



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Suit 302 of 2007**

**RUTH WANJIRU KIBICHA.....PLAINTIFF**

**VERSUS**

**KIOGORA MUTAI T/A**

**KIOGORA MUTAI & CO. ADVOCATES.....DEFENDANT**

**J U D G M E N T**

The plaintiff and the defendant entered into an agreement on 21<sup>st</sup> February, 2006 whereby the defendant agreed to sell to the plaintiff a flat known as Flat No.B6 situated on LR.No.209/10705 for a consideration of Ksh.2.8 million. According to the agreement, the purchase consideration was to be paid in five installments. Upon the signing of the agreement, the plaintiff paid the defendant a deposit of Ksh.560,000/-, which was 20% of the purchase consideration. Clause 10 of the agreement provided that:

*“If the Purchaser shall be unable to take possession for whatever reason within three months, upon being informed at the last known address that the flat is ready for possession, the Purchaser will be liable to pay interest at the existing commercial bank rate on outstanding amount and after three months the Vendor shall be at liberty to sell the same at a price available in local market and refund the deposit (less, loss and expenses) to the Purchaser only after the unit has been resold.”*

Clause 13 of the agreement stated thus:

*“If the Vendor is unable to make transfer to the Purchaser within Ninety (90) days after the completion date he shall make full refund to the Purchaser of the money paid, together with 10% interest.”*

Clause 3 of the agreement provided that the agreement would be subject to the Law Society of Kenya conditions of sale (1982) edition in so far as it was not inconsistent with the agreement. It is common ground that the plaintiff did not pay the balance of the purchase consideration and sought to rescind the contract. The plaintiff did not take possession of the flat. The defendant did not raise any objection to the plaintiff's decision to terminate the contract. However, the defendant refused to refund the plaintiff the deposit that she had paid upon execution of the agreement. According to the defendant, he was entitled to retain the deposit paid under clause 6 of the Law Society of Kenya conditions of sale (1982) edition which had been incorporated in the agreement by virtue of clause 3 of the

agreement. The defendant notified the plaintiff that her failure to complete the agreement had in fact caused the defendant to suffer a loss greater than the amount that the plaintiff had forfeited. The plaintiff attempt to secure the refund of the deposit was thus frustrated, hence her decision to institute the present suit.

The plaintiff filed suit by way of originating summons under the Provisions of **Order XXXVI Rule 1 & 3** of the **Civil Procedure Rules** seeking the court to determine the issue whether the plaintiff was entitled to the refund of the purchase consideration in accordance with clause 10 of the sale agreement. The plaintiff further sought determination by the court of whether clause 6 of the Law Society of Kenya conditions of sale (1982) edition is applicable to the agreement. Finally, the plaintiff sought determination by the court of whether in fact the defendant made any loss as a result of reselling the suit property to a third party. The grounds in support of the suit were set out on the face of the originating summons. The originating summons is supported by the annexed affidavit of the plaintiff. The defendant filed a replying affidavit in a opposition to the suit. The defendant filed an affidavit in further of opposition to the suit. The parties agreed to have the suit determined by the court by way of submissions. In that regard, the plaintiff's and the defendant's respective counsel agreed by consent to file written submissions. The said submissions were duly filed. This Judgment is therefore written on the basis of the said written submissions filed.

I have considered the pleadings filed by the parties herein in support of their respective opposing positions. I have also considered the submissions filed by the parties to this suit. I have benefited from the authorities cited by counsel. There are two issues for determination by this court: the first issue is the determination of what constituted the terms of the sale agreement between the plaintiff and the defendant in the event that the agreement was not completed. The second issue for determination is whether the standard terms of the Law Society of Kenya conditions of sale were applicable to the agreement between the plaintiff and the defendant in regard to forfeiture of the purchase consideration in event that the plaintiff was unable to complete the agreement. According to the plaintiff, she is entitled to the full refund of the purchase consideration because the agreement did not provide for forfeiture of the deposit in the event that she did not complete the agreement. The plaintiff disagreed with the defendant's suggestion that she was bound by the conditions of sale of the Law Society of Kenya that provided for forfeiture in the event a purchaser was unable to complete the agreement. On his part, it was the defendant's case that the plaintiff forfeited the purchase price in accordance with the terms of the agreement and therefore she was not entitled to any refund.

Having evaluated the facts of this case, and the applicable law, it was clear to this court that the basis of the contract between the plaintiff and the defendant was an agreement that they entered on 21<sup>st</sup> February, 2006. Whereas the said agreement provided that the Law Society of Kenya conditions of sale would be applicable, it could only be applied when the said conditions were not inconsistent with the clause of the agreement. Clause 10 and 13 of the agreement set out the events that would take place if either the purchaser or the vendor was unable to conclude the agreement. In the case of the purchaser, clause 10 provided that if the purchaser failed to complete the agreement, she would be refunded the purchase consideration less any expenses that the vendor would have incurred. Such refund would only be made after the vendor had secured another purchaser for the suit property. It was therefore apparent that the said agreement did not provide for forfeiture of the deposit of the purchase consideration in the event that the purchaser did not complete the sale.

The conditions of sale of the Law Society of Kenya cannot be applied to the agreement between the plaintiff and the defendant, because, to do so would be inconsistent with the agreement. The defendant is therefore required to

refund the deposit of the purchase consideration less any expense or loss that he would have incurred. The defendant claims that he suffered loss and damage as a result of the plaintiff's failure to complete the agreement. Other than the 2% commission that the defendant paid to Mssrs Villa Care Ltd, an estate management and consultancy firm, the defendant did not establish any other loss that he allegedly suffered. The legal fees paid to himself was in respect of a lease agreement that the plaintiff entered between himself on one part and himself and his wife on the other part. The said lease agreement was not in regard to the flat that was purchased by the plaintiff. No connection was established between the other payments made by the defendant (as per the annexures to his affidavit) with the flat that the plaintiff was set to have purchased. The defendant did not disclose whether or not he resold the said flat, and if so, whether the price thereto was below that which had been offered by the plaintiff.

From the above reasons, it is evident that the plaintiff has established her case to the required standard of proof on a balance of probabilities. In answer to the questions posed by the plaintiff to the court, I give the following answers:

In answer to question (1), I hold that the plaintiff is entitled to be refunded the sum of Ksh.560,000/- that she paid as a deposit of the purchase consideration to the defendant. She will be paid the above sum by the defendant less the sum of Ksh.56,000/- that was paid by the defendant to Mssrs. Villa Care Ltd.

In answer to question (2), I hold that of the Law Society of Kenya conditions of sale (1982) edition is not applicable to the agreement between the plaintiff and the defendant because it is inconsistency with clause 10 of the agreement.

In answer to question (3), I hold that the defendant failed to establish any loss that he suffered as a result of the plaintiff's failure to complete the agreement. He is therefore not entitled to be paid any damages.

The upshot of the above reasons is that judgment is entered for the plaintiff against the defendant for the sum of ksh.504,000/-. The said amount shall be paid together with interest at court rates from the date of filing suit until payment in full. The plaintiff shall be paid the costs of the suit.

**DATED AT NAIROBI THIS 28<sup>TH</sup> DAY OF MAY, 2010**

**L. KIMARU**

**JUDGE**