



**Singh v Africa International University (Civil Suit 432 of 2016)
[2022] KEELC 2444 (KLR) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEELC 2444 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
CIVIL SUIT 432 OF 2016
LC KOMINGOI, J
MAY 5, 2022**

BETWEEN

SADNA MEHER SINGH PLAINTIFF

AND

AFRICA INTERNATIONAL UNIVERSITY DEFENDANT

JUDGMENT

1. By a Plaint dated 27th April 2016, the Plaintiff seeks judgement against the Defendant for:-
 - a) An order of specific performance of the sale agreement dated 8th June 2016 against the Defendant.
 - b) In the alternative, refund of kshs.5, 400,000/= deposit towards purchase price.
 - c) Interest on (b) above.
 - d) A permanent injunction against the Defendant from selling, alienating or otherwise interfering or dealing with Land Reference Number 195/243.
 - e) Costs of this suit.
 - f) Any other relief the court deems fit to grant.

The Defendant's case

2. In its statement of defence dated 17th May 2016, the Defendant admitted that it entered into the sale agreement dated 8th June 2015 with the Plaintiff. It contended that it was an express term of the agreement that the completion date would be thirty (30) days from the date of service of notice by the vendor upon the purchaser of completion of sub division and issuance of the deed plan for the said plot by survey of Kenya and the Plaintiff was notified of the same through a letter dated 19th January



2016. It also contended that the Plaintiff was shown beacons prior to purchase and it is ready to repeat the process if requested. It was its case that by its letters dated 19th January 2016 and 3rd March 2016, it informed the Plaintiff of its readiness to complete the transaction but the Plaintiff failed to pay the balance of the purchase price. It also contended that the notice of forfeiture of 10% of the deposit and to rescind the agreement was in accordance with the terms of the agreement.

The Plaintiff's evidence

3. PW1, Sadna Meher Singh, the Plaintiff, testified on 20th September 2021. Her witness statement dated 27th April 2016, her list of documents dated 27th April 2016 and the further list of documents dated 29th July 2018 were adopted as part of her evidence in chief. She told the court that she paid kshs.5.4 million being 20% of the purchase price. She testified that she signed the sale agreement dated 8th June 2015 and that she had seen the property but it had not been subdivided. She stated that she was notified that the deed plan had been issued in January 2016, and on 3rd March 2016, she was issued with the completion notice. She stated that the beacons were pointed out at the time of sale but the access roads had not been done. She added that she only saw the mother title but she was not shown the title for the plot that she was buying. She stated that she seeks a refund of the purchase price plus costs and interest.
4. When cross-examined, she stated that she has abandoned the prayer for specific performance and she only seeks a refund of kshs.5.4 million plus accrued interest. When referred to page 3 of the sale agreement dated 8th June 2015, she stated that the property was under subdivision and she had chosen plot No.7. She added that she visited the site but the beacons were not there. She also stated that they had agreed that the purchase price would be Kshs.27 million and she paid 20% of the purchase price as per clause 2.1 of the agreement and she was to pay the balance of kshs.21.6 million on or before completion date. Referred to clause 3 that provides for the completion date, she stated that she was served with the completion notice and given 30 days to pay the balance but she did not pay the balance. She told the court that her lawyer received the Defendant's letter dated 20th January 2016 but when she went to the suit property, she found no access roads and beacons.
5. When referred to clause 11.2 of the agreement, she stated that she was issued with 21 days' notice. She also stated that according to the agreement, the purchaser would forfeit 10% of the purchase price if the balance was not paid and in absence of completion of the balance she would not be given completion documents. She stated that she is entitled to kshs.5.4 Million since she wanted to be shown the beacons and the access road before paying the balance.
6. When referred to the letter dated 10th March 2016 addressed to the Defendant's Advocates, she stated that the land rates receipts were to be given after she paid the balance and at clause 13(ii) of the agreement rates clearance certificate was to be issued after payment of the balance. She further stated that they had meetings at the Defendant's offices but she does not recall committing to pay the balance before she was given the completion documents.
7. On re-examination, she stated that her Advocates wrote the letter dated 10th March because she has not been shown the deed plan/beacons by the vendor.

The Defendant's evidence

8. DW1, one Nelson Kilonzo, an employee of the Defendant testified on 20th September 2021. His witness statement dated 19th May 2016 and the Defendant's list of documents dated 17th May 2016 were adopted as part of his evidence. He told the court that the Defendant can only refund 10% of the purchase price which was kshs.2.7 million as provided under clause 6 of the sale agreement. He added that the 10% was to be forfeited if purchaser was not able to complete the transaction and the vendor



was to refund upon finding another buyer for the plot. He added that they found a buyer and they are expecting to refund 10% of the purchase price. He further stated that they showed the Plaintiff the access road to the plot which had four beacons and it was not blocked. He stated that they went twice to the plot and the Plaintiff did not raise any issue regarding the beacons. He further stated that the Plaintiff never asked to commence developments in the suit property but since she has not paid the balance of the purchase price, she could not be allowed to develop. He also stated that they had a meeting with the Plaintiff where the Plaintiff committed to pay the balance but she did not make any payments after March, 2016 yet she had more than 90 days to pay as the Defendant gave her an opportunity to remedy the wrong by paying even after the notice to complete. He prayed that the suit be dismissed.

9. When cross examined, he stated that he signed the witness statement on behalf of the Defendant and he is authorized by the Defendant to act on its behalf as he is the campus manager. He also told the court that he did not show the Plaintiff the beacons after 19th November 2016 as she had been shown before and she had been issued with a copy of the mother title; LR No.195/54 but not the title to her plot. He added that the property was later sold in 2018 but the Defendant did not refund the Plaintiff as the issue was being handled by their lawyers.
10. On re-examination, he stated that the Plaintiff has never asked for a refund from the Defendant as from her explanation, she still wanted the land. He also stated that the beacons were set before the deed plans were issued by the Survey of Kenya therefore there was no change in the beacons/access road after the deed plans were issued and that the deed plan did not alter the Plaintiff's plot or access road. The Plaintiff had no genuine reason not to pay the balance of the purchase price.
11. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's submissions

12. They are dated 12th November 2021. Counsel for the Plaintiff raised the following issues for determination:-
 - a) Whether the completion notice issued by the Defendant was valid.
 - b) Whether the Defendant breached the sale agreement dated 8th June 2015.
 - c) Whether the Plaintiff is entitled to a refund of kshs.5, 400,000/= paid as deposit to the Defendant and interest thereon.
13. Counsel submitted that the Defendant issued a notice to complete prematurely and in clear breach of clause 11.3 of the agreement between the Plaintiff and the Defendant which stipulated that the Defendant was to point out beacons of the property to the purchaser prior to the completion date. He further submitted that clause 7.3 and 7.7 of the Law Society of Kenya Conditions of sale, 2015 also require the vendor to point out to the purchaser the survey beacons delimiting the property.
14. He added that the obligation imposed on the vendor under clause 11.3 is a substantial one that ought to have been adhered to by the Defendant. He put forward the case of *Cole v Rose* [1978] 3 ACC ER 1121 and the case of *British and Common Wealth Holdings PLC v Quadrey Holdings Inc* [1989] 3 ALL ER 492 cited in the case of *Boniface Kevin Omondi & Another v Marlborough Properties Ltd* [2015] e KLR. It was also his submission that upon subdivision of the suit property, the Plaintiff in writing requested the Defendant to issue her with the completion documents but it failed to do so therefore the Defendant cannot purport to issue a completion notice.



15. On whether the Defendant breached the sale agreement, he submitted that the Defendant failed to comply with clause 11.3 which mandated it to point out the survey beacons to the purchaser after it had subdivided the land. He added that the Defendant issued an invalid notice of completion and forfeited the Plaintiff's deposit of kshs.5,400,000/=.
16. On whether the Plaintiff is entitled to a refund of kshs 5,400,00/= interest thereon, he submitted that pointing out of the beacons was a prerequisite to be complied with by the Defendant and the fact that it refused to comply with the requirement amounted to breach of contract therefore the Plaintiff is entitled to a refund. He relied on the case of *Rebema w Njoroge Presbyterian Foundation & Another* [2018] e KLR.

The Defendant's submissions

17. They are dated 3rd February 2022. Counsel for the Defendant raised the following issues for determination.
 - a) The case for the validity of the completion notice.
 - b) The case whether the Defendant breached the sale agreement dated 8th June 2016.
 - c) The case for the refund of deposit in the sum of kshs.5,400,000/=.
18. On the issue of validity of the completion notice, counsel submitted that the Defendant received the deed from Survey of Kenya, duly informed the Plaintiff of this development and a completion notice followed thus the completion notice issued to the Plaintiff was valid and consequential.
19. He further submitted that the Plaintiff's failure to pay the balance and complete the purchase demonstrated that she was not ready and willing to perform her part of the contract within the stipulated time or at all. He added that it was right for the Defendant to invoke clause 10 of the sale agreement and make time of the essence as such, the completion notice is valid. He relied on Halsbury's Laws of England, 4th Edition, Volume 9, page 337, paragraphs 481 which points out: "The modern law, in the case of contracts of all types, may be summarized as follows. (1) The parties expressly stipulate that conditions as to time must be strictly complied with; (2) the nature of the subject matter of the contract or the surrounding circumstances show that time should be considered to be of the essence, or (3) a party who has been subjected to unreasonable delay gives notice." He also relied on the case of *Graham v Pitkin* [1992] ALL E.R. 235.
20. On the issue whether the Defendant breached the sale agreement dated 8th June 2015, he submitted that it was the Plaintiff who breached the agreement by dishonoring the notice of completion, dishonouring clause 10 of the sale agreement which provided that time was of essence, refusing to pay the balance of the purchase price and demanding to receive completion documents without settling the balance of kshs.21,600,000/=. He added that under clause 3 of the sale agreement, the completion date of the conveyance fell on 19th January 2016, more than 30 days from the notice of completion sent on 23rd October 2015 but the Plaintiff breached clause 3 by failing to pay the balance.
21. He also submitted that the special conditions under clause B(ii) provided that the Defendant would deliver to the Plaintiff the completion documents upon receipt of the balance of the purchase price and not earlier; which documents include the executed transfer, original title deeds, plan, copies of land rates and receipts for the years 2013, 2014 and 2015 and receipts paid for land rates for the plot. He added that in breach of condition B(ii), the Plaintiff's Advocates wrote to the Defendant's Advocates vide a letter dated 19th April 2016, insisting that the completion documents be released to the Plaintiff, notwithstanding the fact that the balance of the purchase price remained unsettled. He relied on the



- case on *Ngere Tea Factory Company Ltd v Alice Wambui Ndome* [2018]e KLR to dissuade the court from endorsing the Plaintiff's breach.
22. On the issue of refund, counsel urged the court to consider Law Society Conditions of sale at clause 13.(4.1) and the dictum in *Karanja Mbugua & Another v Mary bin Holding Co. Ltd*[2014]e KLR to find that the plaintiff is not entitled to a refund. It was his submission that the Plaintiff is bound by the terms of clause 6 of the sale agreement which provides that the purchaser will forfeit 10% of the purchase price and refund any sum paid beyond 10% if he finds a buyer. He relied on the case of *National Bank of Kenya v Pipelastik Samkolit (k) Ltd & Another* [2001]e KLR to submit that the parties are bound by the contract and the court is only invited to enforce. He also put forward the case of *Jennifer Muthoni Morigi & 2 Others v Homelands Development Investors Ltd*[2018]e KLR Where the court entered judgement in favour of the vendor citing breach by the purchaser and the court issued an order forfeiting deposit.
23. I have considered the pleadings and the evidence on record, the written submissions filed on behalf of the parties and the authorities cited. The issues for determination are:-
- (i) What were the Defendant's obligations before the completion date?
 - (ii) Which party in in breach of the sale agreement dated 8th June 2015?
 - (iii) Whether the Defendant issued a completion notice prematurely.
 - (iv) What are the consequences of breach for the party in breach?
 - (v) Is the Plaintiff entitled to a refund of kshs.5, 400,000?
 - (vi) Who should bear costs of this suit?
24. The Plaintiff and the Defendant entered into the sale agreement dated 8th June 2015 as purchase and vendor respectively. The Plaintiff contended that the Defendant breached the agreement by failing to point out beacons to her, failing to provide her with completion documents upon subdivision, forfeiting part payment of the deposit and rescinding the agreement when it was at fault. On the other hand, the Defendant contended that the Plaintiff was in breach for failing to pay the balance of the purchase price thus failing to comply with the completion notice issued by the Defendant.
25. Before the completion date, the vendor had an obligation specified at clause 11.3 of the sale agreement. It provides, "The vendor undertakes to point out the beacons of the property to the purchaser prior to the completion date and to repair/replace any damaged or missing beacon prior to the completion date." It was the Plaintiff's testimony that she was not shown the beacons. DW1 stated that the first time the Plaintiff was taken to the site to view the property, she was shown an access road and the four beacons. It was also his evidence that the Plaintiff did not request to be shown the marked beacons the second time. There is no evidence that the Plaintiff sought to be shown the beacons as claimed and the Defendant refused to show her. No correspondence was sent from her Advocates making the request.
26. The Plaintiff claimed that the Defendant was also obliged to issue her with completion documents upon subdivision. Clause B (ii) of the agreement lists the completion documents and further provides that they will be delivered to the vendor's advocates upon receipt of the balance of the purchase price but on or before completion. The Plaintiff did not pay the balance of the purchase price. She was therefore not entitled to the completion documents.
27. What was the completion dated? clause 2.2 provides, 'the completion date shall be 30 days from the date of service of notice by the vendor upon the purchaser of completion of subdivision and issuance of the deed plan for the said plot by survey of Kenya.' In its letter dated 19th January 2016, the Defendant



- notified counsel for the purchaser/plaintiff that it had completed subdivision and obtained the deed plan for the property. Simultaneously with the notice, counsel for the vendor also issued a completion notice with the rider that the balance of the purchase price would be due within 30 days of service of the letter. The notice was not premature.
28. Clause 7 provides, “if completion fails to take place due to default not attributable to the purchaser, the vendor shall pay and refund all monies received from the said purchaser upon expiry of the completion notice together with interest thereon from the time the said amount was paid up to the time of refund to the purchaser.”
 29. PW1 when cross examined by the Defendant’s counsel, told the court that she had abandoned the prayer for specific performance and that she wanted a refund of the purchase price.
 30. By a letter dated 19th January 2016 to M/S S. M. Malonza & Co. Advocates M/S Ojiambo & Co. Advocates attached a copy of Deed Plan and release letter. Notice was also given under clause 3 of the Sale Agreement that the purchaser (Plaintiff) herein pays the balance within 30 days and that the completion documents would be released upon payment of the balance of the purchase price.
 31. Subsequently by a letter dated 3rd March 2016 M/S Ojiambo and Co. Advocates issued a completion notice to the Plaintiff.
 32. By a letter dated 10th March 2016 M/S S. S. Malonza & Co. Advocates wrote to M/S Ojiambo & Co. Advocates raising the issue that the Plaintiff was unable to find the beacons on the ground.
 33. On the 15th April 2016, M/S Ojiambo & Co. Advocates wrote to the Plaintiff’s Advocate indicating that the 21 days had expired on 30th March 2016 and the Plaintiff stood to forfeit 10% of the deposit. In reply, the Plaintiff’s Advocates wrote a letter to the Defendant’s Advocate calling for completion documents before the Plaintiff could pay the balance of the purchase price. It is clear from the above correspondences that the Plaintiff did not pay the balance of the purchase price so that the transaction could be completed.
 34. In the case of *Ngere Tea Factory Co. Ltd v Alice Wambui Ndome* [2018] e KLR the court stated thus;

“The terms of the Agreement to sale are clear and I find that the Defendant herein did not breach any of them. On the contrary, I find that it was the Plaintiff that breached the said terms by failing to remit the balance of the purchase price within the stipulated time as agreed by the parties. A party cannot run away from the terms of its agreement. It has often been stated that the court’s function are to enforce contracts that the parties enter into. The court cannot rewrite the party’s agreements”.
 35. Also in the case of *National Bank of Kenya Ltd v Pipeplastic Samkolit Ltd & Another* [2001] e KLR it was held thus:-

“A court of law cannot rewrite 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”.
 36. It is clear from the clause 6 of the Agreement that the Plaintiff is only entitled to a refund of 10% of the deposit. The plaintiff has failed to demonstrate that she fulfilled her part of the bargain specifically that she paid the balance of the purchase price as stipulated by the sale agreement.
 37. Her claim that she could not locate the beacons on the ground was a non-issue.



38. I find that she is only entitled to a refund of 10% of the deposit as she is the one who breached the sale agreement.
39. Accordingly, judgment is entered for the Plaintiff against the Defendant for a refund of 10% of the deposit which translates to Kshs.2,700,000/-. Each party do bear own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED NAIROBI THIS 5TH DAY OF MAY 2022.

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L. KOMINGOI

JUDGE

In the presence of:-

Mr. D. Makau for the Plaintiff

Mr. Ojiambo for the Defendants

Steve - Court Assistant

