



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 203 OF 2015

ROSE KANANA MUTHURI.....PLAINTIFF

VERSUS

ERDERMANN PROPERTY LIMITED.....DEFENDANT

JUDGEMENT

1. By a plaint dated 9th March 2015 the plaintiff prays for judgment for:-

(a) Order in the nature of a permanent injunction to restrain the defendant, its servants and or agents from advertising for sale and/or offering for sale in any manner whatsoever or selling the property known as Great Wall Apartments Phase II Residential unit H04 on LR No. 12715/449 to any other party whatsoever save for the plaintiff.

(b) An order of specific performance directed at the defendant, to compel the defendant to sign all documents and do all acts for the purpose of completing the contract between the plaintiff and the defendant for the sale by the defendant and the purchase by the plaintiff of the property known as Great Wall Apartments Phase II Residential Unit H04 on LR no. 12715/449 and the developments therein.

(c) Damages for breach of contract in lieu of or in addition to specific performance as prayed in (b) above.

(d) Costs of this suit.

(e) Any other relief this honourable court may deem just and expedient.

2. Upon being served with copies of plaint and summons to eneter appearance the defendant entered appearance and filed a statement of defence dated 13th April 2015.

3. PW1 Rose Kanana Muthuri, the plaintiff told the court that she was adopting her witness statement dated 9th March 2015. She told the court that on 7th November 2013 she saw an advertisement for the apartments in question in the Daily Nation Newspapers. She paid a booking fee of Kshs.10,000/-. She desired to purchase an apartment in Phase II (Great Wall Apartments). The advertisement stated that the show house was ready. She viewed the show house and liked it. On 29th November 2013 she paid Kshs.1.5 million. She was issued with receipt no. 3872. Thereafter she made all the payments to the tune of Kshs. 4 million. She was given a letter of offer on 12th May 2014. She paid the last installment of Kshs.100,000 on 7th May 2014. The house was to be handed over on 31st December 2014 by the defendant to the plaintiff.

4. On 9th January 2015 she went for inspection and found the houses were not complete. There was no electricity. The wires were exposed and the finishing was different from what she had seen on the show house in Phase II. The ceiling was not sprayed with gypsum and the drawers in the kitchen were not as prescribed. She wrote a letter to the defendant pointing out all these issues. The letters are dated 9th January 2015 and 10th January 2015. The defendant replied vide a letter dated 17th January 2015. The defendant claimed the changes were done in respect of specifications of Phase II apartments.

5. It is the plaintiff's case that she was not consulted before these changes were effected. She then instructed an advocate who wrote a letter to the defendant dated 19th January 2015. The defendant responded in a letter dated 26th January 2015 claiming it was the plaintiff's fault for not checking the specifications of Great Wall Phase II apartments show house. She had however been shown the show house in Phase III. She denied that she had trespassed onto the house and made modifications as she did not have access to the said house. She told the court after several correspondences with no solution, she filed this suit she produced the documents in her list of documents dated 9th March 2015 as exhibits P1 to P17 respectively. She urges that the prayers sought in the plaint be granted.

6. PW2 Wilson Mwirigi Muthuari a brother to the plaintiff, adopted his witness statement dated 2nd September 2018. He resides in Great Wall Apartments Phase III which he purchased from the defendant. That following the advertisement in the Daily Nation Newspapers on 7th November 2013, the would be buyers were referred to the show house in Great Wall Phase III. He and the plaintiff saw the show house in phase III. He also stated that the house in phase 2 has a lot of variations from the show house that the buyers were shown in phase 3.

7. DW1, John Rajwayi, head of planning with the defendant adopted the witness statement dated 18th January 2019 and the list of documents dated 22nd September 2015. He told the court that the defendant is a property developer. That he has worked for the defendant for ten (10) years. He told the court that the plaintiff bought an apartment at Great Wall Phase 1 and 2 respectively. He confirmed that the plaintiff paid for the apartment at great wall phase 2 in five instalments. She was given a letter of offer dated 12th May 2014.

8. Further that the defendant was not bound to avail to the plaintiff a houses similar to the show house in phase III. While referring to a letter of complaint dated 10th January 2015 by the plaintiff, The witness stated that the changes were not significant and did not affect the structural effects of the building. That the plaintiff did not fulfil her obligations as stated in the agreement and therefore had no authority to enter the premises. He prays that the defendant be found to have fulfilled its obligations and hence the plaintiff's suit ought to be dismissed without costs.

9. At the end of the hearing the parties tendered written submissions. On 30th January 2020 Mr. Kinyanjui held brief for Ms matasi for the defendant and sought leave to put in written submissions. The defendant was granted five days to file its submissions. At the time of writing this judgment the defendant's submissions were not on record.

10. I have considered the pleadings, the evidence on record, the written submissions and the authorities cited. The issues for determination are:-

(i) Whether the defendant breached the contract and if so, is the plaintiff entitled to general damages.

(ii) Whether the plaintiff is entitled to specific performance.

(iii) Who should bear costs?

11. By a letter of offer dated 12th May 2014, which was signed by the plaintiff on 13th May 2014, the defendant agreed to sell to the plaintiff Apartment H04 Phase II of Great Wall Apartments for Kshs.4,000,000. Thereafter a sale agreement was executed between the parties. The date of completion was 31st December 2014. It is not in dispute that the plaintiff paid the purchase price. She produced the receipts as exhibits in this case.

12. It is the plaintiff's case that by 31st December 2014 the house was not complete. On 5th January 2015 she inquired from the defendant who asked her to inspect the house and suggest the modifications that she needed made. She confirmed that she did so. On 10th January 2015 she wrote a letter to the defendant complaining about material variations pertaining to the suit premises. A follow up letter was written by her advocate on 19th January 2015. The defendant by a letter dated 26th January 2015 averred that the houses at Great Wall Phase II were made according to the standard and specifications of the show house at great wall phase II. This the plaintiff claims was a departure from what had been advertised. Further by a letter dated 2nd March 2015 the defendant purported to terminate the contract.

13. The plaintiff relied on advertisement placed on the Daily Newspapers for sale of residential apartments at Kshs. 4 million. Buyers were asked to view the show house at great wall apartments Phase III. The plaintiff decided to purchase the said apartment on the strength of what she had seen in the show house at great wall apartments phase III. PW2 Wilson Mwirigi confirmed that potential buyers were being shown the show house at great wall phase III. He also confirmed that the house being offered to the plaintiff in phase II had variations. DW1 John K. Otieno Rajwayi, the head of planning with the defendant confirmed that, there were changes but would not affect the structural effects of the building. He however admits that there were changes and the reason given was that the plaintiff had not stated that she wanted her house to look exactly like the show house in Great Wall Apartments phase III.

14. I believe the plaintiff liked what she saw in the show house at great wall phase III. It is what made her to pay for a similar apartment. In the case of **Winfred N. Karanja vs Regnoil Kenya Limited [2018] eKLR** the court stated as follows:-

“35. The doctrine of estoppel is well captured under section 120 of the Evidence Act which provides:-

“when one person has by his declaration act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing”.

The defendant was under an obligation to deliver the apartment with the same specifications as those in the show house in phase III.

15. I agree with the plaintiff's submissions that the defendant cannot claim to have performed or discharged its contractual duties after it altered what was presented to the plaintiff. I am satisfied that the defendant breached the said contract and the plaintiff is entitled to general damages.

16. The defendant claimed that the plaintiff trespassed on to the suit premises and made several modifications. The defendant did not avail any evidence before this court to support this assertion. The defendant claim of trespass on the part of the plaintiff cannot stand.

17. It is the plaintiff's evidence that she was invited by the defendant to inspect the suit premises so as to satisfy herself of its condition. Since the plaintiff purchased the said apartment, she has not been able to make use of it. I find that she has suffered loss. In the case of **PAA Brothers Co. Limited vs Qiye Co. Limited [2018] eKLR**. It was stated that:-

“In the case of Darlington B C vs Wiltshier Northern Ltd (CA) 1 W.LR 1995 the court at page 73 stated that:-

“We start therefore with certain elementary propositions in law as to damage for breach of contract which are binding on this court. Thus in the first place, the general principle for assessment of damage for the breach of contract is compensatory to compensate the plaintiff for the damage, loss or injury he has suffered through the breach”.

The court has not been guided on quantum. I award Kshs.100,000 which I think is reasonable.

18. The defendant did not fulfil the conditions set out in the contract of sale. It received the full purchase from the plaintiff but failed to deliver the apartment she deserved. Clearly the defendant was in breach. The plaintiff is entitled to the apartment she paid for. I rely on the case of **Andrew Karemi Kingori vs Josheph Waweru Njoroge [2018] eKLR** where it was held that:-

“it should be noted that specific performance is an equitable remedy and as a rule of equitable remedies is available at the court's discretion. In this current case the plaintiff has established by his evidence that he performed his part of the bargain and therefore he is entitled to an order of specific performance”.

I find that the plaintiff has performed her part of the bargain. The other charges due were to be paid during registration of the lease in her favour. She cannot be said to have failed to remit.

19. In conclusion, I find that the plaintiff has proved her case on a balance of probabilities as against the defendant. Accordingly, judgment is entered for the plaintiff as follows:-

(a) That an order of permanent injunction is hereby issued restraining the defendant, its servants and or agents from advertising for sale and/or offering for sale in any manner whatsoever or selling the property known as Great Wall Apartments Phase II Residential unit H04 on LR No. 12715/449 to any other party whatsoever save for the plaintiff.

(b) That an order of specific performance is hereby issued directing the defendant, to sign all documents and do all acts for the purpose of completing the contract between the plaintiff and the defendant for the sale by the defendant and the purchase by the plaintiff of the property known as Great Wall Apartments Phase II Residential Unit H04 on LR no. 12715/449 and the developments therein.

(c) That the plaintiff is awarded general damages for breach of contract at Kshs.100,000/-

(d) That each party do bear its own costs.

It is so ordered.

Dated, signed and delivered in Nairobi on this 18th day of June 2020.

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L. KOMINGOI

JUDGE

In the presence of:-

.....Advocate for the Plaintiff

.....Advocate for the Defendant

.....Court Assistant