



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Otundo & 5 others v Creek Limited (Environment & Land Case
14 of 2013) [2022] KEELC 12623 (KLR) (27 September 2022) (Judgment)**

Neutral citation: [2022] KEELC 12623 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 14 OF 2013
NA MATHEKA, J
SEPTEMBER 27, 2022**

BETWEEN

**BENARD ONKUNDI OTUNDO 1ST PLAINTIFF
BARNABAS KIPRONO BAMBOK 2ND PLAINTIFF
KEFA NYAMONGO OENGA 3RD PLAINTIFF
DANCAN OCHENGE OYARO 4TH PLAINTIFF
KENETH ODUOL ESSAU 5TH PLAINTIFF
JAMES KAMBO MUTHUSI 6TH PLAINTIFF**

AND

CREEK MARKETING AND DEVELOPMENT LIMITED RESPONDENT

JUDGMENT

1. The plaintiffs aver that they are the registered proprietors of all that property known as Kilifi/Mtwapa/403. By a sale agreement dated July 21, 2011 and a supplementary sale agreement dated December 15, 2011, the defendant agreed to sell and did indeed sell its property Kilifi/Mtwapa/403 to the plaintiffs herein, for a sum of Kenya shillings thirty three million five hundred thousand (KShs 33,500,000). It was a term of the sale agreement inter alia; the purchase price means Kenya shillings thirty three million, five hundred thousand only (KShs 33,500,000). Deposit means Kenya shillings three million three hundred and fifty thousand only (KShs 3,350,000). Completion date means the 120th day from the date hereof or earlier date as may be agreed by both parties. On or before the completion date the vendor's advocates shall deliver the following; original documents of title in respect of the property. The duly executed transfer of the property (in triplicate) in respect of the property in favour of the purchaser. Kilifi county council rates receipts in respect of the property together with a rates clearance certificate valid for at least thirty (30) days from the completion date. Consent to transfer



of the said property from the land control board or such other consents and documents as may be necessary to process registration of the transfer in favour of the purchasers. all previous documents in possession of the vendor. The purchaser shall pay the balance of the purchase price to the vendor's advocates on receipt of the documents stated above who shall immediately release, the net balance after deduction of sale commission equally to the 1st and 2nd directors. The 2nd director shall upon receipt of the balance hand over the keys to the purchasers within fourteen days. That the property is sold with vacant possession to be delivered to the purchasers within fourteen (14) days after the completion date. The plaintiffs paid a deposit of kshs 3,350,000 being 10% of the purchase price to the defendant's advocates and secured the payment of the balance of the purchase price of kshs 30,150,000 from its financier, M/s Housing Finance Company of Kenya Limited. The defendant duly acknowledged receipt of the deposit before the date of the sale agreement. By a letter dated January 5, 2012, M/s Miller & Company Advocates the purchaser's financier advocates issued to the defendant's advocates M/s P A Osino & Company Advocates an irrevocable professional undertaking to pay to them a sum of kenya shillings thirty million one hundred and fifty thousand being the balance of the purchase price on or before the expiry of fourteen (14) days of successful registration of the transfer in favour of the purchasers' financier. The defendant in contravention of the express terms of the sale agreement herein failed to avail all the aforesaid documents on or before the completion date with the result that the parties herein were unable to conclude the sale agreement on or before the 120 days from the date of execution of the sale agreement, July 21, 2011. In particular, The defendant failed to timeously obtain the rates clearance certificate from kilifi county council. The plaintiffs paid for and obtained the same in April 2012. The defendant failed to timeously obtain the presidential consent to transfer the suit property. The plaintiffs applied for and obtained the same in April 2012. The defendant duly executed a Transfer of Title in favour of the plaintiffs and the Transfer dated May 23, 2012 was simultaneously registered with the charge in favour of the Housing Finance Company of Kenya, securing the advance made to the plaintiffs on June 21, 2012. On or about July 21, 2012 the plaintiffs' financier advocates paid to the defendants advocate the balance of the sum of kshs 30,150,000 as per the terms of their professional undertaking dated January 5, 2012. The defendant has received the entire purchase price as per the terms of the agreement but still refuses to hand over to the plaintiffs vacant possession as per the terms of the sale agreement duly entered into between the parties. The defendant is now contrary to the express provisions of the Law, the sale agreement duly entered by the parties and the professional undertakings exchanged and accepted by the parties unlawfully demanding a sum of kshs 6,540,005, allegedly on account of interest due and owing to it prior to handing over possession of the suit property to the plaintiffs.

2. The plaintiffs are now the registered proprietors of the suit property and are currently servicing a loan of kshs 45,000,000 granted to them by Housing Finance Company of Kenya Limited and the defendant has no colour of right to continue occupying the suit property and deny the plaintiffs vacant possession of the suit property. The plaintiffs are unable to derive and enjoy profits from the suit property which profits the plaintiffs want to use to repay their loan of kshs 45,000,000 taken to finance the purchase of the property herein and there is a real danger of foreclosure on their property. The defendant has no proprietary interest in the suit property, the same having been extinguished immediately upon registration of the transfer of the suit property in favour of the plaintiffs and its continued occupation of the suit property is unlawful and amounts to trespass. The plaintiffs claim against the defendant is for the immediate delivery of vacant possession of the suit property being property Kilifi/Mtwapa/403. The plaintiffs also claim general damages for illegal and wrongful trespass of their property and mesne profits derived from the illegal use of the suit property Kilifi/Mtwapa/403. The plaintiffs pray for judgement against the defendant for:



- a. A declaration that the plaintiffs are the registered proprietors of the suit property Kilifi/Mtwapa/403 and that the defendant is a trespasser.
 - b. An order of vacant possession of the suit property Kilifi/Mtwapa/403.
 - c. An order of eviction against the defendant, its agent and/or servants from the suit property Kilifi/Mtwapa/403.
 - d. An order of Mandatory Injunction compelling the defendant, its agent and/or servants to hand over vacant possession of the suit property Kilifi/Mtwapa/403 to the plaintiffs.
 - e. A permanent injunction restraining the defendant, its agent and/or servants from trespassing on, entering upon or in any manner howsoever interfering with the suit property Kilifi/Mtwapa/403.
 - f. General damages for trespass.
 - g. An order of mesne profits from August 22, 2012 until delivery of vacant possession to the plaintiffs.
 - h. Costs of the suit.
3. The defendant states in their counterclaim that they entered into a supplementary agreement with the plaintiffs dated December 15, 2011 whereby as per clause 3 thereof, the plaintiffs agreed to pay interest on late payment at the rate of 30% from the November 19, 2011 until payment in full, but not later than December 31, 2011. That further on the 3rd February 2012 through their advocates Steve Kithi & Company Advocates gave an irrevocable professional undertaking to the defendants advocate to pay the interest at the rate of 30% on the balance of the purchase price of kshs 30,150,000/= with effect from November 19, 2011 until the amount is paid in full. The defendant's claim against the plaintiffs is for interest on the balance of the purchase price of kshs 30,150,000/= with effect from November 19, 2011 at a rate of 30% pa until payment in full. That as a result the defendant had to incur security charges for maintaining the property secure at the rate of kshs 10,000/= per month and calims the same from November 19, 2011 until payment in full.
 4. This court has considered the evidence and the submissions therein. It is the plaintiffs' case that they entered into two sale agreements with the defendant, for the purchase of Kilifi/Mtwapa/403. The first sale agreement was dated July 21, 2011, while the supplementary sale agreement was dated December 15, 2011. The purchase price was kshs 33,500,000/=, the deposit of kshs 3,350,000/= was paid, while the balance was secured vide a financier Housing Finance Bank. The plaintiffs claim that the defendant has failed to deliver vacant possession of the suit property, and prayed for the same to be delivered to them.
 5. The defendant maintained that the plaintiffs breached the sale agreement dated July 21, 2011 as they failed to complete the transaction, hence the defendant could not give the completion documents and could not deliver vacant possession. Further the defendant claimed that the plaintiffs breached the sale agreement by varying its terms and introduced a financier to secure the balance of the purchase price, and a creation of a charge over the suit property. The defendant maintained that he was ready with the completion documents to complete the transaction, which led to them entering into the supplementary sale agreement dated December 15, 2011 which extended the completion of the initial sale agreement from November 18, 2011 to December 30, 2011. The agreement also substituted the completion documents with a professional undertaking by the firm of Miller & Co Advocates on behalf of Housing Finance Bank to pay the balance. The plaintiff inter alia meant to pay a 30% interest



on the balance of the purchase price with effect from November 19, 2011 until payment in full before possession is handed over to them.

6. The defendant maintained that the plaintiffs have also breached the supplementary sale agreement as they failed to conclude the transaction by December 30, 2011, as the balance was paid on August 8, 2012 after lapse of unreasonable period of time contrary to both agreements. Further, the defendant claimed that the plaintiff failed to pay the 30% interest on the balance as agreed, despite the irrevocable and professional undertaking by their advocate to do so. In his counterclaim, the defendant prayed for inter alia the 30% pa interest on the balance of the purchase price
7. There is no dispute that the parties entered into an agreement of sale for the defendant's parcel of land Kilifi/Mtwapa/403 on July 21, 2011. The agreed purchase price was Kshs 33,500,000/= and the deposit of Kshs 3,350,000/=, which is 10% of the purchase price was paid by the firm of Steve Kithi & Co Advocates (who acted for the plaintiffs in the transaction). Clause 5 of the agreement of sale, the parties covenanted to complete the sale and purchase on the 120th day from the date of execution of the agreement of sale. From the evidence, the plaintiffs only paid the deposit but completion did not take place.
8. The defendant contends that the plaintiffs are in breach for altering the terms of the agreement by adopting a method of completion that was not intended by the parties. The plaintiff sought to obtain the balance of the purchase price from Housing Finance Company of Kenya and the registration of a charge over the suit property for a sum of Kshs 45,000,000/=. This alteration of the agreement was done vide a letter dated October 25, 2011 by the firm of Miller & Co Advocates who wrote to PA Osino & Co Advocates (who acted for the defendant in the transaction), which informed the defendant that the firm of Miller & Co advocates would give a professional undertaking to effect payment of Kshs 30,150,000/= for the balance of the purchase price within 14 days upon the registration of transfer in favour of the plaintiffs and charge in favour of Housing Finance Company of Kenya, the financier. Indeed, by conduct the plaintiffs were in breach of the agreement of sale, they sought to introduce a Third Party through the creation of a charge over the suit property on undisclosed date on account of the professional undertaking of the firm of Miller & Co Advocates who were not privy to the agreement of sale.
9. What followed were correspondences between the firm of PA Osino & Co Advocates and Miller & Co Advocates, and on November 3, 2011, the firm PA Osino & Co Advocates forwarded the original sale agreement to Miller & Co Advocates and requested them to discharge the undertaking. From a plain reading of clauses 1.1 (a), 4.2, and 5 time was of essence. The Court of Appeal in *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others* (2018) eKLR, held that,

“In my research surrounding the point, I was impressed by the authorities cited by the 2nd defendant more particularly the case of JTM Construction & Equipment Ltd (supra). Paragraphs 70 - 75 of that case reads as follows:

It is settled that ‘when time is of the essence there is no leeway for delay’. Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract. In such circumstances, the general principle is that the court will not assist the party served with the notice where he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission.”
10. The letter from the defendant's counsel dated November 3, 2011, can be construed as the defendant granting an extension of the completion date from November 18, 2011 to a later date. The requirement



of the completion notice had by mutual agreement been waived, the process of discharging the undertaking and perfecting the charge in exchange of the balance of the purchase price meant that the completion date of November 18, 2011 could not be met. After expiry of the completion date, there were further correspondences between the parties, where they agreed to execute a supplementary agreement of sale in order to salvage the completion of the transaction.

11. There is no dispute that there was a valid and binding supplementary sale agreement that was executed by the parties hereto on December 15, 2011 complementary to the agreement of sale dated July 21, 2011. The supplementary agreement extended the initial agreement that lapsed on November 18, 2011 to December 30, 2011 by reviewing the completion clause. The completion would now be the delivery of an irrevocable professional undertaking by the firm of Miller & Co Advocates to the counsel for the defendant in exchange of the completion documents. Further the plaintiffs were to pay an interest of 30% on the balance of the purchase price from November 19, 2011 until payment in full and not later than December 31, 2011 and before possession is handed over. It also stated that the deposit stands forfeited as at November 18, 2011 if the transaction is not completed as scheduled.
12. The supplementary agreement of sale was never completed as scheduled on December 30, 2011. What followed were series of correspondences between the firm of Miller & Co Advocates, PA Osino & Co Advocates and Steve Kithi & Co Advocates on the terms of the professional undertaking. During the negotiation period of the terms of the professional undertaking, there has been advanced by the plaintiffs as the defendant breaching the contract. On January 31, 2012, the firm of Steve Kithi & Co Advocates wrote to PA Osino & Co Advocates requesting the completion documents to enable Miller & Co Advocates remit their professional undertaking.
13. On February 1, 2012, the defendant forwarded the completion documents, however, the Miller & Co Advocates wrote back on February 6, 2012 to inform the defendants that the transfer of 2011 would attract penalty of stamp duty and that the suit property required a presidential consent since it was a beach front plot. PA Osino & Co Advocates, wrote back on February 21, 2012 informing Miller & Co Advocates that the suit property did not require the presidential consent as it had been previously registered without a presidential consent. On April 3rd, 2012, Steve Kithi & Co Advocates, enclosed the presidential consent to transfer to Miller & Co Advocates. The Court of Appeal in the case of Attorney General & 6 others v Mohamed Balala & 11 others (2014) eKLR was faced with the same issue on the precondition of presidential consent before a transfer of 1st and 2nd row beach plots it held that,

“National security would ordinarily triumph over the rights of an individual. It is however in such instances that the court must be convinced that it is absolutely necessary before sanctioning it. Furthermore, such a decision must be based on the law so as to prevent abuse. There is currently no law to govern this presidential fiat, leaving it open to misuse and abuse. This was considered by the learned Judge and she found correctly that it amounted to a breach of the Constitution for contravening the national values under article 10 of the Constitution, among them being the rule of law. We cannot fault the Judge.”
14. The charge was finally registered on the certificate of title, issued to the plaintiffs dated June 21, 2012 in favour of Housing Finance Company for kshs 45,000,000/=. Counsel for the defendant, the firm of PA Osino & Co Advocates confirmed receipt of the balance of the purchase price vide a letter to Steve Kithi & Co Advocates on August 9, 2012. Further in the letter, they demanded kshs 6,540,000/= as interest to enable them issue vacant possession, which was grounded upon a professional undertaking issued on February 3, 2012 by the firm of Steve Kithi & Co Advocates to transfer the interest at a rate of 30% per annum on the balance.



15. The effect of the supplementary agreement of sale was to extend payment for the balance of the purchase price and provide for an interest on it. The interest was capped at 30%, though not specified whether the interest was to be earned monthly or annually. The ascertainment of the amount payable being interest in default as per clause 3 of the supplementary agreement of sale is derived from the irrevocable professional undertaking issued by the firm of Steve Kithi & Co Advocates, dated February 3, 2012 which stated that an amount calculated as interest at a rate of 30% annualized on the balance of purchase price from November 19, 2011 until the amount is paid in full. This court must therefore abide by the agreed interest rate between parties.
16. The plaintiffs failed to comply with the terms of the supplementary agreement of sale by not paying the interest on the balance of the purchase price. At the time of completion, the plaintiffs did not request for an extension on payment of interest that had accrued. To the defendant time was of essence in complying with clause 3 of the supplementary agreement of sale, when through the letter dated September 10, 2012 they demanded the interest of kshs 6,540,000/=.
17. In the case of *Housing Company of East Africa Limited v Board of Trustees National Social Security Fund* (supra), the Court of Appeal held that,
- “It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court’s role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally, and the learned judge’s ultimate findings cannot by any stretch of imagination be faulted.”
18. The plaintiffs were in breach despite being put on notice through a letter dated September 10, 2012. The failure to pay the interest of the balance of the purchase price is construed as conduct that would warrant the defendant to repudiate and to rescind the agreement. Where the purchaser has dragged his feet and has been guilty of unnecessary delay as the plaintiffs have been, the vendor is entitled to rescind the agreement. In this case the defendant was entitled to serve the plaintiffs with the notice limiting time, at the expiry of which the vendor would treat the agreement of sale as rescinded. It is unconscionable that the plaintiffs who failed to pay the full purchase price in time, even after being granted several extensions at their request, failed to pay the agreed interest on the balance of purchase price. In *Samuel Ngige Kiarie v Njowamu Construction Company Limited & another* (2019) eKLR, it was held that;
- “It is trite law that parties to a contract are bound by the terms and conditions stipulated therein. That is the case in the instant appeal since the facts confirm that the parties acknowledge having entered into the agreement for the sale of the suit land. None complained of fraud or coercion and they are accordingly bound by its terms.”
19. From the foregoing I find the respondent is entitled to special damages of kshs 6,540,000/= being interest on the balance of the purchase price of kshs 30,150,000/= at a rate of 30% per annum from November 19, 2011 to August 8, 2012. The defendant cannot claim interest of the balance after August 8, 2012 since the balance was fully paid and a charge created over the suit property. Further the defendant seeks special damages for the security charges at a rate of Kshs 10,000/= per month from November 19, 2011 until the plaintiffs obtain possession. Special damages must not only be claimed, but must be strictly proven by documentary evidence. In this case, the defendant has demonstrated



that he spent the sum claimed between March 1, 2015 to May 1, 2022 by producing receipts to support his claim for special damages, therefore the court will only grant the special damages proved and not as sought in the amended counterclaim.

20. The foregoing is that the defendant has showed that he was ready and willing to give good title and that at all material time ready and willing to complete the contract. He has satisfied the court that the plaintiffs breached the supplementary agreement of sale and he is entitled to recover all losses which may be fairly and reasonably considered as arising in the natural course of things from the breach. The plaintiffs on the other hand have failed to prove their case on a balance of probability. On costs, the general rule is that costs follow the event, I see no reason to deviate from this rule, the defendant is entitled to costs incidental to the suit. I find the plaintiffs have failed to prove their case on a balance of probabilities and I dismiss it. The upshot is that the defendant's counterclaim dated March 1, 2013 has been proved on a balance of probabilities and I grant the following orders.
- a. The sum of kshs 6,540,000/= being interest on the balance of the purchase price of kshs 30,150,000/= at the rate of 30% per annum from November 19, 2011 to August 8, 2012.
 - b. Security charges at a rate of kshs 10,000/= per month incurred between March 1, 2015 to May 1, 2022.
 - c. The defendant is granted interest in (a) and (b) at the court's rate from the judgement day till payment in full.
 - d. The defendant is granted costs of the suit.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2022.

N.A. MATHEKA

JUDGE

