



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO. 361 OF 2019**

**LEONARD MUNYUA.....PLAINTIFF**

**VERSUS**

**VALLEY CREEK LTD.....DEFENDANT**

**JUDGMENT**

1. This suit was commenced through a plaint dated 20<sup>th</sup> December 2012 at the High Court Nairobi, but was later transferred to the Environment and Land Court vide an order dated 7<sup>th</sup> November 2019. The Plaintiff's claim is that he entered into an agreement for sale of the property identified as **Apartment Number B2 of LR No. 330/713 Kingara Close, Lavington- Nairobi** for a consideration of Kshs. 13,500,000 but the Defendant failed/refused to have the transaction concluded. The Plaintiff therefore sought for the following orders:

- i. An injunction against the Defendant from disposing, transferring, charging, pledging and or dealing or alienating the property until the hearing and determination of this suit;**
- ii. In default of the Defendant executing the relevant transfers, the Deputy Registrar of the High court to sign the transfer of lease and all other documents that may be necessary for and on behalf of the Defendant to perfect the *Defendants' title over the suit property upon the Plaintiff* remitting the balance of the purchase price;**
- iii. Mandatory injunction against the Defendant compelling them to release completion documents including duly executed leases in respect of apartment number B2 of LR No. 330/713 Kingara Close Lavington Nairobi for registration by the Plaintiff's advocates;**
- iv. Specific performance of the agreement dated 25<sup>th</sup> March 2011 and lease agreement entered between the Plaintiff and Defendant in respect of apartment number B2 of LR No. 330/713 Kingara Close Lavington Nairobi;**
- v. Mesne profits at the rate of Kshs. 100,000 per month calculated from 1<sup>st</sup> March 2012;**
- vi. The cost of this suit and interest;**
- vii. Any other relief that this Honourable court may deem fit to grant.**

2. The Defendant entered appearance, filed a defence as well as a counter-claim. During the infancy stage of the suit, the court issued orders of injunction against the Defendant restraining the latter from selling, letting or leasing the suit property. Subsequently, the matter was listed for hearing of the main suit on 20.1.2021, but the case was adjourned as the witness for Defendant was apparently sick. The matter was then given another hearing date of 1.7.2021. This time round, a counsel holding brief for the advocate for Defendant stated that both the advocate for Defendant and his witness were sick. The court proceeded to adjourn the case to 3.11.2021 while stating as follows;

**“ I will in the circumstances reluctantly grant an adjournment to the Defendant. This is marked as a last adjournment to be granted to the Defendant. ....”**

3. Come 3.11.2021 and both the Defendant and their advocate were nowhere to be found, hence the matter proceeded notwithstanding their absence.

**Plaintiff's Case**

4. The Plaintiff is the sole witness. He adopted the contents of his statement dated 20.12.2012 as his evidence. Therein, he states that on 27<sup>th</sup> October 2010 vide a letter of offer of the even date, the defendant offered to sell him Apartment B2 of LR No. 330/713 Kingara Close Lavington Nairobi for a consideration of Kshs. 13,500,000. The offer had an option of paying a deposit of Kshs. 2,700,000 and the balance of Kshs. 10,800,000 on completion making the purchase price Kshs. 13,500,000. The other option was to pay Kshs. 2,700,000 on signing the offer letter and a further Kshs. 2,700,000 on every successive quarter of a year until payment in full making the purchase price Kshs. 13,000,000.
5. The Plaintiff opted for the first option and on 25<sup>th</sup> March 2011 he signed a sale agreement, of which there was a clause that the completion date would be the 30<sup>th</sup> day next after the vendor sent the purchaser a certified copy of letter confirming authority to occupy the apartment granted by the City Council of Nairobi.
6. The Plaintiff proceeded to retain the Defendant's advocate to act for him. He then made payments totalling to Kshs. 4,280,000 on diverse dates between 3<sup>rd</sup> November 2010 and 16<sup>th</sup> March 2012 which included *inter alia* deposit of the purchase price amounting to Kshs. 3,500,000 and other payments for stamp duty, costs of incorporating a management company, legal fees etc which all amounted to Kshs. 780,000.
7. On 6<sup>th</sup> December 2011, the Plaintiff obtained a financing facility from the Standard Chartered Bank to finance the balance of Kshs. 10,000,000. On 18<sup>th</sup> January 2012 the Bank's advocates made an undertaking to the Defendant's advocates to pay Kshs. 10,000,000 upon registration and charge in favour of the Bank. The Defendant's advocates accepted the undertaking and indicated that the lease and charge would be registered in February 2012 but this was not done on grounds that there were errors in the lease.
8. On 3<sup>rd</sup>, 9<sup>th</sup> and 14<sup>th</sup> March 2012, the Plaintiff tried to follow up on the issue of signing the lease instrument but this did not bear fruits. However, on 13<sup>th</sup> March 2012 he received an email correspondence from the Defendant's advocates informing him of their intention to charge interest on the outstanding Kshs. 10,000,000 which was contrary to the sale agreement because the certificate of completion had not been issued. The Defendant was to change its position as per their letter dated 24<sup>th</sup> September 2012 indicating that they had issued Certificates of Occupation on 1<sup>st</sup> March 2012 but this was in contradiction to the letter dated 13<sup>th</sup> March 2012.
9. The Plaintiff was to learn that the suit property had been charged to I&M Bank Ltd, which impacted on the financing process and the Defendant had not disclosed these facts as at the time of signing the agreement. Thus the the Defendant could not secure a discharge of the charge from I&M Bank early enough. Then the new land laws came to effect on 28<sup>th</sup> May 2012 and the Plaintiff's financier put on hold its decision to finance the Plaintiff pending a review of the new laws to ascertain how they would affect the suit property as security. However, on 25<sup>th</sup> October 2012 the Plaintiff's financier confirmed its willingness to continue financing the transaction for the Plaintiff.
10. The Plaintiff sought the intervention of an arbitrator due to this dispute and the matter was referred to E.N. Wanjama on 10<sup>th</sup> October 2012 by mutual consent. However, the Defendant wanted to rescind the contract of sale and gave its intention to dispose off the property. On 13<sup>th</sup> December 2012 the Defendant was requested by the arbitrator to put on hold plans to dispose the property pending hearing and determination of the arbitration proceedings but the Defendant rejected the proposal.
11. The Plaintiff claimed this was a breach of contract and acting in bad faith which caused the Plaintiff loss and damage. The Plaintiff outlined the particulars of breach by the Defendant as follows: refusing to issue him with a certificate of occupation; not disclosing that the property was charged to I&M Bank at the time of signing the agreement; refusing to hold off from disposing the property pending the arbitration proceedings; giving contradictory dates as to when the certificate of occupation was issued; failure to register the documents by February 2012; the Defendant's advocates taking sides with the Defendant with the aim of defeating the Plaintiff's interests; failure by the firm to give the Plaintiff impartial and independent advise as to procedures and processes; and the firm supporting the Defendant's intention to dispose off the property while arbitration was ongoing.
12. The Plaintiff outlined that the loss and damage incurred was: *mesne* profits of Kshs. 100,000 being monthly rent from the date of supposed completion to the date the property shall be delivered to the Plaintiff.
13. During his oral testimony in court, the Plaintiff stated that the documents requested by his financing Bank were not delivered by the Defendant's advocate as promised stating that when the lease was sent to him for his signature, it had the wrong apartment name and he returned them for correction. He was never furnished with the correct lease thereafter.
14. In support of his case, the Plaintiff produced the 15 documents in his list dated 19.2.2018 as his exhibits.
15. No submissions were availed to the court by 17<sup>th</sup> November 2021 as directed by the court.

### **Determination**

16. This court finds that the following are the issues falling for determination:

**i. Whether the Defendant was in breach of contract;**

**ii. If the answer is in the affirmative, what orders is the Plaintiff entitled to.**

17. For there to be breach of contract, there must be a valid contract in existence. The Court of Appeal in the case of **Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR** while citing the Court of Appeal case of **William Muthee Muthami vs Bank of**

Baroda [2014] eKLR the Court observed;

**“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach.”.**

18. The Plaintiff produced an agreement dated 25<sup>th</sup> March 2011 between him and the Defendant signed by the Plaintiff- Leonard Ngethe Munyua and George Njenga Ngugi the Director of the Defendant and witnessed by their advocates.

19. The Plaintiff has narrated as to how he took the option of paying the Kshs 2,700 000 as the initial deposit and to pay Kshs 10,800, 000 at completion but in essence he paid a total of Kshs 4,280 000 to include other incidental costs. He was to finish paying the balance upon receipt of Certificate of Occupation from the Defendant which was never availed. A perusal of clause 4 of the agreement confirms that the mode of payment chosen by the Plaintiff was provided for. Clause 2 of the said agreement provides as follows:

**“The date of completion of the transaction hereby agreed shall be the 30<sup>th</sup> day next after the vendor has sent to the purchaser a letter confirming that authority to occupy the said apartment has been granted by the City Council of Nairobi (which letter shall enclose a certified true copy of such authority)...”**

20. There is no evidence that there was compliance on the part of Defendant in respect of the above clause. What the Plaintiff states is that he received documents which contained the wrong particulars of the property to be sold. The letter on page 24 of Plaintiff’s bundle confirms that the issue of the erroneous particulars of the suit property was duly communicated to the defence on 14.3.2012. At the same time, the defence was issuing a notice to the Plaintiff to the effect that interest shall accrue on the outstanding balance (see the letter dated 13.3.2012 on page 25 of the bundle).

21. On the other hand, the documents availed by the Plaintiff indicate that he duly performed his part of the contract in terms of clause 4 of the agreement by making partial payments. The receipts thereof are to be found on pages 10-13 of Plaintiff’s bundle including the payment of Kshs 2,700, 000.

23. It has been held that courts cannot re-write contracts for parties and courts are also bound by what parties agreed to. The Court of Appeal in the case of Five Forty Aviation Limited v Erwan Lanoë [2019] eKLR cited in agreement the case of Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd [2017] eKLR which stated that;

**“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”**

23. The Court of Appeal in the case of Mwangi v Kiiru [1987] eKLR made reference to Lord Diplock in the case of Photo Production v Securicor Ltd (1980) AC 827 at page 848 in which he stated that:

**“...Every failure to perform a primary obligation is a breach of contract...”**

24. On a balance of probabilities, this court is satisfied that Defendant breached and or caused frustration of the contract.

25. From the material presented before me, it appears that the dispute was lodged in the Arbitration platform. This was in year 2012. The Plaintiff has not given a clear picture of what happened in the arbitration proceedings.

26. It also appears that at some point, the Plaintiff took possession of the property as discerned from some documents like the letters of 24.9.2012 and 2.10.2021 on pages 26 and 27 of Plaintiff’s bundle. The Plaintiff had apparently put a tenant in the premises. However, the circumstances under which the Plaintiff took over the property then left has not come out clearly. In that regard, the court will not award *mesne* profits.

27. Noting that the suit property is intact in terms of the injunctive orders given by the court on 26.3.2015, and keeping in mind that the Plaintiff is yet to pay the balance of the purchase price, the court proceeds to enter judgment for the plaintiff against the Defendant in the following terms.

**i. An order is hereby issued for Specific performance of the agreement dated 25<sup>th</sup> March 2011 and lease agreement entered between the Plaintiff and Defendant in respect of apartment number B2 of LR No. 330/713 Kingara Close Lavington Nairobi;**

**ii. A Mandatory injunction is hereby issued against the Defendant compelling them to release completion documents including duly executed leases in respect of apartment number B2 of LR No. 330/713 Kingara Close Lavington Nairobi for registration by the Plaintiff’s advocates, within 45 days.**

**iii. The Plaintiff is to remit the balance of the purchase price within 45 days from the date of this judgment.**

**iv. The Defendant is condemned to pay costs of the suit.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF DECEMBER, 2021 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

**In the presence of:-**

Nechesa holding brief for Simiyu for the Plaintiff

Njue Muriithi for the Defendant

Court Assistant: Edel Barasa