



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO 3 OF 2020**

**JOSECK IKAI MUKUHA.....PLAINTIFF**

**VS**

**JAMES IRUNGU KANYUGA.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff instituted the suit as against the Defendant vide a plaint dated 17/ 05/2019 seeking judgment against the Defendant for: -
  - a. Payment for Kshs. 26,000,000/=.
  - b. Interest on (a) above.
  - c. Costs of the suit and interest.
2. The Plaintiff avers that on or about 5/7/2014 he entered into a sale agreement with the Defendant for a parcel of land L.R. No. LOC.12/SUB-LOC.1/GAKIRA/T537 for a consideration of Kshs. 13,000,000. The Plaintiff avers that at the signing of the agreement paid a consideration of Kshs. 500,000 and on dates 2/08/2014 and 11/08/2014 paid Kshs. 100,000 and Kshs. 400,000 respectively.
3. It is the Plaintiff's case that it was a term of the agreement that the consideration would be financed by Unaitas Sacco and the said Sacco granted the Plaintiff the loan on the 11/08/2014 which the Plaintiff affirms that an amount of Kshs. 12,000,000 was paid to the Defendant's account at Unaitas Sacco.
4. The Plaintiff further averred that during the pendency of the transaction he carried out a search over the suit property and it is then he discovered that the Defendant did not have a good title to the property. He avers that he found that there was a suit Murang'a ELC No. 32 of 2017 where the Defendant was found to have illegally sold the suit property. He pleaded breach of contract against the Defendant and prayed for judgment against the Defendant as per the terms of the sale agreement.
5. The Defendant filed a defence dated 10/07/2019. It is to be noted that the same is not signed and therefore cannot be taken as a statement of defence. The claim of the Plaintiff is therefore undefended.
6. The Plaintiff called one witness and produced a bundle of documents to buttress his case. PW1 testified that he is a businessman and sued the Defendant over a sale agreement for the suit property; he adopted his witness statement filed on 17/05/2019 and list of documents filed on the same date being exhibits 1-10 as his evidence in chief.
7. He further testified that the Defendant was served on four occasions but failed to come to Court to defend the suit. It was his testimony that he had been servicing the loan and had paid the Defendant the consideration in cash. His testimony is that he is demanding Kshs. 26,000,000; cost of the suit and damages for breach of contract, with that it marked the close of Plaintiff's case.
8. The Plaintiff submitted that it was during the hearing of Murang'a ELC No. 32 of 2017 that he learnt that the Defendant had sold the property illegally and fraudulently as he did not have a good title. He submitted that the agreement conditioned that a breach would result in refund of the purchase price in two fold.
9. The Plaintiff drew three issues that he sought the honorable Court should consider, as to whether the Defendant breached the contract, the Plaintiff adopted the black's law definition of breach of contract. He submitted that it was the obligation of the Defendant to transfer a valid and clean title over the suit property to him being the key obligation of the agreement but the Defendant breached.
10. The Plaintiff submitted that the Defendant's conduct towards the proceedings portrayed an admission of his conduct of breach of the contractual obligation as contained in the sale agreement. The Plaintiff asserts that the Defendant failed to prosecute his defence and having

admitted the contents of the plaint meant an admission of breach. It is the Plaintiff's submission that the breach of contractual obligation has occasioned him economic and financial hardship. He submits that he continues to service a loan which he did not benefit out of since there was an order of cancellation of title thereby losing title to property.

11. On whether the Plaintiff is entitled to the damages, the Plaintiff relied on the case of **Hadley vs. Baxendale (1854) 9Ech214** submitting that he is entitled to the damages. The damages according to the Plaintiff are meant to protect persons from like him from unscrupulous vendors and being so he wishes that the honorable Court protects him too. He calls on the honorable Court to look at the default clause as contained in the agreement which he says was voluntarily signed and enforce it.

12. It is not in dispute that the Plaintiff and the Defendant entered into an agreement as evident by the Pexh1 which is an agreement entered into on the 5/7/2014 between the Plaintiff and the Defendant. The Defendant in his unsigned defence dated 10/7/2019 admitted the contents thereof and even goes ahead to admit having received the consideration for the purchase.

13. There is an admission on the part of the Defendant confirming the Plaintiff's claim and relevantly, Pexh6 intimates that the Plaintiff held an account with Unaitas SACCO and it is the said SACCO that granted the Plaintiff loan vide a Letter of Offer produced as Pexh 4. As to whether the monies were disbursed to the Defendant the Plaintiff has been demonstrated in the Pexh7 and also the Defendant's defence.

14. This Court voided the transaction between the Plaintiff and the Defendant vide the judgment in Murang'a ELC No. 32 of 2017 delivered on 8/11/2018. The effect of the judgment was that the charge registered over the suit property was cancelled.

15. The issues the Court is left to determine is whether the contract was valid and enforceable and whether the Plaintiff is entitled to the prayers sought.

16. Section 3 of the Law of Contract Act provides that:

“(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:”

17. The contract entered into was for sale of land and which contract was reduced into writing as evident in Pexh1. The agreement was drawn by N.M. Kiriba & Company Advocates and which was signed by both the vendor and the purchaser and attested by Counsel. The same was thus in compliance with the above provisions.

18. It is trite law that the elements of a valid contract constitute offer, acceptance and consideration. It was a term of the contract that the consideration for the sale was Kshs. 13,000,000 which amount was paid as per the terms. It was the Plaintiff's testimony that Kshs. 500,000 was paid at the signing of the agreement and the remainder was to be paid from a loan. The Plaintiff has produced before the Court a letter of offer from Unitas Sacco which shows that the Plaintiff did in fact execute the letter of offer. That upon execution of the offer, a loan of Kshs. 12,000,000 was disbursed to the Plaintiff's account who then transferred the monies to the Defendants account as per Pexh7(Inter Account/GL Funds Transfer Form).

19. There are two acknowledgment receipts produced as Pexh 2 and Pexh3 which cumulatively indicates that the Defendant received a sum of Kshs. 13,000,000 from the Plaintiff, a fact which is not disputed this far. The contract to this end was therefore legally executed and parties were to undertake their performance as per the agreement.

20. The Court in **Nelson Kivuvani Vs Yuda Komora & Another, Nairobi HCCC No.956 of 1991**, opined that an agreement for sale of land

**“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”.**

21. To this stretch the parties entered into a valid contract for the sale and transfer of the parcel of land hence validating the contract. However, the Court in Murang'a ELC No. 32 of 2017 found that, “the 2<sup>nd</sup> Defendant did not possess a valid legal title neither did the 3<sup>rd</sup> Defendant on account of proven fraud, illegality and procedural improprieties on the part of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendant” The Defendant herein therefore did not have a good title to transfer the land to the Plaintiff thus was voided. It has been settled that a party cannot give that which he does not have; therefore, the Defendant could not have given title to land if he did not have.

22. The remedy available for the Plaintiff is for compensation for breach of contract and therefore a refund of the purchase price, the contract having become incapable of being enforced thus putting parties to a position they were before the contract.

23. The agreement under clause 9 mandates the Defendant herein to refund the purchase in two fold in case of default. It has been held that Courts cannot re-write contracts nor import terms and conditions that do not form part of a contract. Scrutton L. J in **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592**, held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the

Court thinks it would have been reasonable to have inserted it in the contract.”

24. The agreement expressly stated..... “that should the agreement fail due to the fault of the purchaser he shall forfeit half of the purchase price and if the agreement fail due to the fault of the vendor he shall pay the purchase price in two folds” It is this clause that the Defendant confirms and admits that the Plaintiff is entitled save that he alludes to parties not party to the suit to pay.

25. Parties’ having agreed on the terms, Court is bound by their intent and enforce the same as was the case in the Court of appeal sitting in Eldoret in **Andrew Kiprop Ronoh v Vitalis Sunguti Ligare & Another [2018] eKLR** case where the Court of appeal awarded interest on breach where parties had made provisions for penalty in case of default and the trial Court had failed to grant the same.

26. The Plaintiff prays for interest on the sum, Court has the discretion to grant as provided for by section 26 of the Civil Procedure Act which provides,

*“26. (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.*

27. (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have ordered interest at 6 per cent per annum.

28. The purpose of interest in many cases in liquidated claims is normally to compensate the party to whom wrongful action was meted on the benefits on the monies he has been deprived of. In this case the Plaintiff did make payment to the Defendant, there has been no refund of the money since the cancellation of title and the Defendant made no attempt to demonstrate intention to refund, for the economic interest of the Plaintiff it would be fair to award interest.

29. This being the case I enter judgement in favour of the Plaintiff against the Defendant as follows:

- a. Liquidated damages in the sum of Kshs. 26,000,000.
- b. Interest on (a) above at Court’s rate until payment in full.
- c. Cost of the suit.

**DELIVERED, DATED AND SIGNED AT MURANG’A THIS 26<sup>TH</sup> DAY OF MAY 2021**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of:**

**Ndung’u HB for Mbiyu Kamau for the Plaintiff**

**Defendant: Absent**

**Kuiyaki/Alex: Court Assistants**