



**Kirui v Westland Pride Limited (Environment & Land Case 184 of 2013)
[2022] KEELC 15034 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 15034 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 184 OF 2013
MD MWANGI, J
NOVEMBER 24, 2022**

BETWEEN

STANLEY KIRUI PLAINTIFF

AND

WESTLAND PRIDE LIMITED DEFENDANT

JUDGMENT

Background

1. The plaintiff brought this suit by way of a plaint dated February 6, 2013 which was amended on the February 14, 2020 pursuant to leave of court granted on the February 12, 2020. In his amended plaint, the plaintiff averred that through 2 sale agreements both dated May 25, 2009 between himself and the defendant, the defendant agreed to sell to him by way of lease, two (2) apartments being D9 and D10 (hereinafter referred to as the “suit property”) at a consideration of Ksh 17,600,000/=. The plaintiff aver that pursuant to the sale agreements aforesaid, on or about April 14, 2009, he paid to the defendant a sum of Ksh 3,520,000/= being 20% deposit in respect of the two apartments.
2. The plaintiff states that it was mutually agreed that the completion date was December 31, 2009 or within 30 days of the issuance of the certificate of occupation by Nairobi City Council and receipt of the clearance certificate. That time was of essence in regard to the completion. He argued that despite the clear terms and conditions of the said sale agreements, construction of the apartments stalled from April, 2009 till sometimes in March, 2011 thereby occasioning delay in the completion of the sale. The defendant however assured him that the project would be completed and they adjusted the completion date to December 31, 2011.
3. He further averred that on the May 18, 2012, despite not completing its side of the bargain, the defendant wrote to him demanding remittance of Ksh 1,760,000 for each apartment as further payment of the purchase price in accordance with the terms and conditions of the sale agreements. The plaintiff requested the defendant for its Bank details to effect the payment but to no avail.



4. That to his surprise, the defendant informed him sometime in 2012 that the suit property had been sold to a third party way back in July 2010. The basis of the sale to the third party was allegedly because the plaintiff had requested for a refund of his deposit paid to the defendant through a letter dated July 21, 2010. The plaintiff states that he abandoned his demand for the deposit paid after the defendant reassured him that the construction would be continued despite having stalled.
5. The plaintiff averred that the defendant later refunded him the said deposit of Ksh 3,520,000/= or the January 31, 2014 despite his willingness to perform his outstanding obligations under the sale agreements.
6. The plaintiff claims that he suffered loss of business opportunity and investment due to the defendant's refusal to complete the contract and proceeding to sell the apartments to a third party without reference to him. He affirms that the defendant's conduct was wrongful, illegal and unlawful and amounted to breach of contract.
7. The plaintiff averred that he was at all times ready, able and willing to perform his contractual obligations under the sale agreements.
8. The plaintiff averred that he had suffered great loss and damage including loss of interest on the said deposit of Ksh 3,520,000/= at the rate of 14% from April 14, 2009 to January 31, 2014 when the same was refunded to him.
9. The plaintiff therefore sought judgement against the defendant for;
 - a. Damages for breach of contract the quantum of which to be determined by this honourable court together with interest thereon.
 - b. Loss of interest of Ksh 2,378, 941 with interest at court rates.
 - c. Costs of this suit and interest at court rates.

Defendant's Statement of Defence

10. The defendant opposed the plaintiff's claim through the Statement of Defence dated April 12, 2013 later amended on the February 24, 2020. The defendant confirmed that it entered into two sale agreements with the plaintiff for the sale of its two apartments; Number D9 and D10 erected on Nairobi LR No 5/155. That indeed the plaintiff paid a 20% deposit on the purchase price of each unit. The defendant however denied all the particulars of alleged illegality and breach of contract against it.
11. The defendant affirmed that the sale price for each unit was Ksh 8,800,000/= and a 20% deposit equivalent of Ksh 1,760,000/= was payable upon execution of the agreement for sale for each apartment. A further sum of Kshs 1,760,000/= was also to be paid before the last day of the sixth month after execution of the sale agreements in respect of each apartment. The balance being 60% of the purchase price was payable upon completion. However, the plaintiff in this case only paid the initial deposit on the sale price (20% deposit) and never paid anything else contrary to the terms of the agreements. The plaintiff did not honour his part of the contract. The defendant at paragraph 5 of the amended statement of defence tabulated the breaches by the plaintiff.
12. The defendant averred that before the completion date, the plaintiff wrote to the defendant citing delays in completing the transaction, rescinded the sale agreements and informed the defendant that he was no longer interested in the transaction. He demanded a refund of his deposit. The defendant responded to the said letter and requested the plaintiff to furnish it with his bank account details so



as to effect the refund but the plaintiff did not avail the details. The defendant further informed the plaintiff that the suit premises had long been sold to a third party.

13. The defendant further contends that although it was entitled to retain the deposit paid under the *Law Society of Kenya Conditions of Sale* (1989), it forfeited the deposit and refunded it to the plaintiff on January 31, 2014. The plaintiff is therefore estopped from claiming damages as a result of his own actions in breaching the terms of the sale agreements and demanding his deposit back. That the suit is mischievous, frivolous and discloses no reasonable cause of action and should therefore be dismissed with costs.

Evidence Adduced

14. The case proceeded to hearing and parties testified in support of their respective positions.

Evidence Adduced By The Plaintiff

15. At the trial, Stanley Kirui (PW1) adopted his witness statement dated February 6, 2013 and the further witness statement dated February 24, 2022 as his evidence in-chief. He further relied on the documents in the plaintiff's bundle of documents in support of his case. The bundles of documents are dated February 6, 2013 and a further list of documents dated February 24, 2022.
16. It was the plaintiff's evidence that he paid a sum of Ksh 3,520,000/= on the April 14, 2009 being the deposit in respect of the 2 apartments he was to buy from the defendant. This was equivalent of 20% of the purchase price for each unit. That subject to clause 10 of the agreements, he was supposed to be given a 21 days' notice before the sale was rescinded.
17. That due to frustration by the defendant, he wrote a letter through his Advocate indicating that he was not intending to continue with the transaction. That there was no response from the defendant until in 2012 when the defendant wrote to him demanding a further instalment of Ksh 1,760,000/=. He sought for the plaintiff's account to enable him effect the payment but to no avail. At that time, construction was still ongoing though beyond the completion date.
18. The defendant later on wrote to him informing him that the letter demanding a further deposit was sent to him erroneously. He was further informed that the apartments had been sold to a third party after the defendant received his letter of July 21, 2010 rescinding the contract and demanding his deposit. The plaintiff however maintained that he had not received any response to his letter of July 21, 2010, he thought that the defendant had not acted on it. He had not been refunded the deposit either despite having demanded the same.
19. He testified that he was later refunded his deposit through his advocate who acknowledged receipt and issued a receipt to that effect. He claims for loss of interest of Ksh 2,378,941/- being the interest he would have earned if he had deposited the money in a fixed deposit account. He further claims for breach of contract and prays for a sum of Ksh 18.4 Million for the two apartments being the equivalent current market value. The figure was based on the sale price of a similar property that the plaintiff had sold in an upmarket location in Nairobi.
20. In cross-examination by the Advocate for the defendant, the plaintiff confirmed that the Letter dated July 21, 2010 (PE 9) from his Advocate demanded a refund of the deposit paid. He also confirmed that the Letter dated June 8, 2012 from the defendant indicated that the demand for a further deposit was erroneous. Further, the letter informed him that the defendant had sold the 2 apartments to a third party. The said letter also requested him for his Bank details to refund the deposit.



21. He agreed that he had not attached a valuation report of the suit property(s). The interest he was claiming was from April 14, 2009 to January 31, 2014.

Defendant's Case

22. Daniel Ojjo Agili, the Managing Director of the defendant Company testified as DW 1. He adopted his witness statement dated February 25, 2020 as his evidence in-chief. He also relied on the documents listed on the defendant's list of documents dated February 25, 2020 in support of the defendant's case.
23. He testified that the plaintiff demanded a refund of his deposit *vide* the letter of July 21, 2010.
24. He further stated that the plaintiff never fulfilled the terms of agreements. The plaintiff actually rescinded the contracts and demanded a refund of the deposit. The plaintiff further, never gave his bank account details to enable the defendant refund him the deposit as requested.
25. During cross-examination, DW1 stated that the completion date was December 31, 2009 or within 30 days of issuance of the certificate of occupation and receipt of the clearance certificate whichever was later. Time was of essence. Further, that as per clause 10, the vendor was to give a 21 days' notice in the event the purchaser defaulted or 30 days' notice in case the vendor defaulted. In case of a refund, the same would be with interest at 1.5 % per month computed from the date of service of rescission notice. That there was no rescission as per clause 11 of the agreement. He blamed the plaintiff for the failure of the transaction.

Court's Directions

26. Upon the conclusion of the hearing, the court directed parties to file written submissions. Both parties complied. The plaintiff's submissions are dated July 4, 2022 whereas the defendant's submission are dated July 25, 2022. The court has had occasion to read the submissions of both parties with the attached decided cases.

Issues for Determination

27. Considering the pleadings filed in this case, the evidence adduced and the respective submissions of the parties, the court is of the view that the issues for determination in this case are;
- A. Who breached the agreements?
 - B. Whether the plaintiff is entitled to the reliefs sought.
 - C. Who should bear the costs of the suit?

Analysis and Determination

A. Who breached the agreements?

28. I have considered all the pleadings and the evidence presented before this court. It is not in dispute that the two litigants herein had entered into two (2) sale agreements for the sale of two (2) Apartments being D9 and D10 (the "suit property") at a consideration of Ksh 17,600,000/=. The plaintiff paid to the defendant a sum of Ksh 3,520,000/= being 20% deposit of the purchase price in respect of the two apartments.
29. It is also not in dispute that the transaction was not successfully completed as contemplated in the agreements. The deposit paid by the plaintiff to the defendant was refunded. The balance of the purchase price was never paid.



30. Each party blames the other for the failure to complete the transaction. The plaintiff blames the defendant for unilaterally rescinding the contracts without any reference and/or notice to him. He faults the defendant for purporting to sell and subsequently selling the two apartments to a third party while their agreements were still in force and at an increased market value despite being the cause of the delay.
31. The defendant on the other hand blames the plaintiff for failing to pay the purchase price as agreed and rescinding the Agreement vide it letter dated July 21, 2010 and demanding a refund of the purchase price. The plaintiff contends that it was the delay in the construction, that prompted him to express his intention terminating the engagement with the defendant.
32. The *Black's Law Dictionary*, 9th Edition, at page 213 defines a breach of contract as follows;
- “a violation of a contractual obligation by failing to perform one’s own promise, by repudiating, or by interfering with another parties performance. A breach may be one by non-performance or by repudiation or both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or unable to show such loss with sufficient certainty he has at least a claim for nominal damages.”
33. In the case of *Gatobu M’Ibuutu Karatho vs Christopher Muriithi Kubai* [2014] eKLR the court cited with approval the Ugandan case of *Nakana Trading Co Ltd V Coffee Marketing Board* 1990 1994 EA 448, where the High court in Kampala held that;
- “In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the terms. Since the contract between the parties was reduced into writing, the duty of the court is to look at the document itself and determine whether it applies to existing facts. No evidence can be adduced to vary the terms of the contract if the language is plain and unambiguous....”
34. In the Court of Appeal case of *National Bank of Kenya vs Pipe plastic Samkolit (k) Ltd & Another* (2001) eKLR, it was held that;
- “A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”
35. Likewise, in the instant matter, this court will not in any way strive to re-write the contract for the parties; rather, the court’s responsibility is only to analyze the terms of the contract against the evidence adduced to determine the issues accordingly.
36. I have perused the agreements of May 25, 2009. The sale price for each unit as provided in clause 5 was Ksh 8,800,000/= and 20% deposit of Ksh 1,760,000/= on the purchase price of each unit was payable as both parties have confirmed. A further sum of Kshs 1,760,000/= was also to be paid in respect of each unit before the last day of the sixth month after execution of the sale agreements. The balance of 60% of the purchase price was payable upon completion.
37. Although the plaintiff faults the defendant for delay in performing its part of the bargain, it not in dispute that he did not pay the second instalment of 20% as agreed in respect of each unit before the last day of the sixth month after execution of the sale agreements. He had not honoured his contractual obligations.



38. The completion date in respect of both agreements was December 31, 2009 or within 30 days of the issuance of the Certificate of Occupation by Nairobi City Council and receipt of the clearance certificate whichever was later. The plaintiff acknowledged writing to the defendant the plaintiff confirmed that the letter dated July 21, 2010 ('PE 9') notifying the defendant that he was no longer interested in continuing with the transaction and demanding a refund of the deposit paid on the pretext that the defendant had delayed completing the construction beyond the completion date. The plaintiff had definitely misinterpreted the completion clauses of the agreements - 'December 31, 2009 or within 30 days of the issuance of the certificate of occupation by Nairobi City Council and receipt of the clearance certificate whichever was later'. The plaintiff's interpretation was that since the defendant had not completed the construction by December 31, 2009, it was default. That was clearly a misinterpretation of the clause.
39. The *Black's Law Dictionary*, Ninth Edition defines "rescission" as,
- "A party's unilateral unmaking of a contract, for a legally sufficient reason such as the other party's material breach or a judgment rescinding the contract.....Rescission is generally available as a remedy or defence for a non-defaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their pre - contractual positions."
40. It is evident that the plaintiff failed to honor his contractual obligations, and the defendant was at liberty to rescind the agreement, by notifying or communicating such rescission to the plaintiff. However, before the defendant could do so, the plaintiff rescinded the Agreement vide the letter dated July 21, 2010 ('PE 9') notifying the defendant that he was no longer interested in continuing with the transaction and demanding a refund of the deposit paid.
41. I need to point out that the plaintiff's letter of July 21, 2010 confirmed the rescission notice given on February 8, 2010 in accordance with the provision of condition 11 of the agreements providing for rescission of the sale. The plaintiff had in the earlier letter explicitly rescinded the sale. His letter stated that,
- "In the circumstances and as per the provisions of the said condition, we, on behalf of our client, give your client 30 days notice from the date of service of this letter upon yourselves that if it does not complete the construction of the two apartments and also the sale herein, the sale shall forthwith stand terminated whereupon your client shall be liable to refund to our client the deposit of Kshs 3,520,000/= aforesaid together with interest thereon and without any deduction whatsoever."
42. In the letter of July 21, 2010, the plaintiff through his Advocate wrote and stated that;
- "In the circumstances and in terms of our letter to you of February 8, 2010, we hereby request your client to remit to us the sum of Kshs 3,520,000/- being refund of the deposit with interest within the next 7 days as our client no longer interested in the two properties any more for the said reason."
43. The said deposit was eventually refunded as demanded without any deductions.
44. The court's finding in respect of the first issue therefore is that it is the plaintiff who breached the agreements.



B. Whether the plaintiff is entitled to the reliefs sought.

45. The plaintiff's claims for:-
- a. Damages for breach of contract the quantum of which to be determined by this Honourable Court together with interest thereon.
 - b. Loss of interest of Ksh 2,378, 941 with interest at court rates.
 - c. Costs of this suit and interest at court rates.
46. The court's finding on the first issue above, settles the issue of reliefs. The plaintiff being the party at fault cannot be entitled to the reliefs sought against the defendant.
47. The plaintiff in his plaint had prayed for damages for breach of contract but in his submissions submitted on loss of bargain amounting to a whopping sum of Kshs 18.4 million. The plaintiff claimed for loss of bargain was in spite of the fact that he acknowledged that he was refunded the deposit he had paid to the defendant.
48. The Court of Appeal decision in *Gami Properties Limited vs National Social Security Fund Board of Trustees & Chief Land Registrar* [2021] eKLR explains what loss of bargain in the following terms;
- “.....A purchaser can claim for the loss of a bargain, i.e the amount by which the net value of the property when conveyed to him at the due date would have exceeded the purchase price. But the court may order such damages to be assessed at some other date where justice so requires; this may be the date of the hearing if the property has risen in value meanwhile. Where the purchaser claims damages for his loss of bargain he cannot in addition recover his costs, e.g. for investigation of title. If he is to be placed in the position in which he would have been had the contract been performed, he would necessarily have incurred those costs.” [Emphasis added]
49. Further in the case of *Millicent Perpetua Atieno Wandiga & Another vs John Chege* [2013] eKLR, Nyamwea J (as she then was) stated that the principles governing the loss that is recoverable and the measure of damages upon breach by a seller of land are stated in *Halsbury's Laws of England*, Volume 12, 4th Edition at paragraph 1183 as follows:
- “.. .Where it is the vendor who wrongfully refuses to complete, the measure of damages is, similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain....”
50. The learned Judge further stated that”the only outstanding loss that needs to be assessed is the loss of bargain, and the normal measure of damages for loss of bargain is the market value of the property at the time of repudiation less the contract price.
51. Having found that the plaintiff was the party in breach of the sale agreements, he would not be entitled to the reliefs sought and especially so for loss of bargain. What loss did the plaintiff suffer? In any event, the plaintiff was refunded his deposit as demanded and he lost no ‘investment’ on the said monies.



Awarding the plaintiff loss of bargain would amount to unjustly enriching him which is contrary to public policy. A man shall only reap what he sows.

52. In regard to the claim for interest, the plaintiff states that although he was refunded his money, he was not satisfied. He therefore claims for loss of interest of Ksh 2,378,941 being the interest he would have earned if he had deposited the money in a fixed deposit account.
53. As held in the first issue above, the plaintiff is to blame for the repudiation of the agreements for sale. Further, the plaintiff is to blame for the delay in refunding the deposit as he failed to give the defendant his bank account details as requested.
54. Secondly, this claim was a specific claim and the plaintiff was obligated to specifically prove it. He did not. It is not based on the terms and conditions of the contract between the parties.
55. Consequently, the plaintiffs' case is dismissed in its entirety with costs to the defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Kinyanjui h/b for Mahugu for the Defendant.

No appearance for the plaintiff.

Court Assistant – Hilda/Yvette

M.D. MWANGI

JUDGE

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