



REPUBLIC OF KENYA



**Karinga & 4 others v Ngure (Environment & Land Case 71 of 2021)  
[2023] KEELC 16210 (KLR) (14 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16210 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 71 OF 2021**

**MAO ODENY, J  
MARCH 14, 2023**

**BETWEEN**

**HENRY GATHARA KARINGA ..... 1<sup>ST</sup> PLAINTIFF  
GRACE WANJIRU KARINGA ..... 2<sup>ND</sup> PLAINTIFF  
MARY WAMBUI ..... 3<sup>RD</sup> PLAINTIFF  
CHARLES KANYI ..... 4<sup>TH</sup> PLAINTIFF  
PAUL MWANIKI GACHOKA ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**DAVID WAIGANJO NGURE ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated 17<sup>th</sup> August 2021 the Plaintiffs herein sued the Defendant seeking the following orders: -
  - a. A declaration that the defendant is in breach of the contract in relation to the construction of villas Coco Bahari Villas erected on property Land Reference Number MN/III/1848.
  - b. An order for refund of a total of Ksh 53,235,000 particularized as follows for each purchaser:
    - i. Ksh 18,000,000.00 for the 1<sup>st</sup> Plaintiffs
    - ii. Ksh 16,400,000.00 for the 2<sup>nd</sup> Plaintiff
    - iii. Ksh 9,500,000.00 for the 3<sup>rd</sup> Plaintiff
    - iv. Ksh 9,335,000.00 for the 4<sup>th</sup> Plaintiff



- c. Interest on b) above for each plaintiff at commercial rates of 14% p.a from the date of payment until payment in full.
  - d. Cost of this suit.
2. The Defendant was served with summons to enter appearance together with the Plaintiff but neither filed a Memorandum of Appearance nor a defence therefore interlocutory judgment was entered on favour of the Plaintiffs.

### **Plaintiffs' case**

3. PW1 Henry Gathara Karanja who had the authority to give evidence on behalf of the other Plaintiffs adopted his witness statement together with the list of documents dated 17<sup>th</sup> August 2021 which he produced as pex No. 1 to 47. It was his testimony that in the year 2011, the Defendant approached them and told them that he is the registered proprietor of Land Reference Number MN/III/1848 situate in Kikambala Beach Kilifi County where he intended to develop luxury villas and a hotel on the property referred to as the Coco Bahari Villas project.
4. It was PW1's further testimony that the Defendant further represented to them that he was in the process of developing Coco Bahari Villas project which comprised of 30 villas and a hotel to be built at the seafront of the development consisting of an ultra-modern spa, gym, swimming pool, conference facilities and 2 tennis courts.
5. PW 1 told the court that vide various sale agreements between the Plaintiffs and the Defendant, the Plaintiffs agreed to purchase the villas as follows;
  - a. that the 1<sup>st</sup> plaintiff would purchase villa No. 4 at Kshs 25,000,000.00/-
  - b. the 2<sup>nd</sup> plaintiff would purchase villa No. 3 at Kshs 25,000,000.00/-
  - c. the 3<sup>rd</sup> plaintiff would purchase villa No. 1 at Kshs 25,000,000.00 and
  - d. the 4<sup>th</sup> plaintiff would purchase villa No. 5 at Kshs 25,000,000.00. /-
6. It was PW1's evidence that the Defendant indicated to them that he had secured part of the financing for the project from Kenya Commercial Bank Kenya Limited while the remainder of the financing will be from the purchasers and the Defendant.
7. PW1 stated that the project would commence on 15<sup>th</sup> February 2011 and the completion date would be 15<sup>th</sup> February 2012 or 30 days from the date the purchasers are notified in writing by the vendor's advocate that the property is ready for occupation.
8. He further told the court that him together and his wife became interested in the project and executed a letter of offer on 8<sup>th</sup> June 2011 where they expressed interest in purchasing villa No. 4. He also told the court that he made payments on diverse dates between 31<sup>st</sup> May 2011 and 25<sup>th</sup> April 2013 through cheque and RTGS for an amount totaling Kshs 18,000,000.00/-.
9. It was PW1's further testimony that they have on various dates made substantial payments towards the purchase of the said villas but the Defendant has failed, refused and or neglected to complete the development of the project as agreed.
10. It was his testimony that they agreed with the Defendant that the construction of the villas was to be undertaken simultaneously with the hotel in order to support the project, its financial viability and operations, that the hotel was to be erected on an area reserved for such purpose and would remain



the property of the Defendant, further that the Defendant would grant leases for the villas to him and the other Plaintiffs and that the land was charged to Kenya Commercial Bank Kenya Limited and that partial discharges of charge would be issued in respect of the various villas bought.

11. PW 1 finally stated that they have visited the site on several occasions since 2013 and have noted that the project is yet to be completed and urged the court to enter judgment as prayed in the Plaint.

### **Analysis and Determination.**

12. The Defendant was served with summons to enter appearance together with the Plaintiff but neither entered appearance nor filed a defence therefore the matter proceeded undefended. However the Plaintiffs are still duty bound to prove their case on a balance of probabilities as was held in the case of *Kenya Power & Lighting Company Limited vs Nathan Karanja Gachoka & another* [2016] eKLR, that: -

“I am of the opinion that uncontroverted evidence must bring out the fault and negligence of a defendant, and that a court should not take it truthful without interrogation for the reason only that it is uncontroverted. A plaintiff must prove its case too upon a balance of probability whether the evidence is unchallenged or not.”

13. The issues for determination are whether there was a valid agreement between the Plaintiffs and the Defendant, whether there was a breach and violation of the terms of the agreement by the Defendant and whether the Plaintiffs are entitled to compensation for breach of the agreement.
14. On the first issue as to whether there was a valid agreement between the Plaintiffs and the Defendant, it is not disputed that the parties entered into sale agreements which were executed on 16<sup>th</sup> August 2012 whereby the terms and conditions were clearly stipulated.
15. Section 3 (3) of the Contract Act provides that;

“3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless

—

- (a) the contract upon which the suit is founded—
  - (i) is in writing;
  - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

16. The Plaintiffs produced signed agreements by all the parties, letters of offer, copies of cheques used for payment of purchase price, signed acknowledgments by the Defendant, funds transfer vide RTGS, and cash deposit slips to the Defendant which has not been disputed. This evidence is proof that there was a valid agreement between the Plaintiffs and the Defendant.



17. The next issue for determination is whether there was breach of contract, Black's Law Dictionary, 9<sup>th</sup> Edition, page 213 defines a breach of Contract as;
- “a violation of a contractual obligation by failing to perform one's own promised, by repudiating, or by interfering with another party's 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”.
18. The Plaintiffs particularized the breach of the agreement for sale as failing to complete the construction of the villas and the hotel as agreed by parties, delaying the completion of the construction of the villas without proper or reasonable excuse, misleading the Plaintiffs on the progress of the construction of the suit properties and failure to refund all monies paid by the purchasers despite the Defendant's non-completion. The Plaintiffs gave evidence to prove that they had done part of their bargain and that the Defendant breached the terms of the agreement by not completing the contract.
19. In the case of *Hadley vs Baxendale* (1854) 9. Exch 214 where Anderson P at page 354 stated as follows: -
- “Where two parties have made a contract which one of them has broken the damages which the other ought to receive should be such as may fairly and reasonably be considered either as arising naturally i.e according to the usual course of things, from such breach itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made a contract as the probable result of a breach of it.”
20. I find that the Defendant is in breach of the agreement having been paid Kshs 53,235,000.00/- but refused and/or neglected to complete the construction of the said villas. In the case of *Perpetua Atieno vs Louis Onyango Otieno* (2013) eKLR, the court of Appeal set out the type and measure of damages recoverable by a purchaser upon breach of contract by a seller of land and held that: -
- “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 .....”
21. Clause 11 of the sale agreement is a default clause for failure to complete the project and having found that there was a valid agreement between the Plaintiffs and the Defendant, that the Defendant breached the terms of the contract, it follows that the Plaintiffs are entitled to a refund of the purchase price of Kshs. 53,235,000.00/- already paid to the Defendant plus interest at 14% from the date of payment till payment in full together with costs of the suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 14<sup>TH</sup> DAY OF MARCH, 2023**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of



Covid-19 pandemic this Judgment has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

