



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Suit 94 of 2003

1. ANDRE HACKER

2. GERDA VIE HACKER PLAINTIFFS

- Versus -

DIANI HOMES LIMITED DEFENDANT

J U D G M E N T

The plaintiffs are husband and wife German nationals. They, in their plaint filed herein, averred that in February 1996 they entered into an agreement with the defendant for the purchase by them of two pieces of land situate in Diani and known as Title Nos. **Kwale/Galu/Kinondo/1155** and **Kwale/Galu/Kinondo/1156** for German DM 245000.00. This price was inclusive of the cost of construction by the defendant for the plaintiffs of “a European style residential house with the usual provisions expected of a residence in an upmarket neighbourhood.”

The plaintiffs further averred that after taking possession of the house they noticed that the workmanship was substandard and brought that to the attention of the defendant who, however, refused to rectify the defects and or transfer the pieces of land to them and instead intimated that it wanted to sell the pieces of land to a third party. The plaintiffs further stated that the defects noted would, as advised by their architect, require Kshs.1,931,200/= to rectify. They therefore sought an order compelling the defendant to carry out the repairs and rectify the defects and transfer the pieces of land to them. In the alternative to that the plaintiffs sought an order that the balance of the purchase price of DM 52,000.00 be deemed to have been off-set against the cost of the repairs.

In further alternative the plaintiffs sought a declaration that the contract between them and the defendant had been frustrated and that the defendant should refund to them the sum of DM 192,500.00 paid to the defendant as part of the purchase price.

In its defence the defendant admitted that it entered into the said agreement with the plaintiffs pursuant to which it had been paid not DM 193,000.00 or DM 192,500.00 as alleged by the plaintiffs but DM 190,000.00 leaving a balance of DM 55,000.00; that after completion the plaintiffs took possession of the house without any complaint or any defects in its construction and that the defects are being alleged after six years. The defendant therefore denied that there were any defects in the construction of the house requiring Ksh. 1,931,200/= or at all to rectify.

The defendant further denied all the other allegations in the plaint and stated that upon the plaintiffs failure after demand to pay the balance of the purchase price of DM 55,000.00 it repossessed the house

and transferred it to a third party.

It was the defendant's further defence that the plaintiffs' claim is time barred as it was based on a contract entered into more than six years prior to the filing of the suit.

The plaintiffs called two witnesses, the second plaintiff and an architect whom they engaged to assess the workmanship in the construction of the house.

In her testimony the second plaintiff stated that the defendant agreed to build for them in accordance with the standard rules of architecture a modern villa like the show-case they had been shown. Although they did not pay as agreed by 30th December 1998 they had paid into the defendant's bank account in Germany as advised a total of DM 192,500.00 leaving a balance of DM 52,500.00. She produced a schedule of payments showing that. The schedule also shows that on 30th January 1999 they paid a further sum of DM 500.00 leaving a balance of DM 52,000.00.

She further testified that when they took possession of the house they were disappointed to note it was not constructed as agreed. They noted several defects which they brought to the attention of Mr. Pullig of the defendant company who promised to do something about it. By February 1998 nothing had been done. They wrote to the defendant the letters dated 24th February 1998 – **Ex 4(a) and 4(b)** and 5th October 1998 **Ex. 5(a) and 5(b)** listing the defects that were in the house. These included a jointed center pole holding the roof, roof windows that were fastened with rusted nails, the floor paint peeling off, bathroom fixtures made of cheap materials, no electric supply to the house, no wardrobes in the bedrooms, the stair case was poorly done and no mosquito mesh on the windows. Later, she said, they instructed an architect who assessed the house and made a report pursuant to which their

Lawyers wrote to the defendant but it did not rectify the defects. In the circumstances, she concluded, the plaintiffs demand a refund of the sum DM 193,000.00 paid to the defendant.

In cross examination the second plaintiff admitted that the agreement provided for the property reverting to the defendant if the full purchase price was not paid. She also admitted that from 1997 to 2000 they had possession of the house.

The plaintiff's witness, George Otieno Adede (P.W.2) is an architect. He testified that in August 2002 on instructions of the plaintiffs he inspected the house in the company of a quantity surveyor. He noted that the workmanship was substandard. He noted for instance that the storm water splashes back on the walls; that the floor was not only uneven and pot-holed but also that the paint used on it was of low quality; that there was no provision for laundry; that the makuti roof was leaking; that there was termite invasion; that the stair case was poorly constructed with treads and risers not conforming to the building code requirements and that even though there were breakages due to wear and tear, the house was poorly constructed with low quality fittings. In his opinion it required Ksh. 1,931,200/= to rectify the defects. In cross-examination he stated that if the house is not occupied it can be attacked by fungus and insects. He was, however, firm on the fact that if the foundation had been treated with anti-termite there could have been no invasion for up to 20 years and that if a makuti roof is properly raised to a high pitch it can last for upto 15 years.

On the part of the defendant only its managing director, Joseph Brunlehmar, testified. He admitted entering into the agreement with the plaintiffs for the sell to them of the two pieces of land on which the defendant was to construct for them a house. The agreed purchase price and the cost of that construction was, according to him, DM 215,000.00.

A further sum of DM 30,000.00 was payable for provision of electric power, water, taxes and transfer charges including stamp duty. He said that at the time of sale and even now the two pieces of land were registered in the name of his wife N.A. Khan who is a director and 50% shareholder in the defendant company. He said that the plaintiffs had paid a total of DM 190,000.00 leaving a balance of DM 55,000.00 and because this balance was not paid the defendant repossessed the house from the plaintiffs on 10th April 2002. He denied that the house was poorly constructed and stated that for a period of about

five years that the plaintiffs had possession they did not raise any complaint. He denied receiving the plaintiff's letters of 24th February 1998 and 5th October 1998.

Mr. Brunlehmar further testified that even though no specifications were provided the defendant constructed the house like the sample the plaintiffs had seen and in accordance with the drawings provided by its architects. When the plaintiffs took possession they did not sign any document to the effect that the house was well constructed. They were, however, asked to raise any complaint about the construction but they did not. He said he did not know if any complaint was raised with Mr. Pullig or any agent of the defendant.

In their submissions counsel for the parties raised some issues which were not pleaded. Mr. Omondi, counsel for the plaintiffs, submitted that consent to transfer the pieces of land had not been obtained and the agreement was therefore void. This was not pleaded in the plaint or amended plaint. Except for the statement by DW 1 that he could not remember whether or not consent was sought or obtained, no evidence was led on the issue. The court does not therefore know whether or not the suit pieces of land were agricultural land requiring consent of the area Land Control Board for any disposition. In the circumstances I make no finding on the matter.

Counsel for the defendant also raised an issue that was not pleaded. He contended that the agreement offended the provisions of section 3(3) of the Law of Contract Act. He did not say in what way the contract was not in accordance with that section, whether it was not in writing or whether it was not executed as required by that section. In the circumstances I also make no finding on the matter. Although Order 6 Rule 7 of the Civil Procedure Rules makes it optional for a party to raise any point of law in its pleadings, the above issues are in my view matters required by Rule 4 of that Order to be specifically pleaded and evidence led on them.

The plaintiffs did not produce the sale and construction agreement because it was not stamped under the Stamp Duty Act. But the same is readily admitted by the defendant in its defence and by its managing director in his evidence. Its existence was neither questioned in the pleadings nor raised as an issue by either party in their separate statements of issues. The purchase price is also not an issue. What is disputed is the exact amount paid by the plaintiffs to the defendant. In the circumstances I find that in February 1996 the plaintiffs entered into an agreement with the defendant for the purchase by the plaintiffs of two pieces of land situate in Diani and known as Title Nos. **Kwale/Galu/Kinondo/1155** and **Kwale/Galu/Kinondo/1156** for DM 245,000.00. This price included the cost of construction by the defendant on the pieces of land of a European style of house for the plaintiffs, the costs of provision of water and electricity to the house, taxes and transfer charges.

The main issue for determination in this case is whether or not the house was properly constructed. In her testimony the second plaintiff stated that the house was poorly constructed with cheap materials. She said that the center pole holding the roof was jointed; that the roof windows were fastened with rusted nails; that the floor paint was of poor quality and was peeling off; that the bathroom fixtures were of simple and cheap materials; that there were no shelves in the kitchen and the bedrooms had no wardrobes and that the windows had no mosquito nets. These are, however, finishing touches which in the absence of agreed specification the defendant cannot be faulted for using cheap materials or failing to provide some things.

The second defendant, however, testified also on the structure of the house itself. She said that the stair case was poorly constructed. It cannot permit one to climb it straight and can lead to injury. She also said that the roof was leaking. This evidence was corroborated by that of their architect Mr. George Otieno Adede P.W.2. According to this witness the stair case treads and risers were irregular. The balustrades were so widely spaced that a child can go through. He also confirmed that the roof was leaking. Although this was a makuti roof, he said if it is raised to a high pitch and properly done it can last upto 15 years without any problem.

The architect also said that the floor was irregular and pot-holed. He also noted a termite invasion which should not occur for upto 20 years if the foundation had been treated with anti-termite. Although he noted that cheap materials were used in the construction of the house and that there were defects and breakages

which were as a result of ordinary wear and tear, the architect also stated that the building was not in accordance with the building plan provided and the building code requirements as a whole. As regards the workmanship he said it was substandard.

To counter this evidence the defendant only called its managing director who said that when possession of the house was given to the plaintiffs it was in immaculate condition. By immaculate I understood him to mean that the house was properly and beautifully constructed. He denied receipt of the two letters **Exhibits 4 and 5** in which the plaintiffs raised some of the construction defects. He, however, admitted that when the plaintiffs took possession they were told to raise with the defendant any defects they noted in the construction of the house. He did not say who told the plaintiffs this as he was not present at that time.

The defendant did not call its architect or any technical evidence to dispute that of P.W.2. In the circumstances the second plaintiff's evidence and that of P.W.2 in particular on the poor construction of the house remains uncontroverted. I therefore find that the defendant did not construct the house as agreed and it was therefore in breach of the agreement. That being my view of the matter the issue that remains is what remedy the plaintiffs are entitled to.

In their plaint the plaintiffs in effect sought an order of specific performance or that the balance of DM 52,000.00 be treated as having been set-off against the cost of repairing the defects. In the alternative the plaintiffs prayed for the refund of the amount paid to the defendant.

Even though D.W.2 said that the two pieces of land on which the house stands are still registered in the name of N.A. Khan, a director of the defendant, in its defence the defendant stated that as the plaintiffs failed to pay the full purchase price it repossessed the house and transferred it to a third party. It is therefore not clear whether or not the two pieces of land together with the house are still with the defendant and whether it is in a position to transfer it to the plaintiffs if specific performance is ordered. Taking this into account and the fact that the pieces of land, if they have not been transferred to a third party, may be in the name of a director of the defendant who is not a party to this suit, I consider the refund of the purchase price paid a more efficacious remedy in this matter and I therefore order it.

The exact amount of the purchase price paid to the defendant is not agreed upon. The defendant acknowledges receipt of DM 190,000.00. In their amended plaint the plaintiffs claim DM 192,500.00 but in her testimony the second plaintiff said they paid DM 193,000.00. Apart from a hand-written document which she called a schedule of payment she did not produce anything else to prove that payment. In the circumstances I will go by what the defendant admits it has received, the sum of DM 190,000.00. The defendant raised the issue of limitation. That however does not avail it as it was, as late as 31st August 1998, demanding, through its lawyer, the balance of the purchase price. See Exhibit 6. In the upshot I enter judgment for the plaintiffs against the defendant for the refund of DM 190,000.00 or its equivalent in Kenyan shillings at the rate prevailing as at the time the German DM ceased being used. The plaintiffs shall also have the costs of this case.

DATED and delivered this 5th day of May 2005.

D.K. MARAGA

JUDGE