



REPUBLIC OF KENYA

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

Civil Case 3857 of 1990

INNOCENT OBIRI MOMANYI..... 1ST PLAINTIFF

MARTHA KWAMBOKA OBIRI..... 2ND PLAINTIFF

VERSUS

JUMA ABDULLA WAZIRI.....1ST DEFENDANT

HALIMA WAZIRI.....2ND DEFENDANT

RULING

This Court delivered judgment in this suit granting damages to the Plaintiff. However, as there was no evidence or argument on this issue, the Court ordered the parties to address the court on the issue of quantum to assist the Court to assess the amount of damages. The parties chose to submit written submissions.

On the part of the Plaintiff, the decision in the case of Omega Enterprises (Kenya) Ltd –vs- Eldoret Sirikwa Hotel & 2 others, the court state “the measure of general damages for breach of a contract to sell land is the difference between the contract price and the price of a similar property at the date when the contract was lost” and further that damages must be fixed in relation to the pecuniary loss suffered, having regard to the market value of the subject matter of contract.

The case of Peter Karanja Mungai –vs- Daniel Njoroge Kamau & 2 others (2005) eKLR. Hon. Justice ojuang applying principles enumerated in the above decision awarded general damages in the sum of Kshs.100,000 /= in a transaction in which the price was Kshs.100,000/= an award of interest at court rates was awarded. In the present case, purchase price agreed to be paid was kshs.29,000 /=.

The Defendants gave possession to the Plaintiffs who continued to pay rent at the rate of 2,000 /= to Defendants say that the rent has not been paid for last 3 years. And the Plaintiffs having been in possession throughout since December 1990 they have suffered no loss or damage. Also the purchase money was not paid.

Since the execution of sale agreement, the Defendants are not entitled to any interest. And that by non-payment of rents they are in breach of sale agreement and are not entitled to general damages and interest is payable on the balance of purchase money.

Upon considering the submissions of both parties the court has considered that the agreement of sale was to be completed on 31.01.1989. It was the Defendants who had wrongfully repudiated the contract and

persisted in such repudiation they could not then raise issues that the Plaintiffs had failed to pay balance of purchase price or delayed the transaction.

The decision of Justice Ojwang in the case of Peter Karanja Mungai –vs- Daniel Njoroge Kamau & others above mentioned commented on the conduct of a party saying “the 1st Defendant in my assessment, and in particular from his deportment and demeanor as a witness and from inconsistencies and commissions in his testimony, was not a truthful witness on the most vital issues. It is clear that he was involved in a fraudulent scheme to maximize his gains from one and the same parcel of land, by pretending to sell it to different purchasers. His conduct was, in my Judgment opportunistic and grossly unethical meriting conclusion by this court.” This shows that the conduct of a party can disentitle consideration from the Court.

In that case the court ordered specific performance or refund of purchase price with interest and damages in the sum of Kshs.100,000/= with interest.

In the present case, no award is made to the Defendants by way of interest on purchase price. It was by their conduct that the contract was not completed within time set.

On the other hand the Plaintiff are entitled to rents from the date of sale agreement to date of transfer. In this case the rents received by Defendants are not stated but there are allegations that there was default. In the circumstances, I adopt the decision of the Court in the case of Mr. & Mrs. Baird Referred in Judgment that “***an award for damages cannot be very high***” and I award a sum of kshs.30,000 /= with interest at court rates from the date of this ruling.

The judgment of the Court is therefore as awarded:

- 1. Order for specific performance as prayed***
- 2. The Defendant to cause transfer to be registered within the next 3 months from 06.10.08.***
- 3. Plaintiffs awarded in addition damages in the sum of Kshs.30,000 /= with interest at court rates from today's date of this ruling***

Costs to the Plaintiff.

It is so Ordered.

DATED this 1st day of December 2008.

JOYCE N. KHAMINWA

JUDGE