



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CASE NUMBER 155 OF 2019 (OS)

IN THE MATTER OF ARTICLES 40,64, AND 159 OF THE CONSTITUTION

AND

IN THE MATTER OF SECTIONS 1,1A,1B,3 AND 3A OF THE CIVIL PROCEDURE ACT (CAP 21)

AND

IN THE MATTER OF ORDER 37 RULES 3 OF THE CIVIL PROCEDURE RULES 2010

AND

IN THE MATTER OF SECTIONS 10 OF THE LIMITATION OF ACTIONS ACT, CAP 22

AND

IN THE MATTER OF A CONTRACT FOR SALE AND/OR A DISPOSITION OF AN INTEREST IN LAND

AND

IN THE MATTE ROF

APARTMENT NUMBER EGL/01/100/2014 IN BLOCK A, HATHERU ROAD

BETWEEN

SUNG RIM CHOI.....APPLICANT

VERSUS

EXOTIC GATES LIMITED.....RESPONDENT

JUDGEMENT

1. The Applicant filed an originating summons against the Respondent on 4th April 2019 in which she sought the following reliefs:-

1. The Hon Court be and is hereby pleased to issue a declaratory order , that the Respondent company is in breach of the contract for the sale of Apartment number EGL/01/011/2014 in Block A, Hatheru Road entered with the Applicant on 8th November 2014.

2. The Hon Court be and is hereby pleased to issue an order directing for the immediate repayment of the full sum of KES 3,000,000/= (Three Million Kenya Shillings) due to the Applicant.

3. The Hon Court be and is hereby pleased to issue an order directing for the immediate payment of interest at the prevailing commercial rates , on the sum of KES 3,000,000/= (Three Million Kenya Shillings) due to the Applicant.

4. The Hon Court be and is hereby pleased to issue an order directing for the immediate payment of general damages to the Applicant for the distress occasioned by the negligent refusal by the Respondent to perform its undertaking and breaching the legitimate expectations of the Applicant.

5. The Hon Court be and is hereby pleased to issue an order for costs of this application in the Applicant's favour.

2. The Respondents filed a replying affidavit in opposition to the Applicant's claim and raised a counter claim seeking the following reliefs:-

a) 2.5 % of the sale price being Kes.507,500/= as per the refund policy term on page 4 of the agreement together with interest on the same at the then prevailing commercial rates.

b) The sum of Kes.1,064,900/= being the cumulative default penalty from 12th November 2014 to the date of completion as per the late penalty fee term on page 3 of the agreement.

c) 10 % of the sale price being Kes.2,030,000/= in accordance with the Law Society Conditions for sale, 1989.

3. The Respondent had intended to develop apartments on LR No. 209/5590/11 in Nairobi along Hatheru Road. The Respondents offered the apartments for sale off plan. One of the purchasers of the apartments was the Applicant who was offered apartment No. EGL/01/011/2014 IN Block A, 4 Bedroom. The purchase price of the apartment was agreed at Kshs.20,300,000/= . Construction was to commence in December 2014 and be complete in June 2016.

4. The Applicant signed an offer letter on 8th November 2014. It was a term of the agreement that the Applicant was to make a deposit of 25% of the purchase price that is Kshs.5,075,000/= . Upon acceptance of the offer letter. The next instalments were to be paid in accordance with the terms agreed in the offer letter. The Applicant made a deposit of Kshs.3,000,000/= which was accepted by issuance of a receipt on 12th November 2014.

5. The Applicant contends that the project has never taken off and that she has been pleading with the Respondent to give her a refund of the deposit made but the Respondent has remained adamant. As at the time the Applicant filed this suit, the project had not begun and it only remains a paper project. The Applicant states that she had anticipated to move into her house in 2016 and avoid high rents she is incurring but this has not been possible and she is now seeking for a refund and other monies in her claim.

6. In a replying affidavit to the originating summons, the Respondent contends that there was no agreement for refund of the deposit made as the agreement was that the deposit would be immediately applied in the proposed construction. The Respondent further contends that it is the Applicant who frustrated the contract by paying only Kshs.3,000,000/= which was less the agreed deposit of Kshs.5,075,000/=.

7. The Respondent denies the Applicant's claim that the contract has stalled. The Respondent states that the project was only delayed as a result of some constraints related to the Respondent obtaining title which was a mandatory requirement for practical completion of the works. The Respondent states that the contract is executory and the obligations in the contract have not crystalized and that the Respondent is keen on selling the apartment to the Applicant.

8. The Respondent further states that as a result of the Applicant not paying the full deposit and the subsequent instalments, the contract has been frustrated and the Respondent now claims the amount in the counter-claim. The Respondent further contends that if the Applicant is insisting on a refund, then the Respondent should be given time to complete the project, sell the apartment to another person before it can refund the deposit.

9. The Court directed parties to file written submissions. The Applicant filed submissions on 23rd January 2020. The Respondent filed submissions on 20th February 2020. I have carefully considered the originating summons by the Applicant as well as the opposition to the same by the Respondent. I have also considered the submissions filed. The issues which emerge for determination are as follows:-

i. Who between the Applicant and the Respondent is in breach of the agreement of 8th November 2014?

ii. Are the parties entitled to their respective claims.

10. There is no contention that the Applicant was expected to make a deposit of Kshs.5,075,000/=. The Applicant made a deposit of Kshs.3,000,000/= which is less 2,075,000/=. The Kshs.3,000,000/= deposit was received and receipted on the 12th November 2014. The Respondent did not ask for the balance from the Applicant. The agreement which was signed was clear that 80% of the amount of the purchase price would go towards construction of the apartments. It was also made clear that the funds paid by the purchaser was for immediate utilization of the proposed development.

11. Five years after the offer letter was signed, the project has not started. It is therefore clear that any payments which would have been made would have gone towards the construction of the apartments. The construction has not started five years later. This is clear indication that the project has failed and there is no possibility of it getting out of the ground. The Applicant would have been motivated to pay the subsequent instalments if the project had started.

12. The Respondent has conceded that the delay in commencement was as a result of issues to do with title. The Respondent should not have entered into the agreement with the Applicant if it had no clean title which would have been the basis of the contract. The Respondent was guilty of material non-disclosure and cannot argue that the Applicant did not adduce any evidence to show that it had no title when the

Respondent has disclosed that the delay in commencing construction was as a result of title.

13. The apartments were expected to be complete by June 2016. Three years after the completion date, the project is yet to start. It is clear that the Respondent is in breach of the agreement. The Respondent accepted the deposit of Kshs.3,000,000/= . It never followed up on the balance of Kshs.2,075,000/= . The Respondent is deemed to have waived its right to insist on full payment of deposit and cannot be used as an excuse for failure to construct the apartments as agreed. There are many decisions on the issue of estoppel by waiver. In the case of **Serah Njeri Mwobi Vs John Kimani Njoroge (2013) eKLR** the doctrine of estoppel was defined as follows:-

“ The doctrine of estoppel operates as a principle of which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person”.

14. In the case of **John Mburu Vs Consolidated Bank of Kenya (2018) eKLR** , the issue of estopped by conduct and waiver was stated as follows:-

“ A person who is entitled to rely on a stipulation existing for his benefit in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist”.

15. In the case of **Steel Rolling Mills limited Vs Jubilee Insurance Company Limited 92007) eKLR** , it was held as follows:-

“ A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one’s guard and leading one to believe that the other has waived his right”.

16. In the instant case, the Respondent accepted the Kshs.3,000,000/= deposit and it remained mum as to the balance . In this case, the Respondent was taken as having waived its right to insist on the balance of the deposit and cannot now raise it to plead breach on the part of the Applicant. The subsequent payments were to be made on the understanding that the same would have gone towards construction of the apartments. As no construction went on, there is no basis upon which the Applicant would have continued to pay for a project which had in all respects stalled.

17. The delay of five years is unreasonable. The Respondent is the one in breach of the agreement. To begin with, the Respondent did not have title as it has admitted that the delay was due to issues relating to title. The construction has not taken off and the Applicant cannot be faulted for not paying the subsequent instalments which in any case would have been justifiable if there was contemporaneous construction going on. It is therefore clear that the Respondent was the one in breach of the agreement. I entirely agree with the reasoning in the case of **Rehema W Njoroge Vs Presbyterian Foundation & Another (2018) eKLR** which dealt with similar issues.

18. The Applicant is entitled to refund of the deposit paid that is Kshs.3,000,000/= . This refund cannot be pegged to completion of the project and sale of the unit which should have been sold to the Applicant before refund can be made. The contract between the Applicant and the Respondent cannot be salvaged. The Respondent has been enjoying the Applicant’s money and it will be unfair to delay the refund anymore.

19. The Applicant was ready and willing to meet her bargain. It is the Respondent which did not meet its side of the bargain. The issue of the Applicant being asked to pay 2.5% of the sale price as per refund policy does not therefore arise. The Applicant was forced to back out of the deal and cannot be penalized for doing so. If the Applicant had willingly opted out, then the 2.5% of the sale price would have been tenable.

20. The amount of Kshs.1,064,900/= being claimed by the Respondent from 12th November 2014 is not awardable. There is no way the Applicant would have continued to pay instalments for a project which had not even started. The penalty would have applied if the project was ongoing but the Applicant delayed on paying her instalments.

21. The 10% of the sale price being claimed by the Respondent is not claimable. This amount will have only applied if a contract for sale had been executed and the contract thereafter collapsed due to the default of the Applicant. In the instant case, an agreement had not been executed. The contract was contained in an offer letter and the contract which would have given rise to forfeiture of 10% had not been drafted and signed.

22. It is therefore clear that the Respondent’s counter-claim fails and the same is hereby dismissed with costs to the Applicant. On the other hand, I find that save for general damages which cannot be awarded in addition to special damages, the Applicant has proved her case on a balance of probabilities. I therefore enter Judgement in her favour against the Respondent as follows:-

1. A declaration is hereby given that the Respondent is in breach of the contract for sale of Apartment No. EGL/01/100/2014 in Block A, Hatheru Road entered with the Applicant on 8th November 2014.

2. An order is hereby given that the Respondent do refund the Applicant a sum of Kshs.3,000,000/=together with interest at court rates with effect from 12th November 2014 until payment in full.

3. The Respondent to pay the Applicant costs of this suit.

Dated, Signed and delivered at Nairobi on this 14th day of May 2020.

E.O.OBAGA

JUDGE

In the virtual presence of :-

M/s Mangla for Respondent.

Court Assistant: Hilda

E.O.OBAGA

JUDGE