



Shamo & another v Ganza Limited & 3 others (Environment & Land Case 46 of 2018) [2024] KEELC 583 (KLR) (1 February 2024) (Judgment)

Neutral citation: [2024] KEELC 583 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 46 OF 2018**

**BM EBOSO, J
FEBRUARY 1, 2024**

BETWEEN

GENOR SHER SHAMO 1ST PLAINTIFF

LARS JONAS GEJKE 2ND PLAINTIFF

AND

GANZA LIMITED 1ST DEFENDANT

HOMEX HOUSING LIMITED 2ND DEFENDANT

ECOBANK KENYA LIMITED 3RD DEFENDANT

VALLEY AUCTIONEERS 4TH DEFENDANT

JUDGMENT

Introduction

1. This suit raises three key issues that fall for determination in this Judgment. One of the issues is the question as to whether the 1st and 2nd defendants are liable to refund the two plaintiffs the aggregate sum of Kshs 4,000,000 which they paid as purchase price in an intended sale of two maisonettes that the two defendants promised to sell to the plaintiffs’ off-plan. The other key issue relates to the question as to who is liable to bear costs of the parties to this suit. It does emerge from the court record that, during trial, the plaintiffs made an oral application to withdraw their respective claims against the 3rd and 4th defendants. The two defendants acceded to the oral application subject to the court making a determination on the question as to who should bear their costs of the suit. I will briefly outline the parties’ respective cases, evidence and submissions, before disposing the three key issues that fall for determination in the suit.



Plaintiffs' Case

2. The plaintiffs initiated the suit through a plaint dated 14/2/2018. The plaint was subsequently amended on 23/3/2021. In summary, the plaintiffs' case was that, the 1st defendant, through the agency of the 2nd defendant, offered to sell to them maisonette numbers 97 and 105 in a development described as Kitisuri Gardens, which was to be undertaken on land parcel number Kabete/Kibichiko/906, registered in the name of the 1st defendant and located in Kiambu County. The agreed purchase price for each maisonette was Kshs 10,000,000. 10% of the purchase price was to be paid on signing the letter of offer. A further sum equivalent to 10% of the purchase price was to be paid on 27/5/2014. The balance [80% of the agreed purchase price] was to be paid upon successful completion. The estimated completion date was to be 31/8/2015.
3. The plaintiffs contended that they each paid the deposit as stipulated above, in the aggregate sum of Kshs 2,000,000, for each maisonette. In 2015, they sought a progress report on the development but none was forthcoming from the 1st and 2nd defendants. They subsequently decided to visit the project. On visiting the project, they found that the development had stalled. In October 2017, they wrote to the 1st defendant seeking a refund of their money. The 1st defendant wrote back to them stating that they would not refund the deposit, adding that they [the plaintiffs] were bound by the terms of the sale. At that point, the 1st defendant sent draft agreements for sale, to be executed by the plaintiffs.
4. Aggrieved, the plaintiffs brought this suit. Through the amended plaint, they sought:
 - (i) an order directing the 1st and 2nd defendants to refund to them the sum of Kshs 4,000,000 with interest;
 - (ii) a declaration that the 3rd defendant's statutory power of sale could only be exercised "if and when the plaintiff's interests in the land is registered as the charge was registered with the 3rd defendant having notice of transactions between the 1st and 2nd defendants and various purchasers, including the plaintiffs";
 - (iii) an order inhibiting dealings in the parcel of land;
 - (iv) an interlocutory conservatory order preventing dealings in the land, pending hearing and determination of the suit; and
 - (v) costs of the suit and the interlocutory applications.

Case of 1st and 2nd Defendants

5. The 1st and 2nd defendants filed a joint statement of defence dated 11/2/2020. They admitted that vide a letter of offer dated 24/4/2014, the 1st defendant offered to sell maisonette numbers 97 and 105 to the 1st and 2nd plaintiffs, respectively, in a development project undertaken by the two defendants, known as Kitisuri Gardens at a purchase price of Kenya Shillings Ten Million (Kshs 10,000,000) for each maisonette. They further admitted in paragraph 5 of the defence that each plaintiff paid a total sum of Kshs 2,000,000 as deposit.
6. The 1st and 2nd defendants added that they, at all material times, discharged their obligations under the letters of offer. They added that "under the contract between the parties," the plaintiffs were "not entitled to a refund of the deposit or any monies thereof". They further averred that the plaintiffs unilaterally and without justifiable reason purported to rescind the agreements for sale. They



contended that the plaintiffs had no interest in the suit land to warrant grant of the inhibitory and conservatory orders. They urged the court to dismiss the plaintiffs' suit.

3rd Defendant's Case

7. The 3rd defendant filed a statement of defence dated 22/3/2018. The case of the 3rd defendant was that it was not privy to the transaction between the plaintiffs and the 1st and 2nd defendants, adding that through a charge dated 24/2/2015, it agreed to advance to the 2nd defendant a facility of Kshs 422,000,000 that was secured by the 1st defendant title, Kabete/Kibichiku/906 and a debenture dated 24/7/2015. The 3rd defendant averred that on 10/3/2015, they made a partial disbursement of the loan amounting to Kshs 221,000,000 to the 2nd defendant, adding that the 2nd defendant was required to repay the disbursed amount in twelve [12] monthly instalments inclusive of interest after a 12 months moratorium. The 3rd defendant added that the 2nd defendant defaulted, prompting them to issue a statutory notice of their intention to exercise the chargee's statutory power of sale in 2017. They averred that they subsequently cancelled the intended sale. They denied liability, contending that their rights as chargee could not be defeated by the off-plan sale between the two plaintiffs and the 1st and 2nd defendants. They urged the court to dismiss the claim against them and award them costs of the suit.
8. The 4th defendant neither filed a defence nor led evidence during trial.

Evidence

9. The two plaintiffs testified as PW1 and PW2 and closed their respective cases. None of the defendants led evidence at trial.
10. Geno Sher Shamo testified as PW1. She adopted her witness statement dated 14/2/2019 as part of her sworn evidence-in-chief. She produced the following five exhibits:
 - (i) copies of two unsigned letters of offer dated 24/4/2014 sent to Geno Sher Shamo and Lars Jonas Gejke;
 - (ii) two draft agreements for sale between Ganza Limited and Geno Sher Shamo; and Ganza Limited and Lars Jonas Gejke, relating to maisonettes numbers 97 and 105 respectively
 - (iii) copies of payment receipts from Homex Housing Ltd for misonette number 97 and 105 Kitusuru Gardens dated 23/4/2014;
 - (iv) email correspondence between Robson Harris & Company Advocates and Kishagha & Ogutu Advocates dated between 24/10/2017 and 16/11/2017;
 - (v) newspaper advertisement relating to an intended public auction of title number Kabete/Kibichiko/906.
11. It was PW1's testimony that the 1st defendant, through the agency of the 2nd defendant, sold to her maisonette number 97 off-plan at a purchase price of Kshs 10,000,000. PW1 stated that 10% of the purchase price was to be paid at the point of signing the offer letter and an additional 10% was to be paid on 27/5/2014. The balance was to be paid upon successful completion. She further stated that the completion date was 31/8/2015. She added that the 2nd defendant was the developer while the 1st defendant was the vendor. It was PW1's evidence that on the strength of the offer letter dated 24/4/2014, she paid a deposit of Kshs 1,000,000 on 23/4/2014 and a further deposit of Kshs. 1,000,000 in May 2014.



12. PW1 stated that in 2015, she and the 2nd plaintiff sought a progress report from the 2nd defendant but none was forthcoming. She added that on 24/10/2017, through their advocates, they demanded a refund of their money on the ground that the development had not been actualized. They did not get the refund. PW1 further stated that they discovered that subsequent to the 1st and 2nd defendants marketing the project and “selling” to them the two maisonettes, the two defendants charged the suit property to the 3rd defendant without their knowledge.
13. During cross-examination, PW1 confirmed that the letters of offer which she had produced were not signed. She also admitted that the sale agreements which she had produced were neither signed nor dated. PW1 also stated that she had no claim against the 3rd and 4th defendants, adding that her claim was for the refund of the purchase price paid to the 1st and 2nd defendants. In re-examination, PW1 stated that she had a signed offer letter, even though she had not produced it. She confirmed that she had produced only one receipt for Ksh 1,000,000, adding that the defendants had admitted in their defence that they received Kshs 2,000,000 from her.
14. Lars Jonas Gejke testified as PW2. He reiterated the evidence tendered by PW1. PW2 added that the 1st defendant, through the agency of the 2nd defendant, sold to him maisonette number 105 off-plan at a purchase price of Kshs 10,000,000. PW1 stated that 10% of the purchase price was to be paid at the point of signing the offer letter; an additional 10% was to be paid on 27/5/2014; and the balance was to be paid upon successful completion. PW2 added that the 1st and 2nd defendants frustrated the agreement between the parties when they failed to perform their part of the contract by failing to complete construction within the stipulated time. PW1 further testified that he was no longer interested in continuing with the purchase. He urged the Court to order the 1st and 2nd defendants to refund the purchase price he and the 1st plaintiff paid together with interest from 2014 until payment in full.

Submissions

15. The plaintiffs filed written submissions dated 11/10/2023 through M/s Omuodo & Ogutu Advocates. Counsel submitted that the two plaintiffs had tendered evidence demonstrating that they each paid Kshs 2,000,000 to the 1st and 2nd defendants as purchase price for the two maisonettes. Counsel argued that the plaintiff had shown that the legal charge in favour of the 3rd defendant was registered almost one year after their interest in the suit land had crystalized. Counsel added that given that the plaintiffs saw a notice in the newspaper inviting prospective purchasers to buy the suit land, they were justified in approaching the court for conservatory orders. Reliance was placed on the pronouncement of Mativo J [as he then was] in *Cecilia Karuru Ngayu v Barclarys Bank of Kenya & another* [2006] eKLR where the Learned Judge stated thus:

“In determining the issue of costs, the court is entitled to look at inter alia

- (i) the conduct of the parties,
- (ii) the subject of litigation,
- (iii) the circumstances which led to the institution of the proceedings
- (iv) the events which eventually led to their termination,
- (v) the stage at which the proceedings were terminated,
- (vi) the manner in which they were terminated, (vi) the relationship between the parties and



- (viii) the need to promote reconciliation amongst the disputing parties pursuant to article 159 (1) (c) of *the Constitution*, in other words, the court may not only consider the conduct of the party in the actual litigation but the matters which led to the litigation, the eventual termination thereof and the likely consequences of the order for costs.”
16. Counsel submitted that the plaintiffs had demonstrated that the suit against the 3rd defendant was not frivolous, adding that the 3rd defendant was a necessary party to the proceedings given that they intended to sell the suit property in which the plaintiffs claimed an equitable interest.
17. Counsel argued that the 3rd defendant could not claim costs against the plaintiffs, adding that the 1st and 2nd defendants were the ones to bear costs because they were the reason parties came to Court. Counsel submitted that the plaintiffs did not act maliciously in filing the suit against the 3rd defendant, contending that the plaintiffs were simply seeking conservatory orders against the 3rd defendant. Counsel urged the court to condemn the 1st and 2nd defendants to pay the 3rd defendant's costs because they failed to disclose that they had sold part of the suit property to the plaintiffs and thereafter defaulted in their obligations to the 3rd defendant, thereby necessitating the present suit.
18. The 3rd defendant filed their submissions dated 13/9/2023 through M/s Muri Mwaniki Thige & Kageni LLP. Counsel submitted that the issue for determination was whether the 3rd defendant was entitled to costs. Counsel relied on the case of *Beloico Holdings Limited v Gention AG & another* [2016] eKLR and the provisions of Order 25 rule 2 of the *Civil Procedure Rules* on discontinuance of suits. Counsel submitted that the Court had discretion to decide whether to grant costs or not. Counsel added that in determining the issue of costs, the court should look at the conduct of the parties, the subject of litigation, and the circumstances that led to the institution of the proceedings; counsel relied on the decision in the case of *Morgan Ali Cargo Limited v Everest Enterprises Limited* [2014] eKLR in support of his submission.
19. Counsel contended that the 3rd defendant had taken steps to defend the suit, including appointing advocates who filed a defence and accompanying documents. Counsel submitted that the 3rd defendant participated in the suit throughout, including preparing for the hearing and examining of witnesses. Counsel argued that the 3rd defendant incurred financial costs in participating in the proceedings and it was only fair that it is compensated. Counsel relied on the decisions in the cases of *Pacis Insurance Company Ltd v Francis Njeru Njoka* [2018] eKLR and *Sbadrack Silla Muthama v Kebaso Wycliffe Maengwe* [2021] eKLR in support of his submissions. Counsel further submitted that no misconduct had been demonstrated on part of the 3rd defendant to warrant denial of costs to them Counsel relied on the case of *Devram Manji Daltani v Danda* [1949] EACA 35 where the court held that a successful litigant could only be deprived of his costs where his conduct has led to litigation. Counsel urged the Court to exercise its discretion and award costs to the 3rd defendant.

Analysis and Determination

20. I have considered the pleadings, evidence and submissions that were tendered in this suit. The 4th defendant neither entered appearance nor filed a defence. Secondly, the two plaintiffs withdrew their respective claims against the 3rd and 4th defendants. The 3rd defendant acceded to the withdrawal of the claims against them but insisted that the court makes a determination on who should bear their costs. Thirdly, during trial, the two plaintiffs made it clear that all they were seeking was a refund of the money they paid to the 1st and 2nd defendants, together with interest. They were categorical that they were not interested in the other reliefs itemized in the plaint.



21. Taking into account the pleadings, evidence, submissions and the above circumstances, the following are the three key issues that fall for determination in this suit:
- (i) Whether the 1st and 2nd defendants are liable to refund to the plaintiffs the deposit that they paid;
 - (ii) Whether interest is payable on the deposit and if so, at what rate and for what period, and
 - (iii) What order(s) should be made in relation to costs of the parties in this suit?

I will dispose the three issues sequentially in the above order.

22. Are the 1st and 2nd defendants liable to refund to the plaintiffs the deposit paid towards purchase of the two maisonettes? It does emerge from the pleadings, evidence and submissions in this suit that the 1st defendant owned land parcel number Kabete/Kibichiko/906. It does also emerge that the 2nd defendant is a real estate developer. The two defendants entered into a joint venture where the 2nd defendant was to develop maisonettes on the suit land owned by the 1st defendant. The duo marketed and sold the maisonettes off-plan. The two plaintiffs were offered maisonette numbers 97 and 105 respectively. They agreed to buy the two maisonettes. They each paid a deposit of Kshs 2,000,000 out of the agreed unit price of Kshs 10,000,000.
23. It does also emerge from the incontroverted evidence of the two plaintiffs that the agreed completion timelines were never met by the two defendants. When the plaintiffs realized that the project had stalled, they demanded refund of their moneys. Their demand was rejected by the two defendants.
24. In their statement of defence, the two defendants admitted entering into the off-plan sale of the two maisonettes with the plaintiffs. They also admitted receiving the deposit of Kshs 2,000,000 from each of the two plaintiffs. They alleged in their defence that under the contract between the parties, the plaintiffs were not entitled to refund of the deposit or any money. They did not, however, lead evidence relating to the alleged contract that precluded the plaintiffs from demanding refund of the money. Indeed, none of the parties placed before the court a compliant contract for sale of land within the requirements of section 3 of the *Law of Contract Act*.
25. It does also emerge from the evidence tendered that while aware that they had received money from the two intended buyers, the two defendants jointly entered into a financing arrangement with the 3rd defendant without seeking the concurrence of the intended buyers. Upon defaulting to service the loan, the 3rd defendant advertised sale of the suit land in exercise of the chargee's statutory power of sale.
26. Suffice it to state that, it is clear from the evidence placed before this court that whereas the two defendants received the deposit, no enforceable sale of land contract was subsequently entered into by the parties. Indeed, none was tendered during trial.
27. Given the above circumstances, the two defendants had no proper basis for retaining the deposit which they had received. Put differently, given that the intended land sale contract did not crystalize, the two defendants had no basis for retaining the money. For the above reasons, it is my finding that the two defendants are liable jointly and severally to refund to the plaintiffs the deposit which the plaintiffs paid to them.
28. The next question is whether the plaintiffs are entitled to interest and if so, at what rate and for what period? Parties to the intended sale elected to transact on the basis of trust. There was no written instrument dealing with the aspect of interest. In the absence of any formal evidence relating to interest,



the deposit held by the two defendants is to be treated as a civil debt that fell payable from the date of demand. Consequently, the debt would attract interest from the time demand was made.

29. An examination of the correspondence exhibited by the plaintiffs, particularly the email dated 15/11/2017, reveals that the plaintiffs demanded refunds in or about November 2017. I will in the circumstances reckon interest from 1/12/2017. Further, in the absence of evidence of any contractual interest rate, interest will be awarded at court rate.
30. On costs, it is clear that this case would not be in court if the two defendants refunded the plaintiffs their deposit as demanded because the intended sale never crystalized. Further, joinder of the 3rd defendant would not have been necessary if the two defendants had not secretly charged the suit land after receiving deposit from the plaintiffs. For the above reasons, the 1st and 2nd defendants will jointly and severally bear costs of the two plaintiffs and costs of the 3rd defendant. There will be no award of costs to the 4th defendant because they neither entered appearance nor filed a defence.

Disposal Orders

31. In the end, the following disposal orders are made:
 - a. Judgment is hereby entered in favour of the 1st plaintiff against the 1st and 2nd defendants jointly and severally for the sum of Kshs. 2,000,000/- together with interest at court rate from 1/12/2017.
 - b. Judgment is hereby entered in favour of the 2nd plaintiff against the 1st and 2nd defendants jointly and severally for the sum of Kshs. 2,000,000/- together with interest at court rate from 1/12/2017.
 - c. Costs of the plaintiffs and costs of the 3rd defendant shall be borne by the 1st and 2nd defendants jointly and severally.
 - d. Costs shall attract interest from the date of taxation or assessment by the taxing officer of the court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 1ST DAY OF FEBRUARY 2024

B M EBOSO

JUDGE

In the presence of: -

Mr Gichuhi for the Plaintiffs

Ms Wamaitha for the Defendants

Court Assistant: Osodo/Hinga

