



**Marura Dandora Enterprises v Mwhiko Housing Company (Civil Suit
5488 of 1991) [2023] KEHC 1425 (KLR) (Civ) (2 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 1425 (KLR)

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

CIVIL

CIVIL SUIT 5488 OF 1991

CW MEOLI, J

MARCH 2, 2023

BETWEEN

MARURA DANDORA ENTERPRISES PLAINTIFF

AND

MWIIHIKO HOUSING COMPANY DEFENDANT

JUDGMENT

1. Marura Dandora Enterprises, (hereafter the Plaintiff) filed this suit on 16.10.1991 against Mwhiko Housing Company (hereafter the Defendant) seeking general damages; special damages in the sum of Kshs. 2,745,000/- and /or specific performance by the Defendant; interest on special damage from 03.08.1989 to the date of full payment and costs of the suit. It was averred that by an agreement dated 03.08.1989 the Defendant company agreed to sell to the Plaintiff some two hundred (200) plots out of land parcel L.R No. 10902/1 in South Ruiru Township (Kahawa Kimbo), at a price of Kshs. 13,500/- each. The total purchase price was agreed at Kshs. 2,700,000/- and a deposit of Kshs. 450,000/- was to be paid on signing of the agreement, a condition with which the Plaintiff complied with immediately.
2. That on or about 12.04.1990 the parties entered into a supplemental agreement to the earlier one dated 03.08.1989 for the purchase of an additional two hundred and ninety three (293) plots out of land parcel LR. No 10902/1 (Kahawa Kimbo) on terms and conditions within the Defendant's knowledge, thus entitling the Plaintiff to a total of four hundred and ninety three (493) plots out of land parcel LR. No 10902/1 (Kahawa Kimbo) of which four hundred and eighty (480) plots were for residential purposes each costing Kshs. 12,500/- and thirteen (13) plots designated for commercial purposes at Kshs. 20,000/- each. It was further averred that pursuant to the two agreements the Plaintiff paid to the Defendant company a total sum of Kshs. 2,745,000/- to the Defendant. That the Defendant in breach of the agreements failed to deliver the plots to the Plaintiff thereby occasioning it financial loss and causing mistrust between its officials and members.



3. The Defendant filed a statement of defence dated 09.11.1991 denying the key averments in the plaint and it averred that the suit was premature and ought to abide the outcome of the dispute in Nairobi HCCC. No. 2727 of 1990. The Plaintiff thereafter filed a reply to defence and framed issues for determination.
4. The hearing proceeded ex parte on 30.11.2022 as the Defendant though duly served failed to attend. Their erstwhile advocates Gatumuta & Co. Advocates having successfully moved the court on 27.10.2021 with the application to cease acting, service of the hearing date was effected upon the Defendant's director, one Leonard Kirima.
5. During the hearing Joseph Kariuki Gathara testified on behalf of the Plaintiff as PW1. He identified himself as a director of the Plaintiff having since 1989. He thereafter proceeded to adopt his witness statement filed on 20.02.2020 as his evidence in chief. He produced the bundle of documents in the Plaintiff list of documents filed on 14.09.2017 as P. Exh.1 -9. It was his evidence that the Plaintiff was entitled to refund of Kshs. 2,745,000/- because the Defendant had represented to the Plaintiff that they owned the land parcels that were the subject of the agreement when in fact there was a subsisting litigation, namely, Nairobi HCCC. No. 2727 of 1990 in relation to the ownership of the property. And that the Defendant did not own the property it purported to sell to the Plaintiff. He asserted that on account of the foregoing the Defendant ought to refund the payments made in respect of the agreements as the Defendant lacked title and therefore the capacity to sell the property in question.
6. Upon the close of the Plaintiff case, counsel opted not file submissions in respect of the matter.
7. The court has considered the pleadings and evidence presented. The sole issue for determination is whether Plaintiff has established on a balance of probabilities the breach of the agreements for sale executed by the parties herein by the Defendant and whether the Plaintiff is entitled to the reliefs sought in the plaint. In *Wareham t/a A.F. Wareham & 2 Others Kenya Post Office Savings Bank* [2004] 2 KLR 91, the Court of Appeal stated in this regard that: -

“We have carefully considered the judgment of the superior court, the grounds of appeal raised against it and the submissions before us on those matters. Having done so we are impelled to state unequivocally that in our adversarial system of litigation, cases are tried and determined on the basis of the pleadings made and the issues of fact or law framed by the parties or Court on the basis of those pleadings pursuant to the provisions of Order XIV of the Civil Procedure Rules. And the burden of proof is on the Plaintiff and the degree thereof is on a balance of probabilities. In discharging that burden, the only evidence to be adduced is evidence of existence or non-existence of the facts in issue or facts relevant to the issue. It follows from those principles that only evidence of facts pleaded is to be admitted and if the evidence does not support the facts pleaded, the party with the burden of proof should fail.”

8. The plaintiff's pleadings are replicated in the witness statement adopted by PW1 during his evidence. The key assertions therein are that: -

“The plaintiff herein Marura Dandora Enterprises Limited purchased land from the Defendant Mwhoko Housing Company Limited on or about 1989 from money raised by its member who were about 600.

That the Defendant allocated the Plaintiff 200 plots.



That Mwhoko Housing Company Limited signed the Agreement for the sale of 480 plots for residential and 12 commercial plots at the agreed rate of Kshs. 12,500/ = for each residential plot and Kshs. 20,000/ = for each commercial plot.

That the list of commercial and residential plots were identified in the list issued by the Defendant.

On 30th September 1989 the Plaintiff held its general annual meeting in which among others new directors were nominated.

That on 8th November 1989 the District Officer Mathare Division confirmed that the Plaintiff had held its Annual General Meeting on 30th September 1989.

On 17th November 1989 the Registrar of Companies confirmed the change of directors.

By virtue of the agreements of sale between the Plaintiff herein Marura Dandora Enterprises Limited and Mwhoko Housing Company Limited, the Plaintiff paid the Defendant a deposit of Kenya Shillings Two Million Seven Hundred and Forty Five Thousands only i.e. Kshs. 2,745,000/ = only as deposit which money was acknowledged by issue of receipt.

The company became aware that the Defendant Mwhoko Housing Company Limited was selling land, which it had only paid a deposit and its owner uprooted beacons of the land sold to the Plaintiff, which prompted the Plaintiff to instruct the firm of M/s Onyango Otieno & Company Advocates.” (sic) .

9. Although the hearing proceeded *ex parte* the onus was on the Plaintiff to establish its claim. The applicable law as to the burden of proof can be found in Section 107, 108 and 109 of the *Evidence Act*. In *Karugi & Another v Kabiya & 3 Others* [1987] KLR 347 the Court of Appeal stated that:

“[T]he burden on a plaintiff to prove his case remains the same throughout the case even though that burden may become easier to discharge where the matter is not validly defended and that the burden of proof is in no way lessened because the case is heard by way of formal proof....The plaintiff must adduce evidence which, in the absence of rebuttal evidence by the defendant convinces the court that on a balance of probabilities it proves the claim.”

10. The gravamen of the Plaintiff's grievance is the Defendant's failure to perform the terms of the agreements dated 03.08.1989 and 12.04.1990 respectively. It must be said that the state of documentation filed by the parties in this cause is less than satisfactory; wear and tear has taken its toll during the 32 years in which the suit has been pending. That notwithstanding, the court must do its best to render its decision. Copies of the agreements at the heart of the Plaintiff's cause of action were produced as PExh.1 and PExh.2 respectively. The first agreement dated 03.08.1989 (Pexh.1) provided that;-

- “(a) The Company (Vendor) has agreed to sell 200 plots fully at the purchase price of Kshs. 2,700,000/-
- (b) It was agreed between the parties that a deposit of Kshs. 450,000/- on signing this agreement.
- (c) It was agreed that, they will be paying Kshs. 100,000/-per month within 21 ½ months.



- (d) The certificate of ownership shall be given by the vendor.....with the company seal to the purchaser after the purchase Receives full payment.” (sic)

11. The agreement PExh.2 executed on 12.04.1990 on its part provided that;-

- “ 1. The vendor company has agreed to reserve basically and sell gradually 480 residential plots for Kshs. 12,500/- per each plot.
2. The vendor company agreed to offer 12 commercial plots (adjacent to the residential plots) for sale at Kshs. 20,000/- per plot.
3. Both parties agreed that the unit purchase price will be paid to the vendor company monthly at the rate which the purchasing company feels will make the clearance as quick as possible to them.
4. The plot purchase certificate denoting basic plot ownership shall be given by the vendors (Mwihoko Housing Co. Ltd) with affixed company seal to the purchasers on each fully paid unit plot price as laid.” (Sic)

12. The Plaintiff further tendered a bundle of receipts totaling Kshs. 2,745,000/- as PExh.8 which includes the receipt in respect of the deposit of Kshs. 450,000/- as agreed in PExh.1. Reviewing the material and the testimony of PW1 , which is uncontroverted, it can be stated that the essential elements of a contract were fulfilled between the parties by way of offer, acceptance and consideration. The Plaintiff’s complaint is that that the Defendant at the time misrepresented itself as having the necessary capacity to transact in the plots whereas the Defendant did not own the plots and was at the time embroiled in litigation over ownership thereof. And therefore the Defendant breached its obligation to transfer ownership of the plots to the Plaintiff occasioning it financial loss and causing discord among officials and members as evidenced by minutes adduced as PExh.4. That despite demands made (PExh.9) of it, the Defendant failed to give ownership of the plots to the Plaintiff which now demands refund of Kshs. 2,745,000/-. On a balance of probabilities, I find the Plaintiff’s claim established.

13. Concerning the reliefs sought, the remedy of specific performance does not appear efficacious or realistic in the circumstances proved and the Plaintiff must content itself with an award of damages. The Plaintiff’s case was that the Defendant made untrue representations and had no good title to pass at the time of the agreements made over 32 years ago. In Thrift Homes Limited vs. Kenya Investments Limited [2015] eKLR the Court of Appeal stated inter alia, that: -

“The remedy of specific performance like any other equitable remedy is discretionary. Second, the jurisdiction to grant the relief of specific performance is based on the existence of a valid enforceable contract. Third, specific performance will not be ordered if the contract suffers from some defect such as mistake or illegality or if there is an alternative effective remedy.”

14. it is undisputed that despite making payments to the Defendant, the Plaintiff is yet to receive the plots that were the subject of the two agreements. However, as a general rule, general damages do not issue for breach of contract. The Court of Appeal in Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR held that;

“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”

15. An injured party would however be entitled to special damages in respect of actual loss suffered as a result of the breach. In Anson’s Law of Contract, 28th Edition at Pg. 589 - 590, it is stated: -

“Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal”.

16. However as held Hahn -v- Singh [1985] KLR 716:

“...special damages must not only be specifically claimed but also strictly proved. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves...”

17. The Plaintiff’s pleadings and evidence demonstrate a loss in the sum of Kshs. 2,745,000/- for which it is entitled to an equivalent award in special damages. Judgment is hereby entered for the Plaintiff against the Defendant in the sum of Kshs. 2,745,000/-, costs of the suit and interest calculated at court rates from 16.10.1991 until full payment.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 2ND DAY OF MARCH 2023

C.MEOLI

JUDGE

In the presence of:

For the Plaintiff: Mr.Kerongo h/b for Mr. Nyachoti

For the Defendant: N/A

