



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 350 OF 2009

OLIVE MWEA WACHIRA and

DAVID NDUHIU WAHOME (as Administrators of the Estate of

JOHN WAHOME WACHIRA (DECEASED).....PLAINTIFF

VERSUS

AMBOSELI COURT LIMITED.....DEFENDANT

JUDGMENT

Introduction

1. The dispute in this suit emanates from an agreement for sale of land dated 21/7/1997. John Wahome Wachira [**the deceased**] and Amboseli Court Limited were purchaser and vendor, respectively. For unknown reasons, parties to the contract agreed on a “provisional purchase price” as opposed to specifying definitive purchase price. Secondly, parties to the agreement elected not to stipulate a clear completion period or date. These two features are the source of the dispute in the suit. Mr Kihara Mutu Advocate acted for both parties. The plaint was amended on 28/1/2013. It was further amended after close of evidence to bring on board personal representatives of the deceased. The deceased died after he had given evidence and closed his case.

Plaintiffs’ Case

2. Through a further amended plaint dated 17/7/2020, the deceased sought the following verbatim orders against the defendant:

a) The purchase price of Ksh 350,000 be refunded;

b) Interest on the sum of Ksh 350,000 at 2 percentage points above the maximum rate of interest chargeable by commercial banks for loans or advances with effect from 31st January 1997 until payment in full;

c) Damages for breach of contract and exemplary damages;

d) Costs of this suit together with interest thereon at court rate from the date of judgment until payment in full;

e) Any further or other reliefs as this honourable court may deem fit and just to grant in the circumstances

3. The case of the deceased was that, through an agreement for sale dated 21/7/1997, the defendant sold to him **Land Reference Number 15400/76 [the suit property]** which at that time was simply designated as **Plot No “C”**. The deceased paid the purchase price of Kshs 350,000. He paid the said purchase price on diverse dates between October 1996 and January 1997. The defendant did not process the documents in favour of the deceased. The defendant subsequently, unjustly, demanded a further sum of Kshs 500,000 through a letter dated 25/7/2006 and Kshs 400,000 through a letter dated 22/9/2008, demands which the deceased rejected. It was further contended by the deceased that the defendant, in breach of the sale agreement, fraudulently sold and conveyed the suit property to a third party, Loise Mukira. Aggrieved, the deceased sought the above reliefs.

Defendant’s Case

4. The defendant filed an amended defence dated 4/4/2013. It admitted entering into a sale agreement dated 21/7/1997 with the deceased for

purchase of the suit property. It denied applicability of the Law Society of Kenya Conditions of Sale [1989 Edition]; payment of the sum of Kshs 350,000 by the deceased; demand of additional monies from the deceased; and fraud on its part as particularized in the plaint. The defendant denied all the other averments made in the plaint, including demand and notice of intention to use. Lastly, the defendant contested the jurisdiction of this court, contending that parties to this suit were bound by the arbitration agreement contained in Clause 10 of the agreement for sale. Lastly, the defendant averred that the deceased's suit was statute-barred under the Limitation of Actions Act.

Deceased's Evidence

5. Evidence was taken between 8/2/2018 and 19/2/2020. The deceased testified as PW1. He adopted his written statement dated 25/5/2015. He produced a total of 27 exhibits. In summary, his testimony was that the defendant, through M/s Chancery Properties Limited, made an offer dated 25/10/1996 to him. He duly accepted the offer and paid a deposit of Kshs 180,000. The offer letter provided that the purchase price was Kshs 350,000 and a minimum deposit equivalent to 50% was to be paid within seven (7) days. The balance was to be paid within 120 days. On 13/12/1996, he paid Kshs 40,000. On 14/1/1997, he paid Kshs 30,000 and on 31/1/1997 he paid Kshs 100,000. He was issued with receipts for all the payments. Subsequently, on 21/7/1997, an agreement for sale was drawn and executed, indicating that the purchase price of Kshs 350,000 was inclusive of costs relating to water, sewer, street lighting, and tarmac which the defendant undertook to provide.

6. The deceased added that on 11/2/1997, the then Managing Director of the defendant, Mr D M Kairu, wrote to him a letter confirming that he had fully paid purchase price for the suit property and that he was authorized to take possession of the suit property. He did not take possession because he wanted title documents to be processed first. On 25/7/2006, the defendant's new Managing Director, Mrs Lucy W Kairu, wrote to him informing him that the defendant had encountered several difficulties in obtaining the head title for the suit property due to several court cases. Through the said letter, he learnt that the suit property had been surveyed out of the larger parcel as **LR No 15400/76**. In the same letter, Mrs Kairu advised that because the market value of the suit property had risen to Kshs 1,100,000, he was required to top up purchase price by a sum of Kshs 500,000 to facilitate the transfer of the suit property to him. He wrote back to the defendant on 8/8/2006 indicating that he had paid the full purchase price as per the agreement dated 21/7/1997.

7. PW1 added that on 18/8/2008 and 1/9/2008, the defendant wrote to him inviting him to a meeting in which the purchase price was to be revised. The letter was followed with another letter dated 22/9/2008 in which the defendant required him to either pay an extra sum of Kshs 400,000 or accept a refund of Kshs 350,000 together with an extra amount of Ksh 160,000. He declined the proposal. He subsequently brought this suit.

8. Lastly, he testified that when he conducted a search on the suit property in October 2012, he established that the suit property had been transferred to Loise Hugiuru Mukira for Kshs 400,000 on 28/6/2010. He urged the court to grant him the orders sought in the amended plaint.

Defendant's Evidence

9. The defendant called one witness, Patrick Maina Munene. He said he was a director of the defendant effective from 1999. He adopted his written witness statement dated 22/6/2015. He produced two exhibits; letter of offer dated 25/10/1990, and letter dated 25/7/2006. In summary, his evidence was that, by a sale agreement dated 21/7/1997, the defendant agreed to sell to the deceased the suit property. The agreement provided that the sale was subject to the Law Society of Kenya Conditions of Sale [1989 Edition]. He added that the purchase price quoted in the agreement for sale was provisional.

10. DW1 further testified that while the defendant was pursuing title deeds for the sub-division scheme, two groups calling themselves **Kiambu Dandora Farmers** and **Dandora Housing Scheme** invaded the land, constraining the defendant to seek redress in court. He added that the defendant had to contend with numerous suits filed by persons claiming interest in the suit property. This led to escalation of costs of re-establishing infrastructure in the Scheme. Consequently, on 25/7/2006, the defendant gave the deceased an offer under which the deceased was to top up the purchase price by an additional sum of Kshs 500,000 towards purchase price. The deceased declined. The defendant made a revised offer to the deceased to top up the purchase price by Kshs 400,000 or alternatively receive a refund of Kshs 350,000 plus an ex-gratia payment of Kshs 160,000/-. Due to the deceased's failure to top up the purchase price as required, the property was transferred to Loise Hugiuru Mukira in 2010.

11. DW1 added that the deceased had failed to comply with Clause 10 of the agreement for sale requiring any dispute between the parties to the agreement to be referred to arbitration. Lastly, DW1 testified that the deceased's claim was statute-barred because the cause of action arose in 1996 and the suit herein was filed in 2009. He urged the court to dismiss the suit.

Plaintiffs' Submissions

12. The plaintiffs filed written submissions dated 14/9/2020. On the issue of arbitration, Counsel for the plaintiffs cited **Section 6(1)** of the **Arbitration Act** and submitted that the defendant was estopped from invoking the **Arbitration Clause**. On the defence of limitation, counsel relied on **Section 7** of the **Limitation of Actions Act** and contended that the limitation period for the plaintiff's claim was 12 years. Counsel further submitted that the correspondence made by the defendant to the deceased constituted acknowledgment.

13. On the question as to whether the defendant had breached the contract, counsel argued that the deceased understood "**provisional purchase price of Kshs 350,000**" to mean the actual purchase price and this interpretation was proved correct when the former managing director of the defendant confirmed to the deceased that he had fully paid the purchase price. Counsel urged the court to invoke the principle of *contra proferentem* and find that the loose and ambiguous use of the Phrase "provisional Purchase Price" should work against the defendant.

Defendant's Submissions

14. The defendant filed written submissions dated 30/11/2020. Counsel for the defendant identified the following as the issues falling for

determination in this suit: (i) whether the claim as pleaded in the amended plaint is statute-barred; (ii) whether there was a breach of contract between the deceased and the defendant; and (iii) whether the transfer of the suit property to a third party was fraudulent.

15. On the first issue, counsel submitted that all the remedies sought in the further amended plaint were based on breach of the agreement dated 21/7/1997. He added that the claim in this suit was not one for recovery of land. Counsel contended that the limitation law applicable to the claim in this suit was **Section 4(1)** of the **Limitation of Actions Act** which set the limitation period at 6 years. Counsel argued that the cause of action arose in July 1997 and this suit was statute barred because it was brought in 2009.

16. On whether there was a breach of the contract between the deceased and the defendant, counsel submitted that the material sale agreement was subject to certain conditions and was governed by the **Law Society of Kenya Conditions of Sale (1989 Edition)**. He added that some of the terms were conditional. Counsel argued that the defendant had fulfilled all its obligations under the contract.

17. On whether transfer of the suit property to a third party was fraudulent, counsel submitted that at the time the defendant transferred the suit property to a third party, it had attempted to transfer it to the deceased but the deceased rejected the defendant's terms. He added that it was after the deceased had failed to remit balance of the purchase price that the defendant transferred the suit property to a third party.

Analysis and Determination.

18. I have considered the parties' respective pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence. The deceased amended his plaint on 28/1/2013. Upon the deceased's demise, the amended plaint was further amended to bring on board his personal representatives. The claim before court is for refund of the purchase price of Kshs 350,000; interest on Kshs 350,000; damages for breach of contract; and costs of this suit. The following, in my view, are the five key issues falling for determination in this suit: (i) whether Clause 10 of the sale agreement dated 21/7/1997 precludes this court from determining this dispute; (ii) whether the deceased's suit is statute-barred under the Limitation of Actions Act; (iii) whether the deceased is entitled to a refund of the sum of Kshs 350,000 together with interest, and if so, for what period and at what rate?; (iv) whether the deceased is entitled to damages for breach of contract; and (v) what order should be made in relation to costs of this suit.

19. The first issue is whether Clause 10 of the sale agreement dated 21/7/1997 precludes this court from determining this dispute. The said Clause provides as follows:

“Any dispute with regard to any matter in connection with the sale and purchase of the said property shall be referred to an arbitrator to be appointed by the parties hereto and failing agreement as to the appointment of such arbitrator then the two arbitrators are to be nominated by each party in accordance with the provisions of the Arbitration Act (Cap 49 Laws of Kenya) or any statutory modification or re-enactment thereof for the time being in force and the decision of such arbitrator or arbitrators shall be final and binding on the parties hereto provided always that the making of an award as aforesaid shall be a condition precedent and that no action and/or cause of action shall accrue and/or arise on this agreement before an award has been made and filed in accordance with this clause”.

20. This suit was filed on 16/7/2009 through a plaint dated 15/7/2009. The plaint was amended on 28/1/2013 and the amended plaint was filed on the same day. The defendant filed a memorandum of appearance dated 31/8/2009 on 2/9/2009 through the Firm of **A N Ngunjiri & Company Advocates**. On 7/10/2009, the defendant filed a statement of defence dated 7/10/2009. Subsequently, on 10/4/2013, the defendant filed an amended defence dated 4/4/2013. Both the original defence and the amended defence contested this court's jurisdiction on account of Clause 10 of the agreement for sale. Hearing of the suit commenced in February 2018. The defendant fully participated in the hearing. At no time did the defendant apply for stay of these proceedings.

21. The law on timelines within which to invoke an arbitration agreement and divest the court of jurisdiction is spelt out in Section 6 of the Arbitration Act. It provides thus:

6. Stay of legal proceedings

1. A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—

a) that the arbitration agreement is null and void, inoperative or incapable of being performed; or

b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

2. Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined.

3. If the court declines to stay legal proceedings, any provision of the arbitration agreement to the effect that an award is a condition precedent to the bringing of legal proceedings in respect of any matter is of no effect in relation to those proceedings.

22. Decisions by our superior courts abound on the tenor and import of the above legal framework. In summary, the party invoking an arbitration agreement is obligated to move the court for referral of the dispute to arbitration not later than the time of entering appearance in the suit.

23. The defendant in this suit entered appearance but never bothered to apply for stay of these proceedings. It subsequently filed a defence without seeking a stay of proceedings. It participated in the suit to the conclusion of the trial. It filed submissions and invited the court to render a judgment in its favour. In the circumstances, it can only be concluded that the defendant waived its opportunity to invoke the arbitration agreement. Objection to the jurisdiction of this court at this point is therefore belated and lacks merit. My finding on the first issue is that, in the absence of an application for stay of proceedings and for referral of the dispute to arbitration at the stage of entering appearance, Clause 10 cannot be invoked at this point of rendering judgment in the dispute.

24. The second issue is whether the deceased's claim is statute-barred under the Limitation of Actions Act, Cap 22 of the Laws of Kenya. The deceased's claim is a suit for refund of money paid under a contract for sale of land. Secondly, it is a claim for damages for breach of a contract for sale of land.

25. The legal framework on limitation period relating to contract is contained in **Section 4 (1)** of the **Limitation of Actions Act** which provides thus;

4(1) The following actions may not be brought after the end of

six years from the date on which the cause of action accrued—

a) actions founded on contract;

b) actions to enforce a recognizance;

c) actions to enforce an award;

d) actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;

e) actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.

26. The agreement dated 21/7/1997 did not have a completion clause or completion period. Nonetheless, Clause 8 incorporated into the agreement the **Law Society of Kenya Conditions of Sale (1989 Edition)** in the following terms:

“8 This transaction is subject to the Law Society's Conditions of Sale (1989 Edition) in so far as the same are varied by or inconsistent with the express terms of the express terms (1) of this agreement”

27. Clause 2 of the Law Society of Kenya Conditions of Sale (1989 Edition) defines “completion date” as follows:

“Completion date” means the date shown in the special conditions, failing which either.

(i) in respect of a controlled transaction, forty-two (42) days after the receipt by the vendor of consent to the transaction; or

(ii) in respect of a contract which is not a controlled transaction, forty-two (42) days after the date of the contract”

28. Further, Clause 2 (1) (d) of the Law Society of Kenya Conditions of Sale gives “**controlled transaction**” the meaning given to it under the Land Control Act.

29. Clause 7 (c) of the Law Society of Kenya Conditions of Sale contains the following framework on completion:

“Upon service of a completion notice, it shall become a term of the contract that the transaction shall be completed within twenty-one (21) days of service and, in respect of such period, time shall be of the essence of the contract”

30. I have looked at the evidential materials presented to the court. Neither of the parties to this suit presented evidence of service of completion notice after expiry of 42 days in terms of Clauses 2 and 7(c) of the Law Society of Kenya Conditions of Sale [1989]. Evidence of service of completion notice is what would give indication on when the cause of action accrued, or put differently, when the breach occurred. Secondly, from the materials before court, it is evident that the purchase price captured in the agreement was provisional. The agreement for sale presupposes parties were to mutually agree on the definitive purchase price. When the defendant attempted to unilaterally revise the purchase price through its letter dated 25/7/2006, the deceased rejected that proposal through his letter dated 8/8/2006. That is the day when the parties failed to agree on the definitive purchase price. My view, based on the evidence before court, is that the date when the parties failed to agree on a definitive purchase price is the date when the contract aborted and that is the date when the deceased's claim for a refund of the purchase price of Kshs.350,000 accrued. This was on 8/8/2006.

31. This suit was subsequently filed in court on 15/7/2009, which was about three years from the date when the parties failed to agree on a definitive purchase price. That is a period of about three years from August 2009.

32. The claim for refund of Kshs 350,000 together with interest were contained in the original plaint filed on 15/7/2009. What was introduced through the amended plaint is the plea for interest at 2% above the maximum rate chargeable by commercial banks and damages

for breach of contract. It is clear from the court record that the limbs introduced through the amended plaint were brought in January 2013 which was outside the limitation period of six years from 8/8/2006. The said claims introduced through the amendment to the plaint are therefore statute-barred. The claim for refund of Kshs 350,000 brought on **15/7/2009** is valid. Those are my findings on the second issue.

33. The third issue is whether the deceased is entitled to a refund of Kshs 350,000 together with interest, and if so, at what rate and for what period. From the evidence, parties to this suit agreed on a provisional purchase price. When the defendant attempted to make a demand for a top up of the provisional purchase price, the deceased rejected the proposal and the sale aborted due to the parties' failure to agree on a definitive purchase price. Secondly, there is no evidence of service of a proper completion notice in the terms set out under the Law Society Conditions of Sale (1989 Edition). In the circumstances, it can only be concluded that the contract aborted because the parties initially agreed on a provisional purchase price but were unable to agree on a definitive purchase price. There was no breach by either party. In the circumstances, I find that the deceased is entitled to a refund of the sum of Kshs 350,000 together with interest at court rate from the date of filing this suit, that is 15/7/2009, because the agreement aborted due to the parties failure to agree on a definitive purchase price.

34. The fourth issue is whether the deceased is entitled to damages for breach of contract. From the evidence before court, both parties were responsible for the abortion of the contract. They were responsible because, first they failed to specify a definitive agreed purchase price. They opted for what they called "provisional purchase price". Subsequently, they were unable to agree on a definitive purchase price.

35. The deceased relied on the letter dated 11/2/1997 by D M Kairu and contended that the defendant had acknowledged that the deceased had paid full purchase price. In my view, the said letter cannot be read in isolation. It ought to be read alongside the signed agreement which provided for provisional purchase price and left room for adjustment of the purchase price. The full purchase price which was alluded to in the said letter is the provisional purchase price which the parties had agreed on, leaving room for subsequent adjustment.

36. Secondly, there is no evidence to suggest that proper completion and/or rescission notices were issued and served by the deceased in accordance with the Law Society of Kenya Conditions of Sale (1989 Edition). The totality of the foregoing is that the deceased failed to prove breach of contract on part of the defendant. He cannot therefore be said to be entitled to damages.

37. The last issue relates to costs. The deceased's suit for refund of the provisional purchase price has succeeded. The defendant did not tender the sum of Kshs. 350,000 at the time they were served with the summons to enter appearance. In the circumstances, I will award the deceased's estate costs of this suit.

Disposal Orders

38. In light of the above findings, judgment is hereby entered in favour of the plaintiffs against the defendant in the following terms: -

(a) Refund of the purchase price of Kshs. 350,000 together with interest at court rate from the date of filing this suit.

(b) Costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF JANUARY 2021.

B M EBOSO

JUDGE

In the Presence of: -

Court Clerk - Waweru