification for holding on to the 10% deposit, it was submitted that the issue of fraud was determined in the aforementioned criminal case and that the delay by court to confirm grant was occasioned by the plaintiff's objection in the Succession Cause 1397 of 2012.
19. It was further stated that the breach in performing the contract was caused by the plaintiff based on his conduct in what he purported to be a bad deal and equity could not aid him as was the holding in the case of *Fina Bank Limited vs Spares & Industries Limited* (Civil Appeal No. 51 of 2000) (unreported). It was also submitted that the Defendant had always been ready to complete the transaction, as was also made known in the Criminal Case Number 889 of 2014 and it was the Plaintiff who kept frustrating this completion. Therefore the defendant was entitled to retain the 10% deposit
20. On the issue of the refund of the legal fees, interest and damages, It was submitted that the breach having been occasioned by the Plaintiff, then there was no justification in such a refund. Thus the plaintiff should not be rewarded for his deeds/misdeeds.
21. On the issue of costs, it was submitted that in determining the said issue, courts should look at the conduct of the parties, the subject of litigation and the circumstances which led to the proceedings among other creterias. Reference was made to the following cases in regard to costs: *Rufus Njuguna Miringu & Another vs. Martha Muriithi & 2 others* [2012] eKLR; *Morgan Air Cargo vs Everest Enterprises Limited* [2014] eKLR; *Supermarine Handling Services Ltd vs Kenya Revenue Authority* Civil Appeal No. 85 of 2006 and *Devram Manji Daltani v Danda* [1949] 16 EACA 35.

Analysis and determination

22. Having evaluated the pleadings and rival submissions, the issues for determination shall be summarised as follows:
 - a. Whether the plaintiff is entitled to a refund of the deposit of Ksh. 1, 400, 000 as well as the legal costs of Ksh. 56,000 together with interest.
 - b. Whether the plaintiff is entitled to damages for breach of contract and costs of the suit.
23. It is trite law in evidence that he who asserts must prove his case. section 107 of *Evidence Act* succinctly states:

“Whosoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”
24. The parties herein through their advocates opted to record the Consent Judgment of 11.11.2021 where they agreed on the refund of the sum of Ksh. 11,600 000 by the defendant to the plaintiff. The parties did not give the court a sneak preview of the behind the scenes intricacies culminating into the



agreement. No evidence has been adduced to support the claims captured in the pleadings. In that regard, I find the process of analyzing evidence in the platform of submissions is un-acceptable to this court. It is trite law that what is set out in the pleadings must be subjected to proof through the process of adducing evidence.

25. I therefore find that there is no evidence of how the contract was breached by who and when the breach occurred. Thus none of the parties should gain from the fall out. The logical conclusion is that the parties should as is practically possible revert back to the position they held before they entered into the agreement. In that case, the defendant should refund the deposit, but the parties should meet their legal costs. There being no substantive determination on the question of breach of contract, the claim for damages of which ever kind by the plaintiff fails. The parties should bear their own costs, while interests can only be imposed upon the deposit from a time to be determined by the court.

Final orders

- 1) The defendant is hereby directed to refund the deposit of the purchase price amounting to Kshs. 1,400,000 to the plaintiff within 30 day, failure to which interests on the said amount shall start accruing from the 31 day from the date of delivery of this ruling at court rates.
- 2) All other prayers sought are declined.
- 3) Each party to bear their own costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JULY 2022 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Omondi for the Plaintiff

Gichamba for defendant

Court Assistant: Eddel / Benson

