



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NYERI**

**ELC NO. 48 OF 2015**

**COMFORT GARDENS LTD.....PLAINTIFF**

**VERSUS**

**GLADHOME (1977) LTD.....DEFENDANT**

**JUDGMENT**

**A. THE PLAINTIFF'S CASE**

1. By a plaint dated 24<sup>th</sup> April, 2012, amended on 19<sup>th</sup> July, 2012 and further amended on 29<sup>th</sup> January, 2015, the Plaintiff sought the following reliefs against the Defendant on account of alleged breach of contract in relation to the abortive sale of **Nyeri Municipality Block 1/623 and 624**:

- (a) There be an injunction against the Defendants, their servants, agents and or employees from dealing, selling, damaging and/or alienating **Nyeri Municipality Block 1/623 and 624** pending the hearing and determination of this case.
- (b) There be an injunction against the 1<sup>st</sup> Defendant, its servants, agents and/or employees from charging, transferring, admitting and/or removing the Directors and/or their share holding in Gladhome (1977) Limited pending the hearing and determination of this case.
- (c) Specific performance of the sale of **Nyeri Municipality Block 1/623 and 624** from the 1<sup>st</sup> Defendant to the plaintiff.
- (d) In the alternative, refund of a sum of Kshs. 22, 000, 0000/= from the 2<sup>nd</sup> Defendant.
- (e) Special damages of Kshs. 3,150,000/= as at 23<sup>rd</sup> April, 2012.
- (f) Lost income of Kshs. 200,000,000/=.
- (g) Costs of the suit together with interest.
- (h) Interest on (d) and (e) above at Bank rates of 27% per annum from the date of filing this suit until payment in full

2. The Plaintiff pleaded that the Defendant was in breach of the contract for the sale of the suit properties and pleaded the following particulars of breach in paragraph 8 of its further amended plaint of 29<sup>th</sup> January, 2015:

- a) **Failing to comply with the terms of the letter of offer.**
- b) **Failing to furnish the Plaintiff with a sale agreement.**
- c) **Failing to honour its part of the offer letter.**
- d) **Terminating the sale contract herein.**
- e) **Blowing hot and cold in the sale contract herein.**

f) **Failing to complete the sale contract herein.**

g) **Frustrating the sale contract herein.**

3. The Plaintiff also pleaded various particulars of special damages and loss in paragraph 9 of its further amended plaint. Among the pertinent particulars included were:

**“ Causing the Director of the Plaintiff Charles Rukwaro Gitahi to sell his prime property Parcel Number Ruiru/Ruiru East Block 7/75 on the knowledge that his company was purchasing the property herein and suffering a loss of income in the sum of Kshs. 200 million for the houses he was to put on his land.”**

#### **B. THE DEFENDANT’S CASE**

4. The Defendant filed a defence dated 10<sup>th</sup> March, 2015 in response to the Plaintiff’s further amended plaint denying the Plaintiff’s claim in its entirety. By its earlier defence dated 24<sup>th</sup> May, 2012 the Defendant had pleaded that no contract was ever signed between the parties and that the conditional letter of offer had lapsed due to the Plaintiff’s non-compliance with its terms. It was denied that the remedy of specific performance was available to the Plaintiff, or any of the reliefs sought. The Defendant consequently prayed for dismissal of the Plaintiff’s suit with costs.

#### **C. THE CONSENT OF THE PARTIES**

5. The record shows that during the pendency of the suit the parties partially compromised the suit by recording a consent on 27<sup>th</sup> February, 2019 in the following terms:

- (a) That prayers (a) (b), (c) and (d) and the amended plaint dated 29<sup>th</sup> February, 2015 be and is hereby abandoned by the Plaintiff.
- (b) That the claim for special damages be settled at Kshs. 6,590,080/= which is inclusive of interest.
- (c) That costs for the compromised claim be agreed at Kshs. 321,801/=.
- (d) That the only remaining claim being prayer (f) be agreed upon by the parties within 60 days failing the matter be set down for hearing.
- (e) That the compromised amount to be paid within 60 days from the date hereof.

#### **Further Orders by Consent.**

- (f) That parties are granted 60 days to try and reach a settlement on the only issue remaining on loss of income of Kshs. 200,000,000/=.
- (h) That the matter will be mentioned on 8<sup>th</sup> May, 2019 to confirm full settlement or take a hearing date.

#### **D. THE REMAINDER OF THE SUIT**

6. When the suit was mentioned on 8<sup>th</sup> February, 2021, the advocates for the parties informed the court that they had not reached a settlement on the outstanding issue. They confirmed that the only outstanding issue was the prayer for loss of income pleaded in paragraph (f) of the further amended plaint. The advocates consequently agreed to leave the pending issue for determination by court.

#### **E. THE SUMMARY OF EVIDENCE AT THE TRIAL**

##### **(a) The Plaintiff’s evidence**

7. The Plaintiff called 3 witnesses at the trial and closed its case. The key witness was Charles Rukwaro Gitahi (PW1) who was a director of the Plaintiff. It was his evidence that prior to the Defendant’s hotel being put up for sale he had intended to construct 20 rental houses on **Title No. Ruiru/Ruiru East Block 7/75 (Parcel 75)** from which he could have earned Kshs. 200 million according to a feasibility study by his architect. It was his evidence that he abandoned the project and sold **Parcel 75** at a throw away price when the Defendant put up the suit properties for sale since he wanted to mobilize working capital for operating the hotel.

8. During cross examination by the Defendant’s advocate, PW1 stated that the Defendant’s offer was not conditional upon the sale of **Parcel 75** and that he sold the property so that he could loan the Plaintiff the money which was refundable within one year. He also conceded that he had not obtained approval of building plans or obtained other regulatory approvals for construction at the time he sold **Parcel 75**.

##### **(b) The Defendant’s evidence**

9. The Defendant called one witness Carol Lyn Wahome (DW1) who was a director of the Defendant. Although DW1 conceded that the

Defendant had offered the suit properties for sale, she denied liability for the Plaintiff's claim for loss of income. It was her case that the withdrawal of the letter of offer did not occasion the Plaintiff's alleged loss. It was her evidence that the Defendant was not privy to any information on the intended developments on **Parcel 75** and that the said project was never disclosed during the negotiations leading to the issuance of the letter of offer. She further stated that the Defendant was never consulted prior to the sale of **Parcel 75** by PW1.

#### **F. THE ISSUES FOR DETERMINATION**

10. The court has noted from the material on record that the parties filed a joint statement of agreed issues dated 20<sup>th</sup> February, 2019 listing the following issues:-

**(a) Whether the Plaintiff is entitled to loss of income as pleaded in prayer (f) of the further amended plaint or any part thereof.**

**(b) Whether the Plaintiff is entitled to additional costs and interest.**

#### **G. ANALYSIS AND DETERMINATION**

**b) Whether the Plaintiff is entitled to loss of income as pleaded in prayer (f) of the further amended plaint or any part thereof**

11. The court has considered the pleadings, evidence and submissions on record on this issue. Whereas the Plaintiff contended that it had adequately proved the loss of income in the sum of Kshs. 200 million, the Defendant contended otherwise. The Plaintiff's claim is based on the fact that it had to abandon its intended project on **Parcel 75** in order to mobilize resources for the hotel the Defendant had put up for sale. The Plaintiff's claim was further based upon a feasibility study by PW2.

12. The court is far from satisfied on the basis of the material on record that the Plaintiff has proved its claim for loss of income to the tune of Kshs. 200 million for several reasons. First, the claim for loss of income is in the nature of special damages which ought to have been pleaded with particularity. The alleged loss of expected income from a project on **Parcel 75** at Ruiru did not flow naturally from the alleged breach of contract with respect to the suit properties in Nyeri Town hence the necessity of pleadings it will particularity.

13. In the case of **Hahn v Singh [1985] KLR 716**, the Court of Appeal described special damages as hereunder:

**“Now the next two grounds of the memorandum concern special damages which must be not only claimed specifically but proved strictly for they are not the direct or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves. This has been adumbrated by Bowen LJ in *Ratcliffe v Evans [1982] 2QB 524,532,533....*”**

14. It is not sufficient for the Plaintiff to merely plead a lump sum of Kshs. 200 million without giving a breakdown of how it was arrived at. The pleadings did not disclose how many houses were intended to be built; whether they were for sale or rental purposes; how much income was expected from each house; and over what period of time the income was to be made. The court is thus of the opinion that the Plaintiff did not plead the claim for loss of income with sufficient detail and particularity as required by law.

15. The second reason why the court is not inclined to grant the Plaintiff's prayer is on account of the doctrine of remoteness of damages. The Plaintiff's witness conceded during cross-examination that the sale of the suit properties was not subject to the sale of **Parcel 75**. The letter of offer did not make any reference to **Parcel 75** and it was not part of the transaction between the parties. The unchallenged defence evidence at the trial was that the Plaintiff did not disclose any dealings or proposed developments on **Parcel 75** during negotiations leading to the issuance of the letter of offer. It would appear that any plans or dealings with **Parcel 75** were peculiarly within the knowledge of the Plaintiff and its directors at all material times.

17. The principle of remoteness of damages was considered by the Court of Appeal in the case of **Johnson Mugwe Wanganga v Joseph Nyaga Karingi [2014] eKLR** as follows:

**“In contract, the principle relating to remoteness of damage is enunciated in the case of *Hadley v Baxendale [1954] 9 Exch. 341*. For loss to be recoverable, the damages should be such as may fairly and reasonably be considered either arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach. In the instant case, it is our considered view that loss of trade debts and non-repayment of bank loans are not anticipated as the natural and probable consequence of breach of a landlord-tenant relationship. If any such loss was suffered, the damage is remote...”**

16. The 3<sup>rd</sup> reason is that the material on record does not bring out any connection between **Parcel 75** and the Plaintiff. The material on record shows that at all materials times **Parcel 75** was the property of PW1 and not the Plaintiff. A copy of the sale agreement dated 1<sup>st</sup> February, 2012 for **Parcel 75** shows that it was made between Charles Rukwaro Gitahi as Vendor and Dozen Ventures Limited as purchaser. Clearly, the Plaintiff did not sell the said property hence it could not legally suffer any financial loss as a result of the Defendant's alleged breach of contract. This is confirmed by the Plaintiff's own pleading in paragraph 9 of the further amended plaint that:

**“ Causing the Director of the Plaintiff Charles Rukwaro Gitahi to sell his prime property Parcel Number Ruiru/Ruiru East Block 7/75 on the knowledge that his company was purchasing the property herein and suffering a loss of income in the sum**

of Kshs. 200 million for the houses he was to put on his land.”

18. In the case of **George W.M. Omondi & Another v National Bank of Kenya Ltd & 2 Others** [2001] eKLR, Ringera J (as he then was) considered the consequences of incorporation of a company as follows:

**“As regards whether the Plaintiffs have *locus standi* to institute suit, I am in complete agreement with the submissions made by the Defendants’ advocates that they do not. It is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even when the directors happen to be the sole shareholders (see *Salmon v Salmon & Co Ltd* [1897] AC 22.) The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company’s property apart from the shares they own...”**

19. The court has further noted that the architectural drawings presented by PW2 indicated that the client was PW1 and not the Plaintiff. The Structural Design Report indicated the client was PW1 and not the Plaintiff. The bills of quantities and all letters and documents relating to the proposed project were all addressed to PW1 and not the Plaintiff. In fact, PW1’s evidence at the trial was to the effect that he intended to **lend** the proceeds of sale of **Parcel 75** to the Plaintiff which was **refundable** within one year. It is thus clear that PW1 appreciated all along that the Plaintiff was a separate and distinct entity from the directors. There is thus no evidence on record to support the Plaintiff’s claim that it intended to undertake any housing project on either **Parcel 75** (which did not belong to it) or any other Parcel. There is also no evidence on record to demonstrate that the Plaintiff sought or obtained development permission and licences from various regulatory authorities such as the Planning Authorities, National Construction Authority or National Environment management Authority for the project.

20. The upshot of the foregoing is that the court finds that the Plaintiff has failed to prove its claim for loss of income in the sum of Kshs 200 million or any part thereof. Accordingly, the court is not inclined to grant the same.

**(b) Whether the Plaintiff is entitled to additional costs and interest**

21. The court has considered the material and submissions on record on this issue. It is evident that the partial consent recorded on 27<sup>th</sup> February, 2019 provided for the Plaintiff’s costs on the compromised claim only. The issue of costs on the claim for loss of income was thus not covered by the consent. Accordingly, the court would be at liberty to make an award of costs on that claim. However, since the Plaintiff’s claim has failed it shall not be entitled to costs and interest thereon even though it may be liable for costs on the lost claim.

22. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd** [1967] EA 287. The court finds no good reason why the successful litigant in this suit should not be awarded costs of the suit. Accordingly, the Defendant shall be awarded costs of the claim for loss of income.

**H. CONCLUSION AND DISPOSAL**

23. The upshot of the foregoing is that the court finds and holds that the Plaintiff has failed to prove its claim for loss of income in the sum of Kshs. 200 million or any part thereof. The court also finds and holds that the Plaintiff is not entitled to any additional costs or interest on that claim. Accordingly, the Plaintiff’s claim for loss of income of Kshs. 200 million in terms of paragraph (f) of the further amended plaint of 29<sup>th</sup> January, 2015 is hereby dismissed with costs to the Defendant.

**JUDGMENT DATED AND SIGNED IN CHAMBERS AT NYAHURURU THIS 14<sup>TH</sup> DAY OF OCTOBER, 2021 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of:**

Mr. Wainaina for the Plaintiff

Mr. Kenneth Wilson for the Defendant

CA- Carol

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**Y. M. ANGIMA**

**JUDGE**