



Lwande & 66 others v Registered Trustees of Teleposta Pension Scheme (Environment and Land Case Civil Suit 1321 of 2013) [2022] KEELC 13555 (KLR) (13 October 2022) (Judgment)

Neutral citation: [2022] KEELC 13555 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1321 OF 2013
OA ANGOTE, J
OCTOBER 13, 2022**

BETWEEN

MARY LWANDE & 66 OTHERS PLAINTIFF

AND

REGISTERED TRUSTEES OF TELEPOSTA PENSION SCHEME .. DEFENDANT

JUDGMENT

1. The Plaintiffs instituted this suit on May 8, 2008 seeking for the following reliefs:
 - a) An order of permanent injunction restraining the Defendant whether by themselves and/or through Teleposta Pension Scheme, its servants, agents, representatives, advocates or auctioneers or any of them or otherwise howsoever from doing the following acts or any of them that is to say from advertising, disposing or selling by public auction, tender, bids and private treaty, howsoever at any time completely by conveyance, transfer or any sale concluded by auction, private treaty, leasing, letting or otherwise howsoever by interfering with the Plaintiffs/Applicants' peaceful and priority right to purchase the house known as house Number H9/2, H4/3,J11/2,H2/11,H3/2,B2,B3, PF, J4/2,E12,G2/3,P2, B11, G8/3, D1, C8, P7, G5, B12, B2, J5/2, D4, H7/3, A11, F8, A6, D6, E1, P6, H1/3, H8/3, G2/3, G12/3, K11 ,K3, I11, L11, K1, B6, G1/2 Jogoo Road, C15, B16, B6, B7, and A6, Elgeyo Marakwet and 35,1 and 15 South B.
 - b) An order for specific performance of all the respective Sale Agreements entered into between the Plaintiffs and the Defendant for the purchase of the subject properties.
 - c) An order directed at the Defendant compelling them to supply the relevant documents of Title to enable the Plaintiffs procure financing for the balance of the purchase price for the said houses.



2. The 67 Plaintiffs averred in the Plaint that they are and have at all material times been tenants in the Defendant's houses comprised in a block of flats known as Jogoo Road Teleposta Flats situated on LR No 202/55 (house unit 5); Elgeyo Marakwet Road, Kilimani Teleposta Flats situated on LR No Nairobi Block 71/415 (unit 49) and South B Teleposta Flats situated on LR No Nairobi Block 69/117 (house unit).
3. It was averred that on diverse dates, the Defendant offered to sell to the Plaintiffs the houses they were occupying; that the Plaintiffs accepted the offer and proceeded to sign their respective sale agreements and paid the requisite 10% deposit of the purchase price and that they intended to procure financing to pay the balance of the purchase price but were required to furnish their financiers with completion documents.
4. It was averred by the Plaintiffs that despite seeking the aforesaid completion documents from the Defendant, the same were never issued as a result of which they were unable to procure financing to pay the balance of the purchase price and that the Defendant purported to rescind the sale agreements and claimed that the 10% deposit had been forfeited.
5. According to the Plaintiffs, the purported rescission of the sale agreements was malicious and intended to frustrate the Plaintiffs' efforts and right to purchase the subject houses and unjustly enrich the Defendant; that the Defendant is in breach of the contract for the reasons that their right to rescind the agreement had not arisen and that the notices to rescind the agreements were defective.
6. It is the Plaintiffs' case that the delay in paying the balance of the purchase price was occasioned by the Defendant who failed to supply them with the completion documents and that the rescission of the agreement was meant to deprive them their right to purchase and sell the suit properties at higher prices.
7. The Plaintiffs lastly averred that they have always been ready and willing to purchase the houses provided the Defendant issues them with the relevant documents to enable them access financing; that unless the Defendant is stopped, the Defendant shall proceed to evict them rendering them homeless and that the Plaintiffs have been active members of the Defendant's pension scheme and it will be unfair to deny them an opportunity to purchase the houses.
8. In its Defence, the Defendant denied the averments in the Plaint and averred that the Defendant is entitled to sell the suit property and the same will not render the Plaintiffs desolate and that the Plaintiffs had previously filed HCCC 1602 of 2007 which has since been dismissed by the Court and costs therefrom have yet to be settled by the Plaintiffs.
9. According to the Defendant, the Plaintiffs' suit is incurably defective and ought to be struck out as it does not plead the particulars of each of the Plaintiffs' alleged contract, does not plead to any payments or any individual acts of fraud with respect to the alleged individual contracts and that there is no common question of law and fact pleaded in the Plaint within which the Plaintiffs could commence the suit against the Defendant if at all.

Hearing and evidence

10. This matter proceeded for hearing on November 2, 2021. PW1 informed the court that the Defendant is the Trustee of the Pensions of Kenya Posts and Telecommunications Corporation (KPTC) and that he worked for the Defendant until 1999 when it was split up into three entities where after he joined the Postal Corporation of Kenya until 2018 when he retired.



11. PW1 testified that during his employment, he was allocated a two bedroomed self –contained house number H4/Phase 3, which house he still occupies; that in the year 2007, he together with the other Plaintiffs were given letters of offer to purchase the houses they occupied on condition that they do not take a mortgage and continue paying rent; that the value of his house was Kshs 1,800,000 and that he paid the deposit of Kshs 180,000 within 10 days and was to pay the difference within 90 days.
12. According to PW1, he did not have the balance of the purchase price as it was during the post- election violence in 2007/2008; that he managed to secure a financier who required completion documents from the Defendant, including the Title Deed and that the Defendant refused to issue him with the documents prompting them to move to court. It was the evidence of PW1 that they have never received demand letters for the rent, neither is there a counter-claim for the same and that he has been in the house for more than 26 years.
13. During cross-examination, PW1 stated that he lives in house number 4, Block H; that he is not a tenant and lives in the house as a purchaser; that the Plaintiffs did not give him any consent to represent them; that the letter of offer indicated that the sale was not subject to mortgage and that he did not stop payment of rent.
14. It was the evidence of PW1 that he has not fully paid the rent; that although he signed the offer he has not paid the full purchase price; that he received a letter in February, 2008 asking him to complete payment of the purchase price within 21 days; that there is no clause in the consent indicating that they should not pay rent and that he is not aware that some Plaintiffs purchased the houses neither is he aware that their advocates were furnished with titles.
15. In re-examination, PW1 stated that the rent payments were initially directly deducted from his salary; that he is not aware of the Plaintiffs who purchased the units and that the advocates demanded for the titles within 5 days of the consent.
16. PW2 was Plaintiff number 49. PW2 stated that she was employed by the defunct Kenya Post and Telecommunication Corporation in 1991 and thereafter by Telkom Kenya; that during her employment, she was allocated house unit number 197 which she occupies to date; that she was given an offer to purchase the property, Kshs 180,000 being a 10% deposit of the purchase price and pay the balance of Kshs 1, 620,000 within 90 days.
17. According to the evidence of PW2, she was unable to raise the balance of the purchase price; that on 3rd February, 2008, they were granted a 21 day extension to pay the balance of the purchase price but due to the prevailing economic situation, she was unable to secure financing and that when she eventually secured financing, she issued the Defendant with a cheque for the balance of the purchase price which was rejected without any reason.
18. In cross-examination, PW2 stated that they have moved the Court to be allowed to purchase the houses; that she signed an agreement for sale through the lawyer and she paid 10% of the deposit by cheque and was to pay the balance within 90 days and that she did not pay the balance because her financier asked for a copy of the original Title which was with the Defendant.
19. It was the evidence of PW2 that she does not pay rent because after paying the 10% deposit, she became a purchaser; that she wrote a letter to the Defendant seeking for more time to pay the balance of the purchase price which elicited no response and that she managed to get a financier who gave her a cheque of Kshs 1.2 million but the Defendant declined to accept the same.
20. DW1 stated that he is the administrator and trust secretary of the Defendant, a registered pension scheme constituted vide a Trust Deed dated 1st July, 1997 and that nowhere in the Trust Deed is it



provided that the first priority in purchasing the Scheme's staff houses and properties should be given to its members.

21. According to DW1, between 1998 and 2005, the Defendant was allowed by the Minister of Finance through an Act of Parliament to discharge pension liabilities to employees and former employees of the defunct Kenya Post and Telecommunication Corporation, Communication Commission of Kenya, Postal Corporation of Kenya and Telkom Kenya Limited and that to enable the Defendant perform its mandate, it was vested with several properties including the suit properties.
22. DW1 testified that sometime in the year 2007, the scheme gave its members and occupants of the premises first priority in purchasing the suit properties; that the Plaintiffs were to express interest by filling the forms and submitting them to the Defendant for consideration and that despite having been given the first consideration, the Plaintiffs were unable to complete the transactions leading to the Defendant offering the premises for sale to third parties who were able to complete the transactions.
23. It was the evidence of PW1 that the suit properties were offered for sale and the scheme and is currently holding funds either as deposit or full purchase price on the properties but is unable to give vacant possession of the suit properties and that the court granted the Plaintiffs more time to complete the purchase price which they never did.
24. DW1 informed the court that that the Defendants were granted an extension to April, 2009 and further to May 22, 2009 to complete the purchase, after which only 20 of the 67 listed Plaintiffs made full payments; that one of the pre-condition for the purchase of the suit properties was for the Plaintiffs to pay all outstanding rent arrears, sign new tenancy agreements and demonstrate their ability to purchase the houses and that the Plaintiffs have failed to pay rent since the filing of the suit.

Submissions

25. The Plaintiff's advocate submitted that the contents of the offer letter were oppressive as they had an express term barring the purchasers from seeking mortgage and further required a 10% deposit of Kshs 180,000/= within 14 days and a payment of the balance of the purchase price being Kshs 1, 600,000/= within 90 days failure of which the purchaser was to forfeited the 10% deposit paid to the vendor.
26. It was submitted that having regard to the Plaintiffs' basic salary which the Defendant was aware of, they were reasonably expected to be aware of the fact that the Plaintiffs would not be able to purchase the houses on the aforesaid terms and that the clause requiring forfeiture of the 10% deposit upon failure to pay balance of the purchase price was a tactic to make money.
27. Counsel for the Plaintiff cited the case of *Fibrosa Spolka Akayina v Fairbairn Lawson Combe Barbour Ltd* [1943] AC cited with approval in the case of *Kenya Commercial Bank Limited & Another v Samuel Kamau Macharia & 2 Others* [2008] eKLR which set out the principles of unjust enrichment.
28. It was submitted that the Plaintiffs sourced for financiers after a court order was made enabling them to do so but the Defendant blatantly refused to send to their financiers completion documents making it impossible to complete the Sale Agreement and that despite a 21 day extension, the Plaintiffs were unable to get other financiers as the country was experiencing the 2007-2008 post-election violence.
29. Counsel submitted that the Defendant intentionally frustrated the sale of the houses on several occasions by putting unfavorable terms in its offer letter and that the Court should find that the Defendant's actions deliberately frustrated the sale and should therefore be compelled to do what is right. Reliance was placed on the cases of *Andrew Murugi Maina & Another v Johnson Ngarari Mwaura* [2019] eKLR.



30. According to counsel, the Plaintiffs entered into a legally binding agreement with the Defendant upon payment of the 10% deposit and that there a valid contract that ought to be guarded by the courts.
31. The Defendant submitted that Order 1 Rule 13 of the Civil Procedure Rules requires the filing of written authority by one or more Plaintiffs to plead on behalf of others and that not having filed the aforesaid authority, it follows that the evidence by the witnesses was tendered in their personal capacity.
32. Reliance in this regard was placed on the case of Shadrack Mwamuu Nzioka & 2 Others(suing on their behalf as officials of Crescent Self Help Group) v Tropical Blooms Limited[2020]eKLR where the Court stated that the members of a group who had not given the Plaintiff written authority to swear and plead on their behalf were not parties to the suit.
33. It was submitted that the two Plaintiffs who testified lacked representation by the fact that 26 of the Plaintiffs complied with the consent order and are no longer pursuing the case and that the letter dated August 1, 2007 was a mere invitation to treat. Counsel relied on the Court of Appeal case in Involate Wacike Siboe v Kenya Railways Corporation & Another [2017] eKLR.
34. It was submitted that the Defendant is not in breach of its obligations under the Sale Agreement; that the Plaintiffs having failed to pay the balance of the purchase price following the issuance of the 21 days' notice to complete the purchase, the Plaintiffs were to forfeit the 10% deposit paid.

Analysis & determination

35. Having carefully considered the pleadings, testimonies and submissions by the parties herein, the following arise as the issues for determination;
 - i. Whether PW1 & PW2 have the requisite locus to testify on behalf of the other Plaintiffs?
 - ii. Whether there was a valid Agreement for the sale of the suit properties?
 - iii. Whether there was breach of the terms of the offer letter and by whom?
 - iv. Whether the Plaintiffs are entitled to the reliefs sought in the Plaint?
36. It is the Defendant's case that PW1 and PW2 do not have the requisite locus standi to tender evidence as representatives of the other Plaintiffs for want of written authority pursuant to Order 1 Rule 13 of the Civil Procedure Rules and that subsequently, the testimonies by PW1 and PW2 were rendered in their personal capacities and should be considered as such.
37. The Plaint filed herein relates to 67 Plaintiffs. It is not indicated in the Plaint that it is a representative suit. Where there are several Plaintiffs and/or Defendants, Order 1 Rule 13 of the Civil Procedure Rules, 2010 allows a single Plaintiff to be authorized and/or mandated to appear, plead or act on behalf of the rest of the Plaintiffs. It provides as follows:
 - “(1) Where there are more Plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.
 - (2) The authority shall be in writing signed by the party giving it and shall be filed in the case.”



38. The Court of Appeal in *Chalicha Farmers Co-operative Society Limited v George Odhiambo & 9 Others* [1987] eKLR had occasion to consider a similar issue and stated thus;

“This suit raises some points to be considered in law. The first is that when the summonses were served, only four entered appearances and filed defences. At the time of the hearing two of those who filed joint defences attended and participated in the hearing. One of those who neither entered appearance nor filed defence attended and participated in cross-examining the plaintiff’s witnesses. Others never entered appearances or filed defences or attended the hearing. Their claim is that they had appointed the first respondent, George Odhiambo, as their spokesman. The question is, is that the proper procedure? If George Odhiambo was to represent them then, either Order 1 rule 8 or rule 12 of the Civil Procedure Rules should have been followed. It was not proper in that respect and the trial judge should not have allowed George Odhiambo to represent and proceed with the suit as he did. The appearance and defence of defendants (respondents) 1, 2 5 and 7 were prepared and filed by an advocate and if the defences were on the basis of representative action, then the advocate should have stated so. The trial judge in allowing the suit to proceed as a representative suit caused miscarriage of justice in that the suit should have proceeded on formal proof and judgment entered for the plaintiff against those who did not enter appearance and/or filed defences, and against those who did not attend at the trial. Judgment should have been entered against defendants 3 to 10.... George Odhiambo could not have been allowed to represent other defendants without written authority. This caused miscarriage of justice.”

39. In *Stephen lolo Tathi & Others v Mahabm Musa Kioko Ziwani Mosque & School Association* [2003] eKLR, the High Court posited thus;

“Order 1 rule 12(1) stipulates that where there are more than one plaintiff any one or more than may be authorized by any other of them to appeal plead or act for such other in any proceeding. Order 1 rule 12(2) stipulates that the authority shall be in writing signed by the party giving it and shall be filed in the case.”

40. More recently, the Court in *Noor Ahmed Noor & 158 others v Kenya Railways & another* [2016] eKLR persuasively expressed itself as follows:

“From the foregoing, the salient requirements of an appearance of one of several plaintiffs or defendants, are to have a (i) written document (ii) signed by plaintiffs or defendants authorizing one of them to (iii) appear, plead or act, which must be (iv) filed in the case. On perusal of the Plaintiffs’ bundle of documents in the Court record, there is a document titled “Authority to Act (Under Order 1 Rule 12 of the Civil Procedure Rules). The contents therein are very clear, that: the undersigned from the date thereof until the determination of the suit authorize Noor Ahmed Noor the 1st Plaintiff, to act, appear, execute/sign documents/pleadings relating to the suit and to instruct counsel/advocate on their behalf to prosecute the suit. The Authority is accompanied by a list of all the Plaintiffs who appended their signatures. Whilst it is not an express requirement, the Authority also has the descriptions of the firm from which it is drawn and filed and whom to be served upon. I am satisfied that the provisions of Order 1 Rule 13 have been met and consequently find that the point of objection fails.”

41. In the present circumstances, the plaint was accompanied by the verifying affidavit of Grace Mwhiki ostensibly sworn with the authority of all the other Plaintiffs. However, no authority has been filed to



show that any of the Plaintiffs has been granted authority to act on behalf of the others. This fact was admitted in cross-examination.

42. It therefore follows that the evidence by PW1 & PW2 is with respect to their individual cases. What then happens to the rest of the Plaintiffs? It is a cardinal principle of law that he who alleges must prove. The failure by the other Plaintiffs to testify essentially means that their case was unprosecuted. As such, the only recourse open to this Court is to dismiss the same which it proceeds to do. The merit of the 36th and 49th Plaintiffs' case will be considered under the next head.

Whether there was a valid agreement for the sale of the suit properties?

43. The Plaintiffs herein (PW1 & PW2) instituted this suit seeking *inter-alia*, permanent injunctive orders, an order of specific performance of the sale agreements entered into between the Plaintiffs and the Defendant and an order directed at the Defendant compelling it to supply the relevant documents of title to enable them procure financing for the balance of the purchase price.
44. PW1 and PW2 informed the court that they were employees of Kenya Posts and Telecommunication and later on Telkom Kenya; that while in employment, they were allocated houses no H4/Phase 3 and 197 to reside in, which houses they still reside in and that sometime in 2007, they were issued with offer letters for the purchase of their houses, the terms of which were that they would within 14 days of receipt of the offer letter pay 10% of the purchase price and pay the balance within 90 days failure to which they would forfeit the deposit.
45. According to the two Plaintiffs, whereas they were able to raise the 10% deposit, they were unable to raise the balance of the purchase within 90 days; that on the February 3, 2008, they were granted an extension to pay the balance of the purchase price but failed to do so and that when they eventually managed to get financiers, the Defendant refuses to issue them with completion documents thus frustrating their attempts to get financing.
46. In response, the Defendant asserted that the Plaintiffs failed to comply with the terms of the agreement by failing to pay the balance of the purchase price within the contractual timelines and that despite the grant of a 21 days extension, the terms of the contract were clear that failure to pay the balance of the purchase price would result in forfeiture of the deposited sum.
47. It is common ground that the Plaintiffs are members of the Defendant scheme and were former employees of Telkom Kenya and Kenya Postal Corporation respectively. By virtue of their employment, they were allocated houses which they reside in to date. The evidence adduced shows that the two Plaintiffs were issued with letters of offer for the sale of their respective houses. The sale of the houses was never completed.
48. It is apparent from the foregoing that this dispute is contractual in nature and the first point of call is a determination of whether there is a valid contract between the Plaintiffs and the Defendant.
49. The Plaintiffs have produced into evidence the letters of offer dated August 1, 2007 between themselves and the Defendant as purchasers and vendor respectively. The offer letters meets the legal requirements for a contract pursuant to Section 3(3) of the *Law of Contract Act*.
50. Section 3(3) of the *Law of Contract Act* provides that no suit shall be brought upon a contract for the disposition of an interest in land unless the contract upon which the suit is found is in writing, is signed by all the parties thereto; and the signature of each party signing has been attested by a witness who is present when the contract was signed by such party. That is what happened in this case.



51. While not disputing the validity of the offer letter, it has been extensively submitted by the Plaintiffs' Counsel that its terms were oppressive. That may be so. However, it is a cardinal principle of law that courts are not in the business of writing contracts for parties. Parties are bound by their contracts unless they can prove that coercion, fraud or undue influence was used to procure the contract. The Court of Appeal in *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR presented itself thus:

“The position in law with regard to the binding nature of a contract executed willingly by the parties has now followed a well beaten path. In *National Bank of Kenya Ltd v Pipe Plastic Samkolit (K) Ltd & another* [2011] eKLR, the Court was categorical that:

It is clear beyond para adventure, 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 from a bad bargain. The Court in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, after reviewing case law on the subject reiterated as follows:

We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”

52. Dealing with the exceptions to the foregoing rule, the Court of Appeal in *Margaret Njeri Muiruri v Bank of Baroda (Kenya) Limited* [2014] stated that: -

“Nevertheless, courts have never been shy to interfere with or to refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse during formation of the contract or due to contract terms that are unreasonably favoured to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.”

53. The question as to whether a term of a contract is unconscionable is a matter of fact to be determined on a case by case basis, and must be pleaded and proved. In their evidence, the Plaintiffs did prove the question of the unconscionability of the terms of the contract. Further, notwithstanding this argument which was raised in the submissions, the Plaintiffs do not seek to be discharged from the Agreement but have prayed for specific performance of the same.

54. The Court has considered the terms of the contract. The terms of the sale of the houses were that the Plaintiffs would initially pay 10% of the deposit price within 14 days of signing the agreement and the balance was to be paid within 90 days, failure to which the 10% deposit would be forfeited.

55. The agreement further provided that the sale was not subject to a mortgage and did not operate to stop the payment of rent. The evidence before this court shows that the Plaintiffs failed to pay the purchase price within the stipulated 90 days. On January 28, 2008, they wrote to the Defendant seeking for an extension of the timelines.

56. The evidence shows that on February 3, 2008, the Defendant issued to the Plaintiffs a 21 days notice to pay the balance of the purchase price. The Plaintiffs in response wrote a letter dated February 22, 2008 seeking for an extension of 90 days to pay the balance of the purchase price. However, the Plaintiffs failed to honour this promise.



57. Having regard to the above narration, it is clear that the Plaintiffs breached their part of the bargain with respect to the payment of the purchase price. The Defendant granted the Plaintiffs several opportunities to rectify the position which they failed to do.
58. Other than none payment of the purchase price, it appears that the Plaintiffs are equally in breach of clause 6 which required them to continue paying rent for the houses they were occupying. In conclusion, the court is satisfied that the Plaintiffs committed a fundamental breach of the agreement which destroyed the foundation of the sale agreement.
59. As to whether the Defendant breached the conditions of the Agreement, the Plaintiffs state that the Defendant failed to give them copies of the relevant documents to enable them get financing. This was not a term of the contract and the same cannot be used as against the Defendant.
60. As to whether there was rescission of the contract, there is no evidence of the same. Apart from the letter of February 3, 2008 issuing the notice, which letter was overtaken by the subsequent events, it appears that the Defendants have not formally rescinded the Agreements. However, the agreements between the Plaintiffs and the Defendant remain voidable on account of the Plaintiffs' breach.
61. Taking into account the circumstances of the case and the totality of the evidence, the court is not convinced that this is a situation which calls for the grant of Specific Performance. As with any other equitable remedy, the party raising it must approach the court with clean hands. The Plaintiffs have failed in this regard.
62. The Plaintiffs being in breach of the contract for non-payment of the purchase price and failure to pay rent, it is the finding of the court that the Plaintiffs' suit is unmerited. The suit is dismissed with costs to the Defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 13TH DAY OF OCTOBER, 2022

O. A. ANGOTE

JUDGE

In the presence of;

Ms Beatrice Nduta for Plaintiff

Ms. Nyabenge and Ms Mutinda for Defendant

Court Assistant - June

