



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 12 OF 2019

CATHERINE WAMUYU NG'ANG'A.....1ST PLAINTIFF

JOSHUA N. CHEGE.....2ND PLAINTIFF

VERSUS

KABETE DAM LIMITED.....1ST DEFENDANT

PINNACLE PROJECTS LIMITED.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiffs filed suit on 25/1/2019 seeking damages of Kshs. 120,000,000/= against the Defendants for breach of contract and a refund of the sum of Kshs. 31,500,000/= with interest from the date they paid this sum to the Defendants until payment in full. The claim arose out of the Defendants' offer in February 2012 to sell house number 7 on the development known as Kabete Green Villas on L.R. No. 2951/36 (original number 2951/17/14) ("the Suit Property") to the Plaintiffs at Kshs. 47,000,000/=. The Plaintiffs claimed that they paid a total of Kshs. 31,500,000/= towards the purchase of the Suit Property to the Defendants.

2. The Plaintiffs averred that the housing project stalled for a while and in 2017, the 1st Defendant's director informed the 1st Plaintiff that the cost of the Suit Property had increased to Kshs. 80,000,000/=. The Plaintiffs maintained that all along they were ready, willing and able to perform their obligations under the contract by paying the balance of purchase price of Kshs. 15,500,000/= to the Defendants. The Plaintiffs later learnt that the Defendants sold the Suit Property to a third party. The Plaintiffs averred that similar properties in the same neighbourhood were selling at prices ranging from Kshs. 110,000,000/= to Kshs. 120,000,000/= and sought damages for breach of contract in this sum.

3. The Defendants appointed Mwamba and Javan Company Advocates to enter appearance on their behalf on 12/2/2019 but never filed a defence. The Plaintiffs agreed to abandon their application for injunction and instead have the suit set down for hearing.

4. The 1st Plaintiff gave evidence. She learnt in January 2012 that the Defendants were in the process of constructing townhouses for sale in Lower Kabete, Nairobi which they were offering for sale off-plan. The 2nd Defendant was the 1st Defendant's appointed selling agent. The 1st Plaintiff had a meeting with the Defendants' representatives and they offered to sell the Suit Property to the Plaintiffs vide the letter of offer dated 7/2/2012 at the agreed price of Kshs. 47,000,000/= subject to the terms and conditions set out in the letter.

5. The Plaintiffs accepted the offer and paid Kshs. 5,000,000/= on 15/2/2012 to the 1st Defendant's advocate, M/s Mbugua Atudo and Macharia Advocates. The Plaintiff gave the Defendants the name of Machira and Company Advocates as her advocates in the transaction. No sale agreement was prepared. The 1st Plaintiff explained that she had no reason to doubt the Defendants since in the past she had dealt with them and successfully concluded the sale of house number 35B at Runda Park, Nairobi without a formal sale agreement.

6. According to the letter of offer, the construction of the Defendants' townhouses was expected to be completed in October 2013. However, the Defendants encountered serious financial problems at the beginning of 2013 and the project stalled. The Plaintiffs resumed making payment after the meeting which was held in February 2014 with the 1st Defendant's representative. The 1st Plaintiff gave a schedule of the payments made towards the purchase price from 15/2/2012 to 19/2/2015. Some payments were made to the Defendant advocates, M/s Mbugua Atudo and Macharia Advocates while others were paid into the 2nd Defendant's account.

7. The project stalled again sometime in 2015 causing the Plaintiffs to withhold further payment as they awaited completion of the townhouses. The 1st Plaintiff followed up the completion of the townhouse and in March 2017 the Defendants informed her that they could not sell the Suit property to her at Kshs. 47,000,000/= and wanted her to increase the payment to Kshs. 80,000,000/=. She stated that she was ready and willing to pay the balance of the agreed purchase price.

8. At the time this suit was heard in October 2019, the 1st Plaintiff informed the court that the Defendants had already sold the Suit property. The Plaintiffs amended the claim and indicated that they were seeking a refund of the purchase price they paid plus damages and costs taking into consideration the fact that the current market price for a similar house was Kshs. 120,000,000/=. The 1st Plaintiff stated that the Suit property was sold for Kshs. 85,000,000/=.
9. After the hearing was concluded and the court gave directions for the filing of submissions, the Defendants filed the application dated 29/10/2019 seeking to stay these proceedings, set aside the proceedings of 9/10/2019 and have the case heard afresh. They also sought to extend the time within which to file a defence. The court directed the Defendants to serve the application on the Plaintiffs. The court gave parties an opportunity to discuss the matter out of court and they reached a consent on 6/11/2019 vide which the Defendants withdrew their application dated 29/10/2019 with no orders as to costs and the court was to proceed and deliver its judgement.
10. The Plaintiffs filed submissions. The Plaintiffs submitted that they had paid approximately 67% of the purchase price. They submitted that the Suit Property was sold for Kshs. 85,000,000/= and relied on the replying affidavit of David Kabubi Kuria sworn on 21/3/2019 in opposition to the Plaintiffs' application for injunction. The Plaintiffs urged that they paid Kshs. 31,500,000/= to the Defendants between 15/2/2012 and 19/2/2015 and termed the Defendants' conduct as outrageous, callous and bordering on fraud in selling the Suit Property at Kshs. 85,000,000/= to a third party after receiving a substantial part of the purchase price from the Plaintiffs.
11. The Plaintiffs submitted that the Defendants should not be allowed to benefit from their illegality and high handedness. The Plaintiffs further submitted that going by the increment in the prices of real properties, the price for the Suit property would have been Kshs. 153,722,500/= at the time this suit was heard. They urged the court to award them damages of Kshs. 106,722,500/= being the difference between the cost of the Suit Property in 2012 and Kshs. 153,722,500/=. The Plaintiffs urged the court to take note of the Defendants' conduct in continuing to hold the Plaintiffs' funds in the sum of Kshs. 31,500,000/= even after selling the Suit Property to a third party in 2015.
10. The Plaintiffs relied on the case of **Delilah Kerubo Otiso v Ramesh Chander Ndingra [2018] eKLR** in which the Court of Appeal quoted the finding in **Hardley v Baxen Dale** (1854)9 Exch. 341 where it was held that the measure of damages was such as may be fairly and reasonably considered arising naturally from the breach or what the parties may reasonably contemplate at the time of making the contract and the probable result of such breach. The Plaintiffs submitted that the purpose of damages was to put a plaintiff as far as possible in the position he would have been in had the breach complained of not occurred.
11. The Plaintiffs also relied on the case of **Simon Manyara and another v Pauline Mahugu trading as Mianda Investments [2019] eKLR** in which Eboso J. quoted Sir Robert Megarry and Sir William Wade in "**The Law of Real Property**", 8th Edition page 694 which gives the measure of damages as the loss to the claimant from the non-performance of the contract. A purchaser can claim for the loss of a bargain which is the amount by which the net value of the property when conveyed to him at the due date would have exceeded the purchase price. The writers stated that a court may order such damages to be assessed at some other dates where justice required which would be the date of the hearing if the property had risen in value. Where the purchaser claims damages for the loss of bargain, he cannot recover the costs for investigating the title.
12. The Plaintiffs also relied on **Gami Properties Limited v National Social Security Fund Board of Trustees and 2 Others [2018] eKLR** in which Tuiyott J. stated that if the objective of an award of damages for breach of contract was to put the offended party in the same place as if the breach had not happened, then a person who loses a particular piece of land on account of breach of contract should be awarded such damages that will place him in a position to acquire property of an equivalent value. The judge had in mind the simple fact that court cases take a very long time to be resolved as justification for assessing damages based on the value of the lost property at the time of judgement.
13. The issue for determination is whether the court should grant the orders the Plaintiffs seek against the Defendants, which is a refund of the purchase price the Plaintiffs paid to the Defendants plus damages of Kshs. 120,000,000/= and costs.
14. The Plaintiffs sought damages for breach of contract of Kshs. 120,000,000/=. In their written submissions, the Plaintiffs sought the sum of Kshs. 106,722,500/= which is the difference between the sum of Kshs. 153,722,500/= that they gave as the current market value for similar properties and the contractual price for the Suit Property of Kshs. 47,000,000/=. The Plaintiffs arrived at the sum of Kshs. 153,722,500/= based on the increment rate of 80.85%. The onus lay on the Plaintiffs to demonstrate through acceptable evidence that the loss they suffered as a result of the Defendants' breach was Kshs. 106,722,500/=. They did not lead any evidence or tender a valuation report showing the market price of the Suit Property at the time the case was heard. The court declines to grant the sum of Kshs. 106,722,500/= sought by the Plaintiffs.
15. In the court's view, the correct assessment of the loss suffered by the Plaintiffs is that set out at paragraph 1183 of Halsbury's Laws of England, Volume 12, 4th Edition, being the return of the deposit paid plus interest together with damages for loss of bargain where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price. The loss of the bargain is computed as the difference between the market value of the suit property at the time of repudiation and the contract price.
16. Looking at the Replying Affidavit of David Kabubii Kuria filed in court on 28/3/2019 in opposition to the Plaintiffs' application for injunction, the court notes that the Defendants did not deny receipt of the purchase price paid by the Plaintiffs. The Defendants only contended that the Plaintiffs' breached the terms of the offer by making the payments later than the stipulated times without providing any evidence to support their contention. The Defendants added that they had offered the Plaintiffs other townhouses in the same neighbourhood similar to the Suit Property at current market prices but that the Plaintiffs remained adamant and insistent on only purchasing the Suit Property at Kshs. 47,000,000/=. The Defendants did not attach any evidence of the offers they contended they made to the Plaintiffs.
17. The court notes that the Defendants entered into an agreement for the sale of the Suit Property to Sachin and Seema Dhanani in May 2015 for Kshs. 85,000,000/=. Mr. Kuria attached a copy of the letter of offer dated 15/5/2015 to his affidavit together with the sale agreement dated 18/7/2015. The court will therefore treat 18/7/2015 as the date of repudiation of the contract by the Defendants.

18. After making the last payment to the Defendants on 19/2/2015, there is no record that the Plaintiffs took any action in the matter until 30/7/2018 when their advocates issued the demand letter to the Defendants. The Plaintiffs filed suit on 25/1/2019. Without a valuation report to confirm the market value of the Suit Property, the court is inclined to go by the value of Kshs. 85,000,000/= for which the Suit Property was sold to Sachin and Seema Dhanani in July 2015.

19. The court agrees with the Plaintiffs that they are entitled to a refund of the sum of Kshs. 31,500,000/= which they paid to the Defendants and awards this sum together with interest at court rates from the dates of payment until the sum is paid in full.

20. The court awards the Plaintiffs Kshs. 38,000,000/= as damages for loss of bargain, being the difference between the sum of Kshs. 85,000,000/= for which the townhouse was sold on the date of repudiation of the contract and the contractual price of Kshs. 47,000,000/=. The Plaintiffs are also awarded the costs of the suit.

Dated and delivered at Nairobi this 16th day of January 2020.

K. BOR

JUDGE

In the presence of: -

Mr. Kimondo Mubea for the Plaintiffs

Mr. Richard Otieno for the Defendants

Mr. V. Owuor- Court Assistant