



REPUBLIC OF KENYA



KENYA LAW
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**Gitau & another v Bere & 3 others (Civil Case 1354 of 1993)
[2025] KEHC 2395 (KLR) (Civ) (6 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 2395 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 1354 OF 1993

JN MULWA, J

MARCH 6, 2025

BETWEEN

CHARLES REUBEN GITAU 1ST PLAINTIFF

ESTHER WAMBUI GITAU 2ND PLAINTIFF

AND

GIDEON KINUTHIA BERE 1ST DEFENDANT

**CHARLES GITONGA KINUTHIA (SUED AS LEGAL REPRESENTATIVES OF
THE ESTATE OF HIRAM BERE KINUTHIA) 2ND DEFENDANT**

ESTHER WANJIRU NGIGI 3RD DEFENDANT

**ROBERT MATATHIA NGIGI (SUED AS LEGAL REPRESENTATIVES OF THE
ESTATE OF FRANCIS NGIGI MATATHIA) 4TH DEFENDANT**

JUDGMENT

1. At the onset, Charles Reuben Gitau and Esther Wambui Gitau (hereafter the 1st and 2nd Plaintiffs respectively) instituted the present suit by way of a plaint dated 18th March, 1993 and sought reliefs in the nature of an order to the effect that Hiram Bere Kinuthia and Francis Ngigi Matathia (hereafter the 1st and 2nd Defendants respectively) do transfer Plot No. 17 (being a portion of L.R. No. 14702) (hereafter the subject property) to the Plaintiffs; and a further order that the Registrar-High Court be authorized to sign the requisite forms for effecting transfer of the subject property in default of compliance by the Defendants. The Plaintiffs similarly sought costs of the suit. The suit was premised on an agreement for sale dated 1st April, 1987 and entered into between the parties herein, whereby the Defendants had agreed to sell the subject property to the Plaintiffs for a consideration of Kshs. 180,000/-.



2. In summary, the Plaintiffs pleaded that pursuant to the agreement for sale, they were to pay a deposit sum of Kshs. 18,000/- to the Defendants, and to thereafter pay the remaining balance upon completion. The Plaintiffs pleaded that they performed their contractual obligations by paying the above deposit sum, but that the Defendants defaulted in their contractual obligations on their part by failing and/or refusing to produce the deed plan and/or a valid clearance certificate in respect of the subject property. That instead, the said Defendants purported to rescind the contract on 20th May, 1992 without lawful cause.
3. The court record shows that upon entering appearance, the Defendants filed a statement of defence and counterclaim challenging the claim. In their defence, they denied the key averments in the plaint. By way of their counterclaim, the Defendants prayed for an order for vacant possession to issue against the Plaintiffs herein.
4. Upon hearing thereof, Aluoch, J. by way of her judgment delivered on 29th June, 2005 dismissed the Plaintiffs' case for want of proof save that the 1st Defendant was directed to refund the deposit sum of Kshs. 18,000/- earlier paid by the Plaintiffs. The Learned Judge however allowed the Defendants' counterclaim as prayed.
5. The record shows that being aggrieved by the aforesaid decision, the Plaintiffs challenged the same by way of an appeal, to the Court of Appeal. Upon hearing thereof, the Court of Appeal delivered its judgment on 11th December, 2015 thereby allowing the appeal and consequently setting aside the decision rendered by the High Court on 29th June, 2005. The Court of Appeal therefore ordered that the Defendants do refund to the Plaintiffs the deposit sum of Kshs. 18,000/- plus interest thereon at court rates from the date of filing the suit until payment in full, and that the matter be remitted back to the High Court for hearing and determination of the issue of assessment of damages payable to the Plaintiffs.
6. It is apparent from the record that thereafter, both the 1st and 2nd Defendants died on separate dates; a result of which their respective personal representatives took out the requisite letters of administration and were therefore substituted in place of the said Defendants.
7. That said, pursuant to the above orders and directions deriving from the Court of Appeal, the matter is now before this court solely for hearing and determination of the question of assessment of the costs awardable to the Plaintiffs.
8. At the hearing of the suit, the 1st and 2nd Plaintiffs' case relied on the testimonies of two (2) witnesses including that of the 1st Plaintiff, while the 1st and 2nd Defendants each called one (1) witness.
9. The Plaintiffs first called Paul Ngathu Ngotho as PW1. The witness testified that he is a full time arbitrator by profession and a lecturer at the University of Nairobi, in addition to undertaking property valuations and surveys. He then adopted his signed witness statement dated 10th September, 2021 as part of his evidence-in-chief and produced the valuation report dated 25th August, 2021 and prepared by himself as P. Exhibit 10. The witness then proceeded to testify that the valuation report relates to the subject property which is situated in Garden Estate and that at the time of preparing the report, the said property was valued at the sum of Kshs. 60,000,000/- exclusive of improvements thereon. He further testified that the said property contains black cotton soil and that had the same contained red soil, its valuation would have exceeded the above mentioned sum. The witness added that he charged a fee of Kshs. 200,000/- for preparation of the report, and tendered the supporting Fee Note as P. Exhibit 2. However, the witness stated that he is yet to raise a fee note, but that he reserved the right to charge time spent in court attendances, at a rate of Kshs. 25,000/- per hour.



10. In cross-examination, the witness stated that the title to the subject property is leasehold in tenure, with effect from 1st November, 1988; adding that the said property serves as a residential premises. He further stated that going by his report, there is no sewerage system in the area and that during the period between 1987 and 1992 he was familiar with adjacent property values, since there were similar ½ acre plots being sold within the vicinity.
11. In further cross-examination, the witness testified that from his understanding of the decision rendered by the Court of Appeal in the matter, the Defendants herein were ordered to pay the market value of the subject property as compensation to the Plaintiffs, taking into account the current market value for similar properties, and not the market value then. That in preparing his report, he did not account for the deposit sum earlier paid to the Defendants by the Plaintiffs. That nevertheless, he analyzed the property market rates for nearby properties. It was his testimony that previously in the year 1987 and prior to its subdivision, the parcel of land containing the subject property was agricultural in nature.
12. During re-examination, the witness reiterated that the subject property as well as neighbouring properties, are leasehold and residential in nature.
13. The 1st Plaintiff who was PW2 similarly adopted his executed witness statement dated 10th September, 2021 as his evidence-in-chief and produced the Plaintiffs' list and bundle of documents of like date, as P. Exhibits 3 to 10 and their supplementary list and bundle of documents dated 31st October, 2022 as P. Exhibits 11 and 12. He then stated that together with the 2nd Plaintiff who is his wife, they are seeking compensation arising from the aborted sale of the subject property. The 1st Plaintiff stated that he had previously taken possession of the subject property and thereafter undertaken vegetable and pig farming, in addition to affecting connection of both water and electricity. The 1st Plaintiff further stated that he had also put up a farm house and had intended to put up a rental property thereon. That he was therefore seeking compensation for the lost opportunity.
14. During cross-examination, he testified that pursuant to the sale agreement pertaining to the subject property, the Plaintiffs paid a deposit in the sum of Kshs. 18,000/- being 10% of the purchase price of Kshs. 180,000/- and were ready and willing to clear the remaining balance. He further testified that in the year 2021 he received a refund on the deposit sum plus interest therein, through his lawyers. It was his testimony that soon after executing the sale agreement dated 1st April, 1987 he took possession of the subject property with the permission of the Defendants, though the same was not reduced in writing. That it was not until 20th May, 1992 that he came to learn that the sale had fallen through, though he was ready on his part to settle the remaining balance of the purchase price. That the subject property measured one (1) acre and hence he could have put up two (2) houses thereon. That the subject property was however transferred to the 2nd Defendant by the 1st Defendant. That he desired to have the said property returned to him but the Court of Appeal, in rendering its decision, confirmed that the same had already been subdivided and sold to third parties. That he therefore seeks compensation for the resulting loss.
15. In further cross-examination, the 1st Plaintiff gave evidence that the sale agreement was not for agricultural purposes and that he had no knowledge as to whether the subject property was subject to the consent of the Land Control Board. He restated his earlier testimony that nevertheless, he had connected water and electricity on the said property though he did not have any supporting documentation. He equally gave evidence that though he had initially registered a caveat thereon, the same was apparently removed.
16. At the point of re-examination, the 1st Plaintiff inter alia, restated his earlier evidence on receipt of a refund on the deposit sum. This marked the close of the Plaintiffs' case.



17. Charles Gitonga Kinuthia being one of the administrators to the estate of the 1st Defendant, gave evidence as DW1. Therein, he adopted his signed witness statement dated 6th December, 2021 and produced his list and bundle of documents dated 9th December, 2021 as D1. Exhibits 1 to 10. The witness proceeded to state that he has been a resident of Garden Estate since the year 1964 on a parcel of land measuring about 1.7 acres. That the said parcel of land contains restrictions that a house ought to measure ½ an acre with a distance of about 450 metres between houses, which restrictions applied to the subject property as well.
18. In cross-examination, the witness testified that the issue of breach of contract was confirmed by the Court of Appeal in its decision on the matter. The witness confirmed the terms of the material sale agreement, adding that the valuation of the subject property at the sum of Kshs. 60,000,000/- would constitute an approximate market value thereof. He proceeded to state that a portion of the subject property was sold to the 2nd Defendant at a consideration of Kshs. 13,500,000/- in the year 2013. That had the subject property not been sold to a third party, it would have been owned by the Plaintiffs, hence by virtue of the sale, the Plaintiffs lost the market value of the said property.
19. In further cross-examination, the witness gave evidence that the initial value of the subject property was placed at Kshs. 180,000/- at the time of execution of the material sale agreement, with the Plaintiffs subsequently paying a deposit sum constituting 10% of the purchase price. That the Plaintiffs lost the value of the subject property as at 1997, and that it is the advocates on record who were to come up with the amount payable to the Plaintiffs.
20. In re-examination, the witness testified that it is the administrators of the estate of the 2nd Defendant who benefited from the sale of the subject property, thus marking the close of the 1st Defendant's case.
21. Robert Matathia Ngigi testified as DW2, in his capacity as one of the administrators to the estate of the 2nd Defendant. Upon adopting his signed witness statement dated 19th January, 2021 and producing his list and bundle of documents of like date as D2. Exhibits 1 to 3, the witness proceeded to state that he is a retired civil servant and a resident of Lower Kabete. The witness further stated that he supports the evidence tendered by DW1. He testified that the amount sought by the Plaintiffs on damages is exorbitant, adding that the said Plaintiffs received a refund of the deposit sum of Kshs. 18,000/-. That at the time of executing the sale agreement, the subject property belonged to the 1st and 2nd Defendants in equal shares and hence the damages awarded in the present suit should be incurred by both Defendants.
22. During cross-examination, the witness gave evidence that he was aware of the decision rendered by the Court of Appeal, in effect finding the Defendants herein to be in breach of the material sale agreement. That as a result, the Plaintiffs were deemed to be entitled to an award of damages. The witness further gave evidence that as at 1993 being the year in which the present suit was filed, the purchase price of the parcel of land on which the said property sat on, was placed at Kshs. 950,000/- per acreage. That the amount stated in the valuation report which was tendered by the Plaintiffs is therefore an exaggeration.
23. During further cross-examination, DW2 echoed his earlier testimony, save to add that seven (7) plots were registered in the names of the two (2) families representing the 1st and 2nd Defendants. That upon sale of the parcel of land which constituted the subject property for a consideration of Kshs. 13,500,000/-, the witness did not remit any of the proceeds recovered therefrom to the family of the 1st Defendant.
24. At the point of re-examination, the witness testified that he was under no obligation to share the proceeds of the above sale with the estate of the 1st Defendant since the entire parcel of land was



apportioned equally between the two (2) Defendants , with each party receiving seven (7) parcels of land. This marked the close of the 2nd Defendant’s case.

25. The parties were therefore directed to file and exchange written submissions in addressing the question of damages. On their part, the Plaintiffs in summary, urge this court to award them a sum of Kshs. 60,000,000/- being the value of the subject property as at the year 2021, pursuant to the valuation report tendered at the trial, adding that the Plaintiffs would have had to part ways with the abovementioned sum in order to acquire a similar plot in the same area at the time. The Plaintiffs rely inter alia, on the case of *Criticos v National Bank of Kenya Limited* (as the successor in business to Kenya National Capital Corporation Limited “Kenyac”) & another [2022] KECA 870 (KLR) in which the Court of Appeal held that the appellant therein, having been deprived of his property, was entitled to special damages being a sum equivalent to the value of the said property.
26. It is the submission by the Plaintiffs that under the law of contract, damages for breach of contract should be aimed at setting the aggrieved party as much as possible, in the position he or she would have been had the breach not occurred. In submitting so, the Plaintiffs borrowed from the case of *Co-operative Bank of Kenya Ltd v Biwott* [2022] KEHC 9946 (KLR) where the above legal principle was restated.
27. In addition to seeking the above mentioned sum, the Plaintiffs also seek the sum of Kshs. 200,000/- being the fees said to have been incurred in obtaining the valuation report (P. Exhibit 1). The Plaintiffs likewise pray for costs of the suit.
28. For the 1st Defendant, it is submitted that at the time of repudiation of the contract, the Plaintiffs had not paid the full purchase price in respect of the subject property. It is further submitted that at the time of repudiation, the said property was valued at Kshs. 950,000/-. That in the premises, the Plaintiffs are entitled to a sum of Kshs. 770,000/- for loss of bargain, being the difference between the value of the subject property at the time of repudiation and the purchase price thereof, pursuant to the sale agreement. The 1st Defendant equally submits that the Plaintiffs would be entitled to interest at 12% p.a. being the court rates applicable then, tabulated between March 1993 and June 2016 (being the date on which the Court of Appeal delivered its judgment in respect of the dispute) and amounting to Kshs. 2,147,224.10. That consequently, the Plaintiffs are only entitled to a total sum of Kshs. 2,917,224.10 on damages.
29. Various authorities are cited in the 1st Defendant’s submissions, including the case of *Millicent Perpetua Atieno Wandiga & Another v John Chege* [2013] eKLR in which the court applied a similar formula in awarding damages for loss of bargain to the plaintiff in that instance. It is equally submitted that the damages awarded to the Plaintiffs should be paid out of the estate of the 2nd Defendant, in view of the fact that the subject property was transferred to his administrators. The 1st Defendant urges the court to exercise its discretion in awarding costs of the suit.
30. The 2nd Defendant on his part contends that the Plaintiffs did not comply with the directions given by the Court of Appeal, adding that the valuer who undertook a valuation of the subject property and prepared a valuation report to that effect did not demonstrate any comparisons made in respect of the subject property or adjacent properties in the years between 1987 and 1992, or at the time of the Court of Appeal judgment. In his view, the proper period ought to be between 1987 and 1993. It is his submission that the Plaintiffs would therefore only be entitled to an award on general damages for breach of contract, to the tune of Kshs. 180,000/- with reliance being placed on the case of *Amina Abdul Kadir Hawa v Rabinder Nath Anand & another* [2012] KEHC 2370 (KLR) where the court awarded a sum of Kshs. 300,000/- on general damages for breach of contract. The 2nd Defendant urges the court to decline to grant the sum of Kshs. 200,000/- sought on the valuation fees.



31. The Plaintiffs rejoined with supplementary submissions, by and large reiterating their earlier submissions, maintaining that the Court of Appeal directions inferred that the Plaintiffs are entitled to receive damages which would put them in the position they would have been, had the contract in question not been repudiated. That in this instance, the applicable time period would be 1992. The Plaintiffs similarly submit that the applicable value is that assessed in the valuation report dated 2021 and tendered as an exhibit. That in the premises, the Plaintiffs are entitled to loss of bargain being the difference between the valued sum of Kshs. 60,000,000/- and the contract price of Kshs. 180,000/- plus interest thereon. Likewise, the Plaintiffs also seek costs of the suit.
32. The court, upon considering the evidence and the competing submissions on record, reiterates that the sole issue for determination at this juncture is the assessment of damages awardable to the Plaintiffs, pursuant to the orders resulting from the judgment delivered by the Court of Appeal on 11th December, 2015 in Civil Appeal No. 201 of 2005 arising from the judgment earlier delivered in the present suit on 29th June, 2005.
33. Upon a perusal of the record, it is apparent that though the 2nd Defendant made a proposal for an award on general damages to the Plaintiffs in place of quantifiable damages, neither the Plaintiffs nor the 1st Defendant advanced any arguments on the question of general damages for breach of contract.
34. Suffice it to say that, it is well settled that general damages are usually not recoverable in claims for breach of contract. This position was reaffirmed by the Court of Appeal in the case of ...

“...as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In DHARAMSHI vs. KARSAN [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication.”
35. In view of the foregoing legal principle coupled with the fact that the Plaintiffs are seeking quantifiable damages, there is no basis upon which to consider or grant general damages here.
36. On the quantifiable damages sought, as earlier mentioned, the Plaintiffs are essentially seeking damages for loss of bargain to the tune of Kshs. 60,000,000/- being the purported value of the subject property pursuant to the valuation report dated 25th August, 2021 and produced as P. Exhibit 1. The Plaintiffs are likewise seeking the sum of Kshs. 200,000/- being the fees allegedly incurred in preparation and obtainment of the said valuation report, pursuant to the Fee note dated 25th August, 2021 (P. Exhibit 2).
37. In contrast, the 1st Defendant urges that the Plaintiffs be awarded a sum of Kshs. 770,000/- being the difference between the purported market price of the subject property as at the time of repudiation of the sale agreement (Kshs. 950,000/-) and the contractual price listed in the sale agreement (Kshs. 180,000/-) together with interest thereon. The 2nd Defendant on his part restricts his submissions to the question of general damages, which has already been addressed by this court as mentioned hereinabove. The 2nd Defendant however urges the court to decline to grant the sum of Kshs. 200,000/- sought on the premise of the valuation report.
38. Upon examination of the record, it is not in dispute that pursuant to the contractual sale agreement dated 1st April, 1987 (P. Exhibit 3) entered into between the Defendants on the one part and the Plaintiffs on the other part, the latter parties paid a sum of Kshs. 18,000/- being the deposit for the subject property which was to be sold at an agreed consideration of Kshs. 180,000/-.



39. Upon further examination of the record, it is not in dispute that the above contract was subsequently cancelled by the Defendants vide the letter dated 20th May, 1992 (D1. Exhibit 4).
40. Be that as it may, the Court of Appeal (whose judgment triggered to the present proceedings) upon finding that the Defendants herein were in breach of the above-referenced contract, reasoned that in making such orders as would have the impact of putting the Plaintiffs in a position ante, the court would be required to equally consider the value of the money in question, the time that has since lapsed, the inflation rate and the conduct of the Defendants herein. The Court of Appeal was satisfied that the Plaintiffs were entitled to an award of quantifiable damages as well as a refund of the deposit sum paid.
41. It is not in dispute that the deposit sum of Kshs. 18,000/- has already been refunded to the Plaintiffs, together with interest accrued thereon. The Plaintiffs on their part purport to majorly rely on the valuation report dated 25th August, 2021 (P. Exhibit 1) in claiming damages of Kshs. 60,000,000/-. It is noteworthy from the record that the valuation report tendered is incomplete. Be that as it may, the court is of the view that the said report cannot form a proper and fair basis for assessing damages here, the same having been prepared close to six (6) years after delivery of the judgment by the Court of Appeal. Otherwise, the Plaintiffs would unjustly enrich themselves and yet the subject contract was repudiated way back in the year 1992. It is also noteworthy that none of the parties tendered a valuation report in respect of the subject property at the time of repudiation, or at the very least, at the time of delivery of the Court of Appeal judgment, for this court's reference and consideration in making its assessment.
42. Further to the foregoing, the court observed that while the Plaintiffs averred that they had previously taken possession of the subject property and undertaken various developments thereon at all material times, no credible material or documentation at all was tendered to support those averments and to support the allegations of loss/damage suffered in that regard.
43. In the circumstances, the court; upon being guided by the decision in *Gami Properties Limited v National Social Security Fund Board of Trustees & Chief Land Registrar* [2021] KECA 673 (KLR) where the Court of Appeal upheld the decision by the High Court to assess loss on the difference between the contract price and the value of the suit property around the time of breach; will rely upon a copy of the sale agreement dated 1st June, 1993 (D1. Exhibit 10) entered into between the Defendants herein and one Anthony Mwaniki Gatumo in respect of a property adjacent to the subject property, namely L.R. No. 14702/21 Garden Estate, at a consideration of Kshs. 950,000/-. In the court's view, the said contract would form a reasonable basis for assessment of damages, in the absence of a relevant valuation report.
44. However it is common knowledge that property values ordinarily appreciate upwards as evidenced in the various values in the sale agreements in 1987 at Kshs, 180,000/= and 1992 at approximately Kshs. 2,900,000/= and four years later in 1996 when the Court of Appeal rendered its decision, the upward trajectory is evident. Therefore, taking into account the above sum of Kshs. 950,000/- alongside the contract price of Kshs. 180,000/- agreed upon in respect of the subject property, and the demonstrated sale price around 1996 at Kshs. 2,900,000/= and the sale price of a similar parcel in the vicinity in 1992 as aforesaid, the court is persuaded to assess damages by way of the approximate difference thereon, to constitute a sum of Kshs. 2,720,000/- This sum, in the court's view, will constitute reasonable compensation to the Plaintiffs and will put them back in the position they would have been, had the material contract not been breached and/or repudiated by the Defendants.
45. Concerning the sum of Kshs. 200,000/- sought on the fee note in respect of the valuation report, it is clear that the same constitutes special damages. The law on special damages is tried and true; that a



claim on special damages must be specifically pleaded and strictly proved. Upon perusal of the record, the court observed that while the Plaintiffs tendered a fee note dated 25th August, 2021 for the sum of Kshs. 200,000/- as P. Exhibit 2, no material was tendered to demonstrate that the said sum was paid out by the Plaintiffs by way of receipts or at all. In the circumstances and upon considering the legal principles as pertains to special damages, this court declines to award the sum sought here.

46. In the end therefore, judgment in terms of quantifiable general damages is hereby entered in favour of the 1st and 2nd Plaintiffs as against the 1st and 2nd Defendants jointly and severally, in the sum of Kshs. 2,720,000/-.

The Plaintiffs shall also have the costs of the suit and interest on the general damages at court rates from the date of this judgment until payment in full.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 6TH DAY OF MARCH, 2025.

.....

JANET MULWA.

JUDGE

