Kihumbu v Kariuki (Environment & Land Case E002 of 2021)
[2022] KEELC 4896 (KLR) (16 August 2022) (Judgment)

Neutral citation: [2022] KEELC 4896 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KWALE

ENVIRONMENT & LAND CASE E002 OF 2021

AE DENA, J

AUGUST 16, 2022

BETWEEN

SABINE CRISTEL KIHUMBU ..... PLAINTIFF

AND

GEORGE NGURE KARIUKI ..... DEFENDANT

JUDGMENT

Plaintiffs Case

1. By a plaint dated October 6, 2020 Sabine Cristel Kihumbu the plaintiff filed this suit against the defendant seeking the following orders;

    a. Orders of specific performance against the defendant to the sale agreement dated June 12, 2007 entered into between the parties herein.

    b. In the alternative, the defendant to be ordered to compensate the plaintiff the purchase price of Kshs 2,250,000/= paid to the defendant with accrued interest of 14% from the date of payment of the deposit and the balance of the purchase price.

    c. General damages for breach of contract by the defendant.

    d. Any other remedy deemed appropriate by this honorable court.

    e. Costs and interest of the suit.

2. The plaintiff's case was that on June 12, 2007 she entered into an agreement for sale with the defendant over a portion of beach front property measuring 2 acres within Tiwi area in Kwale county. That the same was to be subdivided from the larger Kwale/Tiwi beach block/55 (suit property) measuring 23 acres. The consideration was Kshs 2,250,000/-. That at the time of executing the agreement the property was not registered in the defendant's name as he was still making payments over the same.

The agreement was that he would transfer the plaintiff's portion to her once the land was registered in his name.

3. The plaintiff averred that she made payments of the purchase price to the defendant and other persons on his behalf as was instructed by him. The plaintiff states that she fully complied with the terms of the agreement and it is the defendant who was in breach of the same. It is pleaded that the defendant later realised after the transaction that he could not be registered as the owner of the suit and offered the plaintiff alternative parcels of land *in lieu*. The properties offered were Kwale/Tiwi beach block/51,52 and 53. That however that was not to be the case as it was established that the defendant was not the owner of the mentioned parcels of land and the same belonged to one John Kariuki Mbuu and Kristian S Jadgen.

4. It was the plaintiffs claim that the defendant was in breach of the terms of the agreement which were pleaded as; -

    a. Frustrating the completion, sub division and transfer of a portion of land measuring 2 acres of all that parcel of land registered as Kwale/Tiwi beach block/55.

    b. Refusal by the defendant to avail all the completion documents to the plaintiff.

    c. Breaching the terms of the sale agreement dated June 12, 2007.

    d. Refusal by the defendant to execute all the requisite documents required to effect the opening of the lost green cards for the alternative parcels of land i.e Kwale/Diani/186, Kwale/Tiwi/51 to 53.

    e. Frustrating the sub division process by failing to pay survey fees for the subdivision of the alternative parcels of land ie Kwale/Diani/186, Kwale/Tiwi/51 to 53.

5. The plaintiff stated that as a result of the defendants breach she suffered huge financial loss, had to lease a house in anticipation of completion of the sale agreement further frustrating her plans to build a retirement home on the suit property and loss of her retirement savings.

Defendants Case

6. The defendant filed a defence on January 27, 2022. He denied having ever entered into any land sale agreement with the plaintiff over the suit property. He stated that the sale agreement had been frustrated by the plaintiff and her son who wanted the transaction to drag on. That the breach alluded to by the plaintiff was for reasons beyond his control a fact that was well known to the plaintiff. He denied ever being served with a demand notice and notice of intention to sue as alleged by the plaintiff.

Hearing

7. The matter was heard on March 28, 2022. The defendant did not call any witness.

8. PWI was Sabine Cristel Kihumbu, the plaintiff. She adopted her witness statement filed on October 7, 2021 dated October 6, 2021. She produced as evidence documents as outlined in the plaintiffs list of documents dated October 6, 2021. The same were marked as [Pex 1-25] which I will refer to later in this judgement. It was her evidence that the agreement for the sale of land was executed on June 12, 2007. That the same was for two acres of land which at the time had not yet been registered in the names of the defendant. That the defendant had written her a letter dated August 5, 2015 in which he offered to give her alternative parcels of land as he had failed to secure registration as the owner of the initial parcel agreed upon. She stated that her son had done due diligence over the alternative parcels offered and it had been established that the same did not belong to the defendant as he had claimed.

9. She went on to further state that she paid a total of Kshs 2,387,000/- to the defendant which included Kshs 300,000 to a lawyer Mrs Mary Ndale (see Pex 8 and 10) in excess of the agreed price of Kshs 2,250,000/-. She prayed for judgement against the defendant as was stated in the plaint.

10. The plaintiff was placed under intense cross examination by counsel for the defendant which I will refer to in my analysis and determination.

11. With the above the plaintiff closed her case.

Submissions Of The Parties

12. Parties filed and exchanged submissions which I have summarised here below.

Plaintiff's Submissions

13. The plaintiff submitted on whether the defendant was in breach of the terms of the agreement, whether the orders of specific performance, compensation for purchase price and general damages should issue against the defendant. It was submitted on behalf of the plaintiff that several payments had been made to the defendant over purchase of the suit property based on a valid written agreement, executed by the parties and witnessed as contemplated under section 3(3) of the *Contract Act*. That the defendant's failure to sub divide the same for the plaintiff to take occupation was breach of the agreement. It was further urged that in the absence of the defendants evidence the plaintiff should be taken to have proved her case on a balance of probability as held in *North End Trading Company v City Council of Nairobi* and *Gateway Insurance Co Ltd v Jamila Suleiman & another* [2018] eKLR.

14. On whether the orders of specific performance can issue against the defendant for breach of the terms of agreement it was submitted that the plaintiff fully complied with the terms of the sale agreement while the defendant had on the other hand failed to honour his obligations thereof. The plaintiff prayed the defendant should be compelled to complete the terms of the agreement or in the alternative compensate with land equivalent to the suit property. The plaintiff also sought for an order compelling the defendant to transfer 2 acres of parcels no Kwale/Tiwi beach block/51,52 and 53 which the defendant had offered.

15. In response to the defendant's contention that the action to recover the land was barred by dint of section 7 of the *Limitation of Action Act*, it was contended that the suit was not time barred based on the provisions of section 11 of the said Act.

16. Relying on the case of *Solomon Ndegwa Kuria v Peter Nduti Gitau* [2019] eKLR the plaintiff prayed for an award of Kshs 2,000,000/- for general damages for mental anguish and suffering as a result of the defendant's breach.

Defendant's Submissions

17. The defendant's submissions were filed on May 5, 2022. It was submitted, that considering the date of the sale agreement and the date of present suit, the 12 years under section 7 of the *Limitation of Actions Act* had lapsed and therefore the suit was time barred and ought to be dismissed with costs. Reliance was placed in Machakos ELC 50 of 2020 *Soraj Sohanlala & another v Divisional Integrated Development Programs Co Ltd*.

18. In reference to the plaintiff's case and evidence tendered before court, the defendant submitted that all the payments made in purchase of the suit property except the deposit were made outside the agreed time of 6 months. Further that the defendant had written to the plaintiff informing her of a new purchase price being Kshs 2,500,000/- which the plaintiff did not dispute and acknowledged in cross

examination and further indicated that she had paid to the defendant a total of Kshs 2,387,000/-. The defendant states that the plaintiff's evidence in court was contradictory to the documentary evidence she had filed including her statement on ownership of the alternative parcels offered which she stated did not belong to the defendant contrary to the searches she produced. Counsel urged that the assertions that the defendant is not the owner of the said parcels should be regarded as hearsay in the absence of evidence in proof thereof.

19. The defendant further submitted the plaintiff had not tendered enough evidence to support the plaintiff's allegation that the completion of the sale transaction had been frustrated.

20. On the prayers sought the defendant conceded to the prayer for specific performance on condition that the plaintiff pays the balance of the purchase price. That the plaintiff was not entitled to damages since she was the party that breached the contract by failing to pay the purchase price within the stipulated time. Further that the prayer for compensation of the purchase price should not be awarded as the same would result to unjust enrichment. On the issue of costs, it was submitted that each party should bear its own costs as the defendant was never served. The defendant relied on Nyeri HCCA No 56 of 2014 *Billey Oluoch Okun Orinda v Ayub Muthee M'igweta and Murangá* ELC No 25 of 2017 and *African Cotton Industries Ltd v Rural Development Services Ltd*.

Analysis and Determination

21. From my analysis of the pleadings, documentary and oral evidence, and the submissions filed by both parties, I deduce the following as the main issues of determination;

    1. Whether there exists a valid contract for sale of land between the parties herein.

    2. Whether there was breach of the said contract and if yes by which of the parties.

    3. Whether the suit is time barred by dint of section 7 of the *Limitation of Actions Act*.

    4. Whether the plaintiff is entitled to the orders sought.

    5. Who should bear the costs of this suit.

22. Before I delve into my determination of the above issues I find it necessary at this point to address the purport of failure on the part of the defendant to lead evidence in this matter. The plaintiff's submission was that this amounted to an admission of the facts pleaded. That in the absence of the defendants evidence the plaintiff should be taken to have proved her case on a balance of probability. With profound respect this argument cannot be correct. The burden on the plaintiff to prove her case remains the same. She must still discharge the legal and evidentiary burden of proof to the required standard that there was a valid agreement, that consideration changed hands and that the defendant breached the agreement. See the Court of Appeal holding in *Karugi & another v Kabiya & 3 others* [1983] eKLR where the court stated thus; -

> 'The burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended. The burden of proof is in no way lessened because the case is heard by way of formal proof'.

23. Further as I proceed to determine the issues I will also be guided by the court of appeal decision in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR where it was held that submissions cannot take the place of evidence. They are generally parties' "marketing language", each side endeavoring to convince the court that its case is the better one.

WheTher There Exists A Valid Contract For Sale Of Land Between The Parties Herein

24. The law applicable is the *Law of Contract Act* chapter 23 of the laws of Kenya which provides in section 3 that;

> " No suit shall be brought upon a contract for the disposition of an interest in land unless-
>
> (a) the contract on which the suit is founded –
>
> (i) is in writing.
>
> (ii) is signed by all parties thereto; and
>
> (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

The above provisions are also echoed in section 38 (1) of the *Land Act* 2012.

25. The plaintiff pleaded and testified that she entered into a sale agreement with the defendant over a portion of 2 acres of land. She produced as her evidence an agreement made on June 12, 2007 which was marked as 'Pex 1'. My perusal of the agreement revealed that it was in respect of Tiwi beach block 55 and was made between Mr G.N Kariuki and Ms Sabine Christel Kihumbu who are the defendant and plaintiff herein respectively. It is signed by both of them, witnessed by one Mrs. Lilian Murage and dated June 12, 2007.

Based on the foregoing I find that the agreement dated June 12, 2007 meets the legal threshold is therefore valid.

Whether There Was Breach Of The Said Contract By Either Of The Parties

26. It is the plaintiff's evidence and submission that the defendant was in breach of the above agreement while she honoured her side of the bargain. The particulars of breach have already been listed elsewhere in this judgement (see paragraph 4).

Clause 2 and 3 of the agreement herein is to the effect that; -

> 'Whereas Mr G.N Kariuki has bought the above parcel of land measuring 23 acres, it is hereby agreed that Mrs S.C Kihumbu is the beneficiary of 2 acres having paid a consideration of 2,250,000, Kshs The two acres will be excised at the beach front as per Mrs Kihumbu's choice. A down payment of 1,000,000, Kshs is payable on signing of the agreement..... As soon as the title is registered in Mr G.N Kariuki's name, Mr Maina of Seline Consultants will be engaged to subdivide the parcel of land and particular excised the tow (sic) for Mrs Kihumbu mentioned above.'

27. The above shows that there was an agreed consideration of Kshs 2,250,000 and a deposit of Kshs 1,000,000 was paid. The deposit was supported by a cash withdrawal from the plaintiffs account at Commercial Bank of Africa 'Pex 7' and which coincides with the date of the agreement herein. The plaintiff pleaded and led evidence of how she performed her side of the bargain. She testified that she paid a total of Kshs 2,387,000/- which was in excess of the agreed price of Kshs 2,250,000/-. It is noteworthy that the purchase price of Kshs 2,250,000/- is acknowledged by the defendant in the letter dated August 5, 2015 as having been deposited by the plaintiff. It is again confirmed as having been received in the defendant's email dated June 25, 2015 (Pex11). The defendant never led any evidence to deny the contents of these two correspondences or that he was not the maker thereof. The plaintiff led

evidence in respect of payment made to one Mary Kai allegedly on the defendant's instructions which I will pronounce myself when considering whether the reliefs sought should be granted.

28. Based on the foregoing evidence and analysis of the same it is very clear in mind that the plaintiff performed her obligations under the agreement and has proved as such on a balance of probabilities that she paid the purchase price in full.

29. This then brings me to the question of whether there was breach on the part of the defendant. A reading of the agreements set out in clause 2 and 3 of the agreement (see paragraph 26 herein) clearly shows the agreement of sale was dependent upon registration of the defendant as owner of the larger plot Kwale/Tiwi beach block/55 whereupon subdivision would be undertaken to excise and transfer the 2 acres to the plaintiff. The plaintiff led evidence through the letter dated August 5, 2015 'Pex 6'. The said letter is from the defendant addressed to the plaintiff and states at item (ii) referring to Tiwi beach block 55 thus;

> 'You will recall that some land agents from Mombasa approached me and offered the above parcel of land for 15m. You said you would be keen to purchase 2 acres for sh. 2.5m of which you deposited sh 2,250,000/- and an agreement to that effect signed between us.....'

The transaction did not succeed and I consequently made efforts to purchase Tiwi beach 53, 52 and 51 but again there were some difficulties at the Kwale land registry.....'

30. The above is clearly an admission on the part of the defendant that he breached the condition upon which the agreement was anchored upon. That is to say the successful finalisation of his purchase of plot 55 which would lead to his registration as the proprietor and which would enable the sub division of the two acres in the plaintiff's name. While it is noted from the defence (see paragraph 8) that the defendant pleaded that the breach never emanated from his end but from factors beyond his control he never led any evidence in support of this nor does he state the reasons in his letter dated August 5, 2015. In any event it is not in dispute that the agreement dated June 12, 2007 was never completed.

31. In addition, the letter dated August 5, 2015 also offers alternative plots which from the evidence led by the plaintiff she was willing to pursue in lieu of the 2 acres that were to be excised from Tiwi beach block 55. While under cross examination she stated that her son had conducted due diligence on parcel 51,52 and 53 on April 14, 2011 which revealed the defendant as the owner. The plaintiff testified and produced copies of green card for Kwale/Tiwi beach block/53 in the name of the defendant (PEX 16), application for official search for Kwale/Tiwi beach block/53 dated April 14, 2011 (Pex 12), copies of certificates of lease for Kwale/Tiwi beach block/51,52 and 53 all in the name of the defendant. It was her testimony that copies of green cards were missing which was evidenced through email correspondence between her sons and the defendant as well as lawyers Carol Njogu and Aminga. She testified that the demand notice for rates from Kwale county dated September 18, 2014 (Pex14) showed Jagden Kaur as owner for plot 51 but that she was not disregarding the official searches she undertook. She conceded her letter dated October 22, 2014 (Pex 15) to Jagden did not bear her signature and she was not able to confirm if the same was received by the said Jagden though she confirmed she never received a response thereof indicating he was the owner of the said land. It was also the plaintiff's testimony that her sons tried to facilitate replacement of the green cards but this never materialised (Pex 17 – 24). The plaintiff went on to add that the defendant had other properties near the suit property. That she had known the defendant since 1970 when he was her best man and became her sons godfather. Indeed, this was corroborated in the letter dated August 5, 2015 where the defendant states that he had assisted the plaintiff in other projects such as the plaintiffs new house at New Muthaiga, Ntashart farm and Kipeto farm. That the defendant had previously shown him his many parcels of land had no reason to disbelieve him. From the email correspondence I observed very little involvement

by the defendant. I observed a lot of effort on the part of the plaintiff to salvage the situation, secure an alternative piece of land as well as retaining the relationship of the parties which is evident has been on for a considerable time. The plaintiff presented to me as a very honest person during her testimony.

32. From the foregoing I cannot bring myself to a finding that she frustrated the subsequent offer. Indeed, she only became more vigilant the first transaction having failed and gaps having emerged in the alternative plots that were being offered which are clear from the evidence tendered.

33. Based on the foregoing it is my finding that the defendant was in breach of the initial agreement having failed to deliver on the 2 acres by his own admission and also having failed to deliver the alternative plot as promised.

Whether the suit is time barred by dint of section 7 of the Limitation of Actions Act.

34. Based on the date of the agreement it was submitted on behalf of the defendant that the plaintiffs claim was brought after the limitation period of 12 years to bring an action for the recovery of land. It is not in dispute that the agreement for the purchase of a portion of the suit property was entered into on June 12, 2007. The suit herein was filed on October 7, 2021 therefore making a period of 14 years up to June 2021. However, the plaintiff urged that the defendant having admitted that the transaction to have him acquire registration of title no Kwale/Tiwi beach block/55 in his name had failed rendered the claim as one for recovery by virtue of a forfeiture or breach of condition and where the right of action accrued on the date on which the liability to forfeiture was incurred or condition broken.

35. This court was invited by the plaintiff to invoke the provisions of section 11 of the *Limitation of Action Act* which provides that; -

> 'a right of action to recover land by virtue of a forfeiture or breach of condition accrues on the date on which the liability to forfeiture was incurred or the condition broken'

It is noteworthy that for section 11 to apply there must have been a breach of a condition by the party against whom the relief is being sought. The question of whether there was a breach of a condition of the agreement by the defendant vendor in the present case has already been answered in the affirmative and therefore the provisions of section 11 of the *Limitation of Actions Act* apply.

36. Having made the above conclusion, I'm still left with the question as to when the breach occurred or when it was discovered as persuaded by Justice Sergon's dictum in HCC civil appeal No 688 of 2012 *Gregory Mburu v Thika District Hospital* (2018) eKLR where he stated that in a cause of action found on contract the time starts to run when the defendant breaches the terms of contract or on such a date the breach occurred. The agreement dated June 12, 2007 was breached in August 2015 when the defendant communicated to the plaintiff his inability to conclude the transaction. From the said August 2015 to October 7, 2021 the date when the present suit was filed makes a period of 6 years and 1 month and therefore the limitation period of 12 years had not yet crystallised this being an action for the specific performance of an agreement on disposition of land. No evidence was led by the defendant to show that the plaintiff was made aware of his predicament earlier than the date of this letter.

It is therefore my finding that the suit is not barred by limitation, time having started to run in August 2015 when the admission for the breach was made.

Whether The Plaintiff Is Entitled To The Reliefs Sought

37. The plaintiff pleaded for orders of specific performance compelling the defendant to complete terms of the agreement for sale. The defendant in his submissions conceded to the prayer for specific performance on condition that the plaintiff pays the balance of the purchase price. In determining this

issue, I will be guided by the case of *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* [2006] eKLR where Maraga J as he then was stated;

> 'Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.' (emphasis is mine).

38. This court has already determined that there was a valid agreement between the parties. I have carefully considered the facts and evidence placed before this court. It was admitted by the defendant in the letter dated August 5, 2015 that he was not able to procure the registration of the suit property into his name. No evidence was led in the entire proceedings that the said suit property was subsequently registered in the name of the defendant in the form of copy of a title document, search or green card confirming the same. For this reason, I would be hesitant to order specific performance since there will be hardship in enforcement to both parties.

39. Guided by the case law cited above I then proceed to determine if there was an alternative remedy available to the plaintiff? The answer is in the affirmative based on the plaintiff's pleadings. In the plaint herein, the plaintiff pleads that in the alternative the defendant be ordered to compensate her the purchase price of Kshs 2,250,000/= paid to the defendant with accrued interest of 14% from the date of payment of the deposit and the balance of the purchase price. I have already made a finding that the said purchase price was admitted by the defendant (see paragraphs 27 and 28 herein). The plaintiff during her evidence in chief also produced other copies of her bank account statement and customer advise for her account at Commercial Bank of Africa (see Pex 8,9,10). This revealed a cash withdrawal of Kshs 500,000 was made on October 4, 2007, debit advice of Kshs 300,000, 487,100 and 100,000 to May Ndale Kai transacted on October 13, 2010, October 19, 2010 and November 2, 2010 respectively. I'm aware that during cross examination the plaintiff admitted in respect to cash withdrawals that the same did not indicate that the funds were disbursed to the defendant. She testified that she had been instructed by the defendant to make a payment to one Mary and conceded that she had no evidence of the said instructions by the defendant. While she noted the time difference, she could not further explain why the same was being paid 3 years after the purchase of the property when the agreement specified 6 months. She also conceded that Mary's name did not feature in the correspondence with the defendant as the lawyer in the transaction. She further clarified that the correct purchase price was Kshs 2.5 million as per the letter dated August 5, 2015 (Pex 6) and conceded the amount she paid of 2,387,000 was still below the said price. She further admitted she did not dispute the payments reflected in the said letter. On being shown (Pex 13) the certificate of lease for plot 51 she confirmed it was signed by M A Kai though she could not confirm it was the same person she paid to the money. It is this courts view that there is no basis upon which to compute the payments to Mary Kai as part of this transaction.

40. I'm therefore inclined to make a finding that the plaintiff has proved the payment of the purchase price of Kshs 2,250,000/= on a balance of probabilities and the same is therefore refundable to the plaintiff.

41. This court further notes that the plaintiff has pleaded for interest from the date of payment of the deposit and the balance of the purchase price. In determining whether such interest is payable I will be guided by the case of *Highway Furniture Mart Ltd v Permanent Secretary Office of the President & another* (2006) eKLR where the Court of Appeal stated; -

> 'It is evident that the appellant claimed interest for a period of more than 7 years prior to the institution of the suit.
>
> In *Gulam Husein v French Somaliland Shipping Co Ltd* [1959] EA 25 the predecessor of this court while referring to section 34 of *Indian Code of Civil Procedure* which is in *pari materia* with section 26 of the *Civil Procedure Act* said, obiter:
>
> > "section 34 of the Indian code was considered by the Privy Council in the case of *Bengal Magpur Railway Co v Ruttanji Ramji* 1938 AIR PC & 67 and it was indicated by their lordships that the section has no application to interest prior to date of the suit, which is a matter of substantive law. It was also indicated that the power conferred is to order interest upon the principal sum adjudged from the date of suit to the date of the decree but from that date to the date of payment it may be ordered to be paid upon the aggregate of the principal and interest as at the date of the decree".
>
> That construction of section 26 (1) of the *Civil Procedure Act* was adopted by this Court in *New Types Enterprises Ltd v Kenya Achand Insurance Company Ltd* [1988] KLR 380 where the court held that the award of interest for any period prior to the filing of the suit is a matter of substantive law.
>
> Section 34 (1) of the *Indian Code of Civil Procedure* is still intact and is in the same language as section 26 (1) of the *Civil Procedure Act*, (see Mulla – *The Code of Civil Procedure* 16th Edition vol 1 page 505). At page 511 of *Mulla* (supra) the authors state:
>
> > "interest up to date of suit is a matter of substantive law and the section does not refer to payment of interest under the first head (that is interest accrued prior to the institution of the suit).
> >
> > ..... It has been said the right to interest prior to the suit is a substantive one whereas pendente lite, it is one of procedure within the discretion of the court".
>
> The authors further show that according to the substantive law, interest antecedent to the suit is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between parties (see pages 511 – 514) of *Mulla* (supra). (Emphasis is mine).
>
> In this case the building contract did not provide for payment of interest. The appellant did not prove before the trial Judge that interest before the institution of the suit was awardable in law in the circumstances of the case.'
>
> From the above it is trite that interest is payable from the date of filing the claim unless there were specific agreements on interest between the parties. My perusal of the agreement herein does not reveal such an arrangement. I therefore decline to grant interest prior to the filing of this suit.

42. A claim for general damages has been made for breach of contract. It is the plaintiff case and evidence that she was to build her retirement home on the suit property and had suffered both financial and mental anguish. Based on *Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited* supra this court already substituted general damages with the purchase price paid. Coupled with interest it is my view that this should suffice.

43. I will not belabor the issue of costs. These have been pleaded. It is trite that costs follow the event (see section 7 of the *Civil Procedure Act*). Clearly it is the defendant's failure to meet his obligations under the agreement that precipitated these proceedings and he must bear the costs.

44. Having found that plaintiff has proved to the satisfaction of this court on a balance of probabilities that she entered into a valid sale agreement for a portion of the suit property, that she met her part of the bargain by paying the agreed purchase price and that the defendant breached the agreement by failing to transfer the 2 acres from the suit property or the alternative *in lieu* thereof, this court enters judgement for the plaintiff against the defendant in the following terms; -

    i. The court declines to grant an order for specific performance but hereby orders that the defendant do refund the purchase price of Kshs 2,250,000/= to the plaintiff.

    ii. Interest on (i) above at court rates from the date of filing of the suit until payment in full.

    iii. The defendant shall bear the costs of this suit.

    Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 16TH DAY OF AUGUST, 2022

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Mungai for the Plaintiff

Mr. Nyariki for the Defendant.

Mr. Denis Mwakina- Court Assistant.