



**Kunya & 2 others v Global Trucks Limited (Environment & Land Case 63 of 2021) [2023] KEELC 18605 (KLR) (6 June 2023) (Judgment)**

Neutral citation: [2023] KEELC 18605 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 63 OF 2021**

**MAO ODENY, J**

**JUNE 6, 2023**

**BETWEEN**

**FONDO SALIMU KUNYA ..... 1<sup>ST</sup> PLAINTIFF**

**ABDALLA SALIM ZAKA ..... 2<sup>ND</sup> PLAINTIFF**

**SAUMU SAIDI SALIMU ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**GLOBAL TRUCKS LIMITED ..... DEFENDANT**

**JUDGMENT**

1. By a Plaint dated May 25, 2021, the Plaintiffs herein sued the Defendant seeking the following orders; -
  - a) A declaration that the Defendant was in breach of the sale Agreement entered into between the Plaintiffs and the Defendant.
  - b) An order for payment of the sum of Kshs 19,440,000/- together with interest at commercial rates from December 1, 2017 until payment in full.
  - c) Alternatively, a transfer of the title deed back to the Plaintiffs' names at the Defendant's own cost.
  - d) Costs of this suit.
  - e) Any other relief that this Honourable Court may deem fit and just to grant

**Plaintiff's Case**

2. PW1 Fondo Salimu, adopted his Witness Statement and gave evidence on behalf of the other Plaintiffs. PW1 also produced the documents in the list of documents as Pexh-1 to 9.



3. It was PW1's case that they entered into an agreement for sale of land known as title No Mgumopatsa/ Mazeras/45 with the Defendant for a consideration of Kshs 22,100,000/- of which the Defendant paid a sum of Kshs 2,210,000/- as deposit leaving a balance of Kshs 19,890,000/- payable within seven days from the date of registration of the transfer in favour of the Defendant.
4. PW1 also stated that they agreed to remove any graves and tenants on the suit property in exchange of the deposit which they did and transferred the suit property to the Defendant. It was PW1's testimony that upon successful registration and transfer, the Defendant only paid a sum of Kshs 450,000/- and never paid the balance of the purchase price despite demand notice being issued.
5. The Defendant filed a defence but never attended court despite being served with a hearing notice hence the defence case was marked as closed.

### **Plaintiffs' submissions**

6. Counsel identified four issues for determination namely: whether there was a subsisting valid sale agreement between the parties; who breached the agreement; are the Plaintiffs entitled to the prayers sought; and who bears the costs of the suit.
7. Regarding the first issue, counsel submitted that there was a valid agreement in line with Section 3 (3) of the *Law of Contract Act* which was still subsisting as no termination notice had been issued by either party as per clause 10 of the sale agreement.
8. Counsel submitted that going by the evidence produced by the Plaintiffs, it was clear that the Plaintiffs had performed all their obligations under the agreement but the Defendant failed to perform their part to wit, payment of the balance of the purchase price even after registration was effected in its favour.
9. On the second issue as to whether the Defendant breached the terms of the contract, counsel submitted that the Defendant's failure to pay the balance of the purchase price amounted to breach of contract as per the definition in the *Black's Law Dictionary*, 9<sup>th</sup> edition and relied on the case of *Samuel Murigi Waigwa v Francis Babu Mwang* [2021] eKLR.
10. Ms Nyambura further submitted that since the suit property had already been transferred to the Defendant, the most appropriate remedy in this case would be an order of payment of the balance of the purchase price as it was held in the case of Samuel Murigi Waigwa [*supra*].
11. It was counsel's Submission that the Plaintiffs are entitled to interest at commercial rates by virtue of Clause 3 and 12 of the Sale Agreement and in line with Clause 8 (3) of the *Law Society Conditions of Sale* [1989]. Counsel argued that as per the Central Bank of Kenya Monetary Statement Policy of December 2017, the base interest rate was 10 per centum and by adding 2 per centum stipulated under the Law Society Conditions of Sale, 12 per centum interest should be charged as to have accrued from 1<sup>st</sup> December 2017, 7 days after the transfer was registered and relied on the case of *Delilah Kerubo Otiso v Ramesh Chander Ndingra* [2018] eKLR.
12. Counsel therefore urged the court to find in favour of the Plaintiff and further that the Plaintiffs' evidence was uncontroverted.

### **Analysis And Determination**

13. The issues for determination are as follows; -
  - a) Whether there is a valid sale agreement between the Plaintiffs and the Defendant.



- b) Whether the Defendant is in breach of the sale agreement.
  - c) Orders to be granted.
14. On the first issue as to whether there was a valid sale Agreement between the Plaintiffs and the Defendant, the Plaintiff produced a sale agreement and before a court decides on the validity of the agreement, it must be satisfied that the transaction was in compliance with the provisions of Section 3 (3) of the Law of contract which reads as follows; -
- 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.
15. A perusal of the sale agreement produced by the Plaintiffs as exhibit 1, confirms that the above requirements of the law were complied with at the point of drafting. The effect of the compliance therefore being that the Sale Agreement is valid, legal and binding on the Parties and can be relied upon by the Court.
16. In the case of *Nelson Kivuvani v Yuda Komora & Another*, Nairobi HCCC No 956 of 1991, the Court held that: -
- “the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.
17. The Defendant filed a defence but did not attend court to defend the Plaintiffs’ claim. It is also on record that the agreement has not been rescinded by either party as there was no notice of rescission of contract.
18. It is trite law that a court of law will not interfere with a contract entered into between two consenting parties as was held in *National Bank of Kenya Limited v Pipeplastic Samkolit (K) Ltd. and Another* [2001] KLR 112 at p 118 as follows: -
- “A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge. As was stated by Shah, JA in the case of *Fina Bank Limited Vs Spares & Industries Limited* (Civil Appeal No 51 of 2000) (unreported):



“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”

19. The key terms of the agreement were that the purchase price of the suit property was Kshs 22,100,000/- which was to be paid in two instalments. A deposit of Kshs 2,210,000/- was paid on execution of the agreement, into the advocates’ account to be held by the advocates pending vacant possession of the suit property.
20. The balance of the purchase price Kshs 19,890,000/- was to be paid to the Plaintiffs within seven days from the date of registration of the transfer in favour of the Defendant. The completion date was indicated to be within 90 days from the date of the agreement or any other mutually agreed date. Further, vacant possession was to be availed to the Defendant upon transfer of the deposit from the advocates to the Plaintiffs.
21. It was the Plaintiffs case that the Defendant only paid the deposit and a further Kshs 450,000/- upon registration of the transfer. It appears that there were some graves and tenants on the suit property. The terms of the agreement were that the deposit will only be released to the Plaintiffs once the said tenants and graves are removed from the suit property and the Defendant given vacant possession. In the circumstances, if the Plaintiffs acknowledged receipt of the deposit and a further payment after registration, it could only mean one thing that the Defendants were satisfied with the suit property’s condition and that vacant possession was given.
22. The Plaintiffs produced a copy of the transfer document dated November 20, 2017 signed by the Plaintiffs as the transferors and the directors of the Defendant as the Transferees. They also produced a copy of the title deed which confirms that the Defendant was issued with the title to the suit property on November 23, 2017.
23. The Plaintiff’s evidence was uncontroverted and it follows that the Defendant was to pay the entire balance of the purchase price by November 30, 2017, as per clause 2.1 of the Sale Agreement which the Defendant failed to do so. In the foregoing, I find that the Defendant was in breach of the Sale Agreement. The Plaintiffs had already transferred the suit property as per the terms of the agreement.
24. In the Court of Appeal case of *Mwangi v Kiiru* [1987] eKLR where Nyarangi JA observed as follows:

“..... the land having been transferred and as the suit is not on quantum merit, the respondent’s remedy is to sue for damages for breach of contract and the damages can be preferable to the balance of the purchase price.”

The prevailing jurisprudence is that where the aggrieved vendor has fully performed his primary obligations and has conveyed the land to the purchaser and handed over possession of the land, the remedy of rescission is not available. The available remedy is to sue for balance of purchase price. That is my finding on the second limb of the second issue.”
25. The Plaintiffs prayed for an order of payment of the balance of the purchase price together with interest at commercial rates from December 1, 2017. There was no dispute as to the balance yet to be paid but what the court needs to determine is whether the Plaintiffs are entitled to interest. Clause 3 of the Sale Agreement adopted the *Law Society Conditions of Sale*, 1989. Clause 8(3) of the *Law Society Conditions of sale* supports the Plaintiffs’ claim to interest. The clause is in the following terms:
  - (3) Where the completion is for any reason whatsoever other than the default of the vendor or his mortgagee delayed beyond the completion date, the



purchaser shall, subject as is hereinafter otherwise provided pay to the vendor on completion interest on the balance of the purchase money computed from the completion date until the date of payment of the purchase money in full (both dates inclusive)...

26. In the Court of Appeal case of *Lydia Wanjiku Wanyee suing as the administrator of the estate of the Late George Wanyee v George Nyanja* [2015] eKLR while dealing with a similar issue on interests, set aside a judgment of the High Court where interest had been denied. The court proceeded to award interest on the purchase price at the rate of 20 per centum per annum, as from when it fell due.
27. In the present case, counsel for the Plaintiffs submitted that the base interest rate as at the time the purchase price fell due was at 10 per centum as per the Central Bank of Kenya Monetary Statement Policy for December 2017. Counsel annexed the said policy as part of her authorities. The Sale Agreement had no provision for the interest rate to be charged in the event of late payment as is the case herein. However, at Clause 2(1) of the Law Society Conditions of Sale [1989] the term “interest” is deemed as follows: “the annual rate of interest specified in the Special Conditions or, if none is so specified, two percentage points above the maximum rate of interest which may be charged by specified banks for loans or advances pursuant to section 39 of the *Central Bank of Kenya Act* Cap 491; provided that, if more than one maximum rate is so specified, the lowest rate shall be applied.
28. I have considered the pleadings, the evidence on record, submissions by counsel together with the relevant provisions of the law and find that the Plaintiffs have proved their case against the Defendant and are entitled to payment of the balance of the purchase price together with interest at 12 per centum and costs of the suit.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 6TH DAY OF JUNE, 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.**

