REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 111 OF 2016

REHEMA W NJOROGE.....PLAINTIFF

VERSUS

1. THE PRESBYTERIAN FOUNDATION

2. NATIONAL BANK OF KENYA.....DEFENDANTS

JUDGMENT

Historical outline of facts

1. The defendants, the Presbyterian foundation is pleaded and disclosed as the proprietor of that land situate within Mombasa County and known as LR No. MN/1/11518 on which it planned to develop a number of apartment and christened Milele Luxury Appartments for purposes of sale.

2. By a letter dated 9/1/2014 and described as OFFER FOR SALE OF APARTMENT NO. 04 ON BLOCK B" the defendant did make an offer to the plaintiff and the plaintiff did unconditionally accept the said offer on 20/01/2014 together with all its terms and conditions and without varation. The critical terms of the contract were that:-

i. Purchase price was Kshs.28,000,000/= paid in three tranches as follows:-

i. Kshs.10,000,000/= prior to execution of the agreement.

ii. Kshs.4,200,000/= open execution of the agreement.

iii. Balance being Kshs.13,800,000/= payable within the construction period.

- The construction period was estimated to be July 2014 but subject to certification by the project architect on the practical completion of the works being achieved.

3. It was further provided in the accepted letter of offer that a formal agreement of sale would be prepared by the vendors' advocate upon full payment of the deposit and the purchaser was obligated to have same executed within 14 days of its issue. On the effect, tenure and import of the letter of offer, it was covenanted that upon execution the letter of offer would constitute a building agreement between the parties.

4. On 13/7/2016, some 2 ½ years after the binding agreement was entered into and some two years after the estimated completion date had passed, the plaintiff developed impatience and did issue a letter dated 13/7/2016 and complained of failure to complete the construction and the existence of a suit ELC No. 135 of 2016 over the suit land upon which the apartment was being developed, which revealed that the property was threatened by a sale pursuant to statutory power of sale.

5. The letter gave to the defendant 21 days' notice within which to complete the construction works and hand over the completed apartment or effect a refund of the sum paid as deposit within 21 days from the date of service. In the letter the subject apartment was described as No. A12 Block B which the plaintiff later detected to have been an error hence there was a correction on the description by a letter dated 16/9/2016. Both letters were expressed to be due for delivery by hand.

6. It would appear that there was no compliance by the demand as there was never exhibited any response but a plaint was then filed in this suit on 7/10/2018 against two defendants; Presbiterian Foundation and National Bank of Kenya Ltd. The suit against National Bank of

Kenya Ltd, the 2nd defendant, was struck out by court on the 5/2/2018 after it was conceded by both sides that there was never a cause of action disclosed against that said 2nd defendant. That development effectively dealt with prayers a & b of the plaint thereby leaving the only prayer from refund outstanding.

The cause by the plaintiff

7. In the plaint it is pleaded that having paid the deposit but prior to execution of the agreement for sale, the plaintiff noticed that the defendant was struggling financially and was unable to complete construction and had infact stopped the construction works while the plaintiff was at all times ready and meeting to pay them. She thus sought an order for the refund of the sum paid together with interest there on at commercial rates as well as general damages for breach of contract. That plaint was accompanied with the verifying affidavit of the plaintiff, a list of witnesses as well as a list of documents and copies thereof. The documents consisted of the letter of offer, the deposits slips and receipts issued by the defendant in acknowledged of the payment of the deposit, an advertisement for sale of the property, a demand notice and an order issued by the ELC Court on the 31/5/2016. After case conference, the plaintiff filed own single witness statement basically outlining the pleaded facts.

Defence put forth

8. By a statement of defence dated the 30/5/2017 the defendant admitted the pleadings in paragraph 4 of the plaintiff of there having been an offer and acceptance together with payment of the deposit in the sum of Kshs.16,000,000/= without reservation. That admission did include the pleaded fact that the balance of purchase price was payable upon completion. However the defendant then denied all the facts pleaded at paragraphs 5-11 while asserting being a stranger to those fact pleaded at paragraph 11, 12 & 13. There was additional pleading that there was never a covenant to refund, that any refund would only be available upon the defendant getting another purchase for the subject unit and lastly that it was at all time known to the plaintiff that the deposit paid would be employed in the construction and that the defendant was willing to complete the transaction as initially convinced. The defendant also filed two witness statements but no list nor copies of documents. At case conference the defendant chose to call only one of the two people who had filed a witness statement.

Evidence by the parties

9. Pursuant to case conference directions given on the 5/2/2018 the plaintiff did adopt her witness statement as evidence in chief and produced the documents filed as exhibits. She said that while investing on the appointment she expected to get the finished house by the estimated date of completions and not to wait from ever.

10. The defendant's position on the other side was, while admitting payment of the deposit and the letter of offer, that there was no agreement as to refund because the deposit was intended to be employed from the construction and was so employed hence there was never an obligation to refund unless and until there be found another buyer for the same unit.

11. Those same positions were taken by the parties in their written submissions filed on 16/5/2018 and 23/5/2018 respectively.

12. Having considered the pleadings filed and the evidence adduced in support thereof and the submissions offered, two substantive issues isolate themselves as demanding determination by the court. The issues are:

ii. Was there a time limit within which the defendant was to complete construction and surrender the sold unit to the Plaintiff?

iii. What would happen to the deposit in the event there was no completion in time or at all?

iv. What orders should be made on costs?

13. The issues I have found to isolate themselves are informed by the fact that it is common ground that there was a letter of offer made and duly accepted by the plaintiff pursuant to which payment was made in the sum of Kshs.16,000,000/=. Those two facts as pleaded by plaintiff and admitted by the defence cannot be subject of determination by the court. There can be no issue for an admitted fact.

Was there time limit for construction to be completed?

14. The letter of offer, duly accepted by the plaintiff and which was crafted and drawn by the defendant itself provided as follows:-

CLAUSE 13 COMPLETION DATE

The date following five (5) working days after the date on which a certificate by the Architect to the effect

that in the opinion of the Architect a practical completio has been achieved. THE ESTIMATED COMPLETION

DATE IS JULY 2014.

15. Whereas the completion date was subject to certification by the Architect, the clause was specific enough to give an approximate date the defendant in own estimation, maybe based on professional advice, fixed as a reasonable date upon which the plaintiff would base a legitimate expectation. Being approximate, any time around the month of July 2014, a month or two before or after, would properly be

deemed, a reasonable time for the plaintiff to expect delivery of the completed unit. However when the year 2014 ended, some 5 months after the approximate date of completion and the delay progressed into some 24 months later, the delay ceased to be reasonable but qualified to be inordinate and therefore an indication of failure on the part of the defendant to deliver on its bargain and considerate for which the deposit was paid. That to this court was a fundamental breach that in all events entitled the plaintiff to seek and be awarded the refund.

16. Worse still, the letter of offer did not mention that the property was at the time the letter of offer was issued and executed burdened by any encumbrance. When therefore it emerged that the property was threatened with sale it could only indicate to the plaintiff that the defendant actually had no interest to sell free of encumbrances.

17. Infact a casual perusal of the Replying Affidavit filed by National Bank of Kenya, as then 2nd defendant, reveals that, as at the date the letter of offer was issued in 2013, the property had long been charged to thrice to the said bank to secure the borrowing of the defendant in the aggregate sum of Kshs.211,000,000/=.

18. The charge, further charge and 2nd further charge all contained covenants by the defendant to pay the sum secured and on default reserved the chargees' statutory right of sale. In fact clause 10 of the charge forbade the defendant from selling, transferring or in any other way parting with the possession of the property or any part thereof without the prior written consent by the chargee. To that extent only, can it be said that the defendant ever gave any consideration for the payment of the deposit by way of clean title to be passed? I hold and find that the defendant had no unencumbered title to sell or pass, even at completion, when there had not been sought and obtained a consent of the said chargee.

19. It then came to pass that prior to filing the suit the said bank sought to realize its security by sale and when the parties appeared before court on the 23/11/2017, the plaintiffs' counsel informed the court, after reading the Replying Affidavit that there was no cause of action disclosed against the bank and sought to have the suit withdrawn but the court had the same struck out with costs.

20. I do hold that there was an agreement that the construction be completed in or about the Month of July 2014 and that when there was a delay of some 2 years before completion the defendant had fundamentally breached its covenant to the plaintiff and therefore entitled to the plaintiff to rescind the contract by demanding completion or in default refund of the deposit paid as it did by letter of 13/7/2016.

21. There having been a default and a breach by the defendant to complete construction and delivered the agree apartment as agreed and on the date covenanted, and the plaintiff having made a demand, the defendant was bound to prove ability to complete and in default effect a refund.

22. It cannot be lawfully and reasonably said that there was no agreement to refund hence no refund can be ordered. This court proceeds from the learning that it is a remedy in the law of contract that where there is a failure by a contracting party to meet its side of the bargain, the parties are entitled to ***restitutio ad integrum***. That remedy is purposed to take back the parties to their positions before the breach or frustration. Here it is clear that the defendant started on the footing that it could not sell without disclosing the inability to sell without the consent of the bank. One cannot help holding the view that it did mispresent its capacity to sell by failure to reveal the encumbrance against the title it sought to sell. It can therefore not be just nor conscionable to maintain that no refund was agreed hence none is available. That would result in a situation where the defendant is blessed by the court to keep the plaintiffs deposit without a consideration.

23. It is also not conscionable to say that the defendant cannot be compelled to refund unless and until it gets another purchaser. That would be unjust and unreasonable because the subject property is not available for sale by the defendant until unless it discharges its debt to the bank and removes the threat of sale by the bank as a chargee.

24. The upshot is that the plaintiff has proved its case against the defendant for an order that the defendant must effect a refund of the sum paid and acknowledged to have been paid to it.

25. As the defendant has keep the plaintiffs money since the date of payment, there is a benefit derived by the defendant in so keeping the money which is the mirror image of the disadvantage suffered by the plaintiff in her money being kept away from her for the length of time. Where one keep the others money unfairly the remedy in law is to award interest. I therefore order that the defendant refunds the sum of Kshs.16,000,000/= together with interest herein at court rates from the 20/01/2014 when the offer was accepted till payment in full.

26. Although the plaintiff has sought interest at both commercial rates and court rates from date of payment till settlement in full, I have settled on court rates because there was no evidence on what the commercial rates was to be so applied.

27. On costs, the defendant has stressed the fact that there was never demand before action and therefore that the plaintiff even if successful should not be entitled to costs. The determination of that issue should not be difficult.

28. There is that letter dated 13/7/2016 which demanded that the defendant completes the transaction and hands over the completed apartment unit within 21 days or refund the deposit within the same period. The letter then had a penultimate clause. It said:-

> **"TAKE NOTICE that unless you complete the lease transaction as envisaged in the agreement and handover the duly completed apartment to our client or in the alternative refund the deposit to our client together with interest within the period, our client will be at liberty to exercise her rights and remedies under the agreement and as provided by law without any further or other reference to you whatsoever".**

29. I do hold that there was a demand issued and filed with the plaint as demanded by Order 3 Rule 2 Civil Procedure Act. That together with the fact that the plaintiff has succeeded, the law demands that the costs do follow the event.

30. I award to the plaintiff the costs of the suit together with interests on such costs from the date of the judgment till payment in full.

Dated and delivered at Mombasa on this 5th day of October 2018.

P.J.O. OTIENO

JUDGE