



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 2801 OF 1996**

**ANASTASIA WANJIKU KIMANI.....PLAINTIFF**

**VERSUS**

**HALAI DEVELOPERS LTD.....DEFENDANT**

**JUDGMENT**

Plaintiff avers in the plaint that defendant agreed to sell to her L.R. No. 209/1072/36 (maisonette no. 48) together with the dwelling house which under construction in South C Nairobi for a sum of shs 1,850,000 out of which she paid shs 1,000,000/= as a deposit. She avers that defendant has failed to complete the agreement. She seeks the following reliefs:

1. An injunction to restrain defendant from disposing or dealing with LR No. 209/1072/36.
2. (i) specific performance of the agreement and  
(ii) Damages for late completion (iii) In default of defendant specifically performance the agreement plaintiff be declared the legal owner of L.R 209/10721/36

Alternatively

- (iv) Damages for breach of contract
3. Costs
4. refund of shs 1,000,000/= plus interest at the current banking rate
5. Any other or further relief that court may deem fit to grant.

The Agreement of sale which defendant executed and which plaintiff failed to execute shows among other things that:

(i) Defendant had sub-divided its land LR No. 209/1072 into 90 sub plots and was constructing a dwelling house on each sub plot and that after completion of the construction the estate would be known as Halai Estate south C

(ii) That defendant agreed to sell to plaintiff sub - plot No. LR 209/1072/36 (maisonette No. 48) for shs 1,850,000/=

(iii) Plaintiff paid shs 1,000,000 and a balance of shs 850,000 was to be paid on or before the completion date which date was not specified. (iv) Defendant undertook to complete the construction of the dwelling home to be fit for occupation before completion date.

(v) The defendant was selling the sub plot and the dwelling house subject to conditions in the Grant and also subject to all necessary consents and payment of all necessary charges

(vi) Purchaser would be entitled to vacant possession on the completion of the sale and on payment of the full purchase price and outgoing as at the date of completion.

As plaintiff did not execute that agreement, she is not relying on it. She pleads in para 3 of the plaint that the agreement was contained on or evidenced or is to be inferred from:

(a) A receipt dated 8.12.94 acknowledging receipt of deposit of shs 1,000,000/=

(b) a letter dated 9.3.95 from defendant.

The letter dated 9.3.95 is written without prejudice and reads:

“We refer to the above and inform you that according to our completion schedule, your house will be completed by 30th June 1995. On t the circumstances therefore, we expect you to effect the payment of the balance outstanding for Kshs 850,000/= as provided by the sale agreement Referring further to the meeting held in our offices, we confirm that you can clear the balance by three instalments payable as follows:- Kshs 290.000/= now, Kshs 280,000/= in April, and Kshs 280,000/= on completion date of the massionette (30.06.95). Kindly but urgently let us have the payment of kshs 290,000/= to enable us proceed with construction work and complete your house as projected”

Plaintiffs advocate replied to that letter by a letter dated 14.3.93 which says in part:

“It is not clear to us the basis on which you are asking our client to pay the balance of the purchase price.

Clause 4(b) of the agreement contemplated payment on completion. We understand the house is nowhere near ready although our client has paid you shs 1 million. Would you please clarify these matters urgently. Further, we enclosed a copy of our letter of 13th march 1995 to your advocates messrs Mulwa & Mulwa. Please ask your advocates to deal with our letter so that the agreement for sale may be finalised.

This is an important pre requisite to the entire transaction”.

As evidenced by the letter dated 7.4.95 (Ex 9) from plaintiffs advocates, plaintiff declined to pay further sums before an agreement was in place.

By a letter dated 13.6.96, defendant advocates, plaintiff declined to pay further sums before an agreement was in place.

By a letter dated 13.6.96 defendants advocates informed plaintiff that she had failed to pay the balance of shs 850,000/= as earlier demanded and intimidated that the present purchase price due to material fluctuations was shs 2900,000/= Defendants advocate plaintiff gave Notice to pay the balance of shs 1,9000,000/= within the next 30 days and in default defendant would have no option but to rescind the contract and resell the property.

Plaintiffs advocates replied by a letter dated 1.7.96 stating, inter alia, that plaintiff held defendant to original agreement and that plaintiff would not accept unilateral charges to the agreement.

It appears that there was no further correspondence after 1.7.96. The present suit was filed on 12.11.96.

Plaintiff testified that she last saw one director of the defendant three years ago and does not know if defendant is still in operation. She testified further that defendant failed to complete about five houses in the Estate and the owners completed them. She produced a photograph showing the stage at which the construction of the maisonette was abandoned. The photograph shows that defendant constructed the

extracted the external and internal walls but roof was not constructed.

Defendant entered appearance and filed a Defence through the firm of D.A Onyancha & Co., Advocates. But on 14.8.99 defendant's advocates filed an application for leave to withdraw from representing the defendant on the ground that defendant's officers who, according to his information had all left the country, had failed to give its advocates instructions. That application had not been prosecuted by the hearing date and an application by Mr. Onyancha to prosecute the application on the hearing date was rejected. Mr. Onyancha sat in court as plaintiff gave evidence but did not participate in the proceedings.

Defendant in its defence admits receipt of shs 1,000,000/= from the plaintiff but avers that the payment was not in compliance of any agreement of sale; that plaintiff refused to enter into a written agreement of sale leaving the arrangement oral, inconclusive and uncertain; that defendant is not in breach of any term of the agreement; that as there was no written agreement of sale, specifying any terms of sale defendant is entitled to either treat the arrangement as insufficient to create a contract or withdraw from the same altogether or continue to offer the premises to plaintiff on terms reasonable to both.

Plaintiff's case is that the contract is contained in the receipt dated 8.12.94 acknowledging receipt of shs 1,000,000,000/= and in the letter dated 9.3.95. The intention of the parties has to be determined as the time plaintiff paid a deposit of shs 1000,000 on 8.12.94. The receipt shows that the shs 1,000,000 was paid as a deposit for a house. Plaintiff says in her evidence that, the agreement was oral and that the price of the house was agreed at shs 1,850,000/= There is ample documentary evidence which proves that the purchase price was agreed at shs 1,850,000/= Defendant agrees that plaintiff paid shs 1,000,000/= as a deposit. On 8.12.94. Defendant prepared an Agreement for the sale of the house and signed it subsequent to the payment of the deposit. Although plaintiff did not execute the agreement, it is my view that, that document can be taken into account in order to find out the intention of the parties.

According to clause 4(b) of that document, the balance of shs 850,000/= was payable on or before the completion date and by clause 13 of the document, completion date was either the 7th day after the date on which a valid clearance certificate in respect of the property issued by the Nairobi City Commission or the 15th day after the date on which a letter is written to the purchaser by the vendor that the dwelling house forming part of the property has been completed. None of the two events had occurred before the defendant by a letter dated 9.3.95 called for payment of the balance of the purchase price and plaintiff was justified in refusing to pay the balance of the purchase price before the completion date. So, defendant acted in breach of the agreement when it called for the payment of the balance of the purchase price before the completion date.

By clause 15 of the document, defendant could, inter alia, rescind the agreement and resell the property only if purchaser had failed to comply with any of the conditions of sale including condition relating to the completion of the sale and only upon expiry of 30 days Notice to comply. As the payment of the balance of the purchase price was not due, the notice to plaintiff dated 13.6.96, was issued in breach of the agreement.

By a letter dated 9.3.95, defendant intimated to the plaintiff that the construction of the house would be completed by 30.6.95. By the time of the filing of the suit on 12.11.96, defendant had not completed the construction of the house. Indeed, the evidence is that the defendant left five houses including the house offered to the plaintiff uncompleted and has not been completed to date.

I am satisfied in the above circumstances that, plaintiff did not breach any term of the Agreement and that it is the defendant who breached the Agreement by failing to complete the construction of the house and by failing to complete the Agreement.

What remedies are available to the plaintiff? One is the equitable remedy of specific performance. Is that remedy available to the plaintiff in the circumstances of this case?

The Agreement was for the sale of the sub-plot and a dwelling house on the sub-plot upon completion of the construction. The defendant did not complete the construction of the house. As admitted by plaintiff,

defendant abandoned the site. Plaintiff does not know the whereabouts of defendants directors. Defendants counsel says that he has information that they all left the country. The Agreement cannot be completed unless the construction of the house is completed. Even if we assume that, court can order the defendant to complete the construction of the house, that order would be futile because we have evidence that directors of the defendants are not available. There is nobody to receive the balance of the purchase price.

Plaintiff did not produce an abstract of title and so there is no certainty that the sub plot still belongs to the defendant. There were some consents to be obtained before the completion of the Agreement. There is no evidence that those consents have been obtained. Plaintiff has amended the plaint to include a prayer that, in default of defendant specifically performing the agreement she be declared the owner of plot and the uncompleted house standing thereon. There is no evidence that it was a term of the agreement that if defendants failed to complete the house and convey the plot and house to her, then she would be declared as the owner of the house. Therefore, by granting such a prayer, court would be modifying the agreement and giving plaintiff what she did not bargain for. The court cannot do that. Specific performance is an equitable remedy and in the circumstances I have outlined above, an order of specific performance of the Agreement would be a futile remedy.

The other remedies available to the plaintiff are refund of deposit and any other payment and expenses of investigating the title or alternatively damages. The general rule for contract damages is to put the plaintiff in the same position as if the contract had been performed. There is one exception - that where the seller has failed to complete the contract through a defect of title, plaintiff can only recover the deposit paid with interest and expenses incurred in the investigation of the title unless plaintiff proves fraud on the part of the seller. In the present case, non completion of the agreement is not due to the defect in the title. The normal measure of damages where failure to complete is not due to defect in the title, is the market value of the property at the contract time for completion less the contract price. In such a case, the price at which plaintiff has contracted to resell property is normally taken as prima facie evidence of the market value.

Plaintiff seeks damages for late completion, damages for breach of contract and refund of shs 1,000,000/= plus interest at the current banking rates. She cannot get damages for late completion of the agreement because the agreement was not completed.

She cannot also get both damages for breach of contract and refund of the deposit. Court can only award either the two.

Defendant offered to complete the house by 30.6.95. The agreement was to be completed thereafter. There is no evidence as to what was the market price of the property around 30.6.95. Even if court takes the market value of the property as shs 2,900,000/= the price quoted by defendant in the letter dated 13.6.96 and assumes that 13.6.96 is the date of completion, the damages for breach of contract would be the difference between the contract price of shs 1,850,000/= and shs 2,900,000/=: that is, shs 1,050,000/=. But plaintiff would get more than that if judgment for refund of the deposit plus interest is awarded.

Plaintiff merely asks for interest at current bank rates. She did not in her evidence specify the current bank rates. She has not prayed for interest before the filing of the suit.

Plaintiff paid the deposit in 1994 in respect of a commercial transaction. It is just that interest be awarded at bank rates. In the absence of concrete evidence as to what the bank rates are but taking judicial notice of the fact that bank rates are not below 22% p.a. I would award interest at 20% p.a.

For the above reasons, I enter judgment for plaintiff against defendant as prayed in prayer 4 of the plaint with interest at 20% p.a from date of filing suit. I give the costs of the suit to the plaintiff.

**E. M. Githinji**

**Judge**

**7.3.2000**

**Mr. Manyonge for plaintiff present**

**Mr. Onyancha absent**

**Mr. Manyonge**

**I apply for a certified copy of the judgment and proceedings.**

**Order: Judgment to be typed and copy supplied**

**E. M. Githinji**

**Judge**