



Verhoef v Hass Consult Limited; Brookside Pearl Limited (Third party) (Civil Case E083 of 2018) [2024] KEHC 3374 (KLR) (Commercial and Tax) (15 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3374 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E083 OF 2018
NW SIFUNA, J
MARCH 15, 2024**

BETWEEN

ALEXANDER JULIUS VALENTIN VERHOEF PLAINTIFF

AND

HASS CONSULT LIMITED DEFENDANT

AND

BROOKSIDE PEARL LIMITED THIRD PARTY

JUDGMENT

1. This suit arose from a contract of sale of an Apartment. The same was between Brookside Pearl Limited the Vendor (the Third Party, hereinafter referred to as Brookside Pearl) and the Plaintiff Alexander Julius Valentin Verhoef the Purchaser.
2. By a sale agreement made on 11th April 2018, the Plaintiff purchased from the Third Party through the Defendant Hass Consult Limited the said Vendor’s Agent (hereinafter referred to as Hass Consult), Apartment No. D4 at Brookside Pearl Apartments, located on land parcel LR No. 180/11/578 belonging to the said Brookside Pearl Limited.
3. As already stated above the same was purchased through Brookside Pearl’s appointed Agent the said Hass Consult, who had as the former’s Agent placed an advertisement for the sale of those apartments. The payment terms for the Apartments and which terms were in a Brochure circulated by the said Hass Consult, were that 20% of the purchase price was payable on booking, 20% on signing the Agreement for sale, 20% on February 2018, 20% on March 2018, and 20% on Completion.
4. Upon the said Sale Agreement, the Plaintiff made the following payments: Ksh 24 Million to Hass Consult as Brookside Pearl’s Agent as the purchase price for the said Apartment; a further Ksh



- 1,614,520= to Taibjee & Bhalla Advocates (Brookside Pearl's Advocates) as their closing costs on the said sale transaction; and a further Ksh 887,400= to its own Advocates as their legal fees on that transaction. Despite receiving that Ksh 24 Million purchase price as the Vendor's Agent, Hass Consult refused to release the said money to its Principal Brookside Pearl. Arguing that it withheld it as alien for a debt the said Principal owed it for services rendered.
5. Consequently, Brookside Pearl, repudiated the said contract of sale with the Plaintiff; for reason that the Ksh 24 Million purchase price that the Plaintiff paid to Hass Consult's Agent, did not reach it; and that hence the Plaintiff was in breach of the said contract. That repudiation (or rescission as the said Brookside Pearl has referred to it in this suit), was contained in a letter by its Advocates dated 23rd July 2018. After repudiating the contract as aforesaid, Brookside Pearl proceeded to resell the said Apartment to another purchaser.
 6. Incidentally, Clause C of the subject Sale Agreement between the Plaintiff and Brookside Pearl stipulated that once a property had been resold to other persons, all that the Plaintiff could recover was a refund and/or enforcement of the monies paid. In this case Ksh 24 Million. Therefore aggrieved by the said repudiation and failure to deliver up the Apartment, the Plaintiff filed this suit against the Hass Consult the Agent of Brookside Pearl; for the following reliefs:
 - a. A refund of the Ksh 24 Million purchase price that he paid for the Apartment.
 - b. The sum of Ksh 1,614,520= that he paid to Brookside Pearl's Advocates Taibjee & Bhalla Advocates as closing costs on the said sale transaction.
 - c. The sum of Ksh 887,400= legal fees that he paid to his Advocates as legal fees on the transaction.
 - d. The rent he has been paying at his current residence at Ksh 50,000= monthly, and which stood at Ksh 100,000= at the date of filing this suit.
 - e. Costs of this suit.
 - f. Interest on (a), (b), (c), (d) and (e) above.

The Defences By the Defendant and the Third Party, Respectively

7. The Defendant filed a defence in this suit. It later with leave of court, issued a Third Party Notice to Brookside Pearl; joining the latter as a Third party in this suit. The latter in its defence, denied liability, and in vindicating itself blamed its repudiation of the contract on the Defendant Hass Consult's Agent, for failing to release the purchase price. Hence that as Vendor, having not received the purchase price that the Plaintiff had paid, it could not deliver it up the Apartment to the Plaintiff. Further that it therefore the Defendant Hass Consult that should be liable to the Plaintiff in this suit to pay the sums prayed for in the Plaintiff.
8. The Defendant Hass Consult in its defence in this suit did not deny receiving the said purchase price for Brookside Pearl's disclosed Principal Brookside. It has, however, maintained that it has withheld the said money in exercise of a right of lien for a debt owed to it by the latter.
9. Indeed the money was paid to it for onward transmission to its said Principal, and it has all the time admitted receiving the money. A fact also confirmed in the two letters its Advocates wrote to the Plaintiff's Advocate, dated 28th August 2018 and 3rd September 2018, respectively.
10. The Plaintiff has in his pleadings averred that he ought to have moved into the said Apartment in August 2018. But that he has been unable to do so due to the Vendor Brookside Pearl having repudiated



the contract. He has further pleaded that as a result of the action and refusal to give him possession of the said Apartment, he has been forced to continue paying a monthly rent of Ksh 50,000= at his current place of residence. Which rent he in his Complaint stated totaled to Ksh 100,000= at the time of filing this suit.

Analysis and Determination

11. The suit went to full trial and all the three parties called evidence in support of their respective positions. After closing their evidence, the parties then filed written submissions. The main issue for determination is who between the Defendant and the Third Party should be liable to the Plaintiff in this suit, and in what terms?.
12. In reaching a determination on that issue, I have carefully distilled the respective pleadings filed by both parties, their respective filed submissions, as well as the law and legal principles applicable to the facts of this case.
13. I firstly find, that the contract of sale the subject of this suit contained in the Sale Agreement of 11th April 2018, was exclusively between only two parties. Namely, the Third Party Brookside Pearl Limited (the Vendor) and the Plaintiff Alexander Julius Valentin Verhoef (the Purchaser).
14. With that Sale Agreement as their contract of sale, just like in any contract of sale, the Purchaser (the Plaintiff herein) was obligated to pay the purchase price, while the Vendor (The Third Party herein) was obligated to deliver up to the Purchaser the said Apartment. That did not happen in this case, as after the Purchaser had paid for the Apartment, the Vendor for reason of a dispute it has with its own Agent (Hass Consult), repudiated the contract instead of delivering up to the Purchaser, the ownership and possession of the Apartment.
15. Although it believed it was rescinding the contract, this was actually a repudiation. It was a repudiation where there was neither breach nor wrong-doing on the part of the other party; and which therefore amounts to breach of contract. In fact a constructive breach, or breach disguised as a rescission. The Plaintiff and the Third Party having by their said contract undertaken certain obligations thereunder, were under a legal obligation to each perform its side of the bargain. This is because a contract is not an event or mere occurrence. It is a solemn enterprise with binding legal implications and effect.
16. May I add that repudiation and rescission as remedies in the law of contract, can only be applied as against a party in breach or a party at fault; not as against an innocent such as happened in this case. These two remedies cannot be dispatched on an innocent party and unsuspecting party who has fully performed his part of the contract.
17. I hold that such an unconscionable repudiation should never have been invoked, and this Court cannot allow its inequitable effect to be borne by or adversely affect an innocent party such as this Plaintiff. Who was not at fault, and who has not perpetrated any impropriety in the transaction. The loss will not be left to remain where it fell.
18. In such a case, the purported repudiation only amounts to breach of contractual obligation. This was clearly a case of breach by purported repudiation. Such constructive breach has the same legal consequences as any other breach. Including a liability to refund the sums paid under the contract, and even compensatory damages where provided for in the contract. Unlike in this case where the subject did not provide for such damages.
19. Usually, upon the seller breaching a contract of sale, the buyer is entitled to sue for specific performance, or for damages or for refund of the purchase price with or without interest. Or as stipulated in the subject contract. The Plaintiff in this case elected the latter course.



20. Since the Agent Hass Consult was acting for a disclosed Principal Brookside Pearl, the Plaintiff should have filed this suit against the said disclosed Principal and not the Agent. The grievance against the Agent is the said Principal's and not the Plaintiff's. Besides, the contract having been rescinded by Principal itself, it is it that the Plaintiff has a cause of action against, but not the Agent Hass Consult. The one with a cause of action against the latter on the Agency relationship, is Brookside Pearl, and not the Purchaser.
21. With the existence of the Principal having disclosed and it having itself entered into the Sale Agreement with the Plaintiff, there is no privity of contract between the Plaintiff and the Defendant Agent on that contract. As the Defendant was merely the Principal's Agent tasked with receiving the purchase price for its disclosed Principal Brookside Pearl.
22. The Plaintiff had a contract with the Principal Brookside Pearl, and not the Principal's Agent Hass Consult; hence he lacks the locus to sue the Hass Consult on that Sale Agreement. In the Law of Agency there is a Principle that "he who does anything through another, does it himself." The Defendant having been an Agent of the Third Party (a disclosed Principal), the monies paid to this Agent by the Purchaser was as good as paid to the Principal itself. Unless there is evidence that the agency actually did not exist. Otherwise an agent has a right to by its acts, bind the Principal (especially a disclosed Principal such as the 3rd Party).

Two Contracts

23. There are two contracts that existed in these circumstances. The first is the Agency Contract between the Defendant and the Third Party. Where the Defendant was the Agent and the Third Party the disclosed Principal. That contract was strictly between the 3rd Party and the Defendant, and the Plaintiff is not a party to it. Hence the Plaintiff was not privy to it; and there being no privity of contract, he can therefore neither enforce it nor sue on it.
24. It is a general rule of law that contractual rights and liabilities affect only the parties to the contract. As a contract usually confer rights and liabilities only on parties to it, and not on non-parties. *Abbott, K.R & N. Pendlebury in their treatise Business Law (1993)* observed that "The common law doctrine of privity of contract states that no one can sue or be sued on a contract to which he is not a party."
25. Therefore, Brookside Pearl's claim or rights against its Agent Hass Consult cannot be litigated by the Plaintiff as attempted in this suit. Neither can the Plaintiff be Brookside Pearl's surrogate. It clearly lacks the locus standi to maintain a suit on behalf of the latter or that pursues the interest or the cause of action supposed to be the latter's.
26. The second contract is the Sale Agreement between the Plaintiff and Brookside Pearl entered into on 11th April 2018. The Defendant Hass Consult was not a party to it, hence it having no privity of contract thereon, can neither enforce it nor sue on it as he was not a party to it and neither did it sign it. Similarly it cannot be sued on it. Its having been sued in this suit as the sole Defendant, is in my considered view, not only misnomer, but also a misjoinder. It ought not to have been sued on that Sale Agreement/contract.
27. Even though Hass Consult received the purchase price, it received it as agent for and on behalf of Brookside Pearl the 3rd Party herein; hence even a suit by the Plaintiff for refund of the said monies, is only maintainable as against that other the Brookside Pearl the 3rd Party, and not the Hass Consult the Agent. The Plaintiff's election to sue the Hass Consult and not Brookside Pearl, amounts to forbearance from suing. As its cause of action for specific performance or refund of the purchase price on that contract of sale could only avail as against Brookside Pearl the Vendor.



Final Orders

28. For the above reasons, the Plaintiff's claim against the Defendant Hass Consult, is hereby dismissed. As the law cannot suffer a wrong without a remedy, the Vendor Brookside Pearl being a party to this suit, and having unlawfully and without any legally justifiable cause repudiated the subject Contract of Sale to the detriment of the Vendor the Plaintiff an innocent party that had fulfilled his part of that contract, it has to bear liability for that act of fragrant breach of contract. Holding otherwise will be promoting impunity. As its claim against the Defendant Hass Consult's Agent cannot be litigated in this suit, the same is hereby rejected. That can be subject of a separate suit between the two should anyone of them deem it fit to file any.
29. In the confines of this suit, and as to restore the Plaintiff as approximate as possible to his original position before the contract, judgment is hereby entered for him as against Brookside Pearl Ltd the Vendor, for:
- a. A refund of the sum of Ksh 24 Million that the Plaintiff paid on for the purchase from Brookside Pearl Ltd, of Apartment No. D4, at Brookside Pearl Apartments, situated on land parcel LR No. 1870/11/578.
 - b. The sum of Ksh 1,614,520= that the Plaintiff paid to Brookside Pearl Ltd's Advocates Taibjee & Bhalla Advocates as closing costs for the said purchase.
 - c. The sum of Ksh 887,400= that the Plaintiff paid to its Advocates as legal fees for the said transaction.
 - d. Costs of this suit.
 - e. Interest on (a), (b) and (c), at court rates, from the date this suit was filed, until payment in full.

DATED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MARCH 2024.

PROF (DR) NIXON SIFUNA

JUDGE

