



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 692 OF 2009**

**BONIFACE KEVIN OMONDI .....1<sup>ST</sup> PLAINTIFF**

**STEPHEN ANTHONY FOSTER.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MALBOROUGH PROPERTIES LTD .....DEFENDANT**

**JUDGMENT**

1. By an Amended Plaint dated 12<sup>th</sup> November, 2008, the Plaintiffs pleaded that they had entered into an agreement with the Defendant in or about 2007 for the purchase and sale of an apartment in Lavington Valley known as Block D Unit 1 on LR No.330/375 (hereinafter the “Apartment”) for a sum of Kshs. 5 million. A deposit of Kshs.3 million was paid on 1<sup>st</sup> February, 2007 and the construction for the apartment was to be completed by 30<sup>th</sup> April, 2007.
2. The Plaintiffs further pleaded that the Defendant failed to complete the construction of the apartment on 30/4/07 and on 30/7/08 illegally issued a notice of termination of the said contract. That the Defendant finally terminated the contract on 11/8/08 which was unlawful and contrary to the agreement between the parties. That the attempt by the Plaintiffs to pay the balance of the purchase price was rejected by the Defendant on 26/09/2008 when the latter returned a cheque for Kshs.1 million. The Plaintiffs further claimed that due to the delay in completing the construction of the apartment, the Plaintiffs had incurred an expense of Kshs.1,298,000/- as rent for alternative premises. The Plaintiffs therefore prayed for, inter alia, specific performance of the contract of sale, a declaration that the revocation of the sale agreement was unlawful, damages in lieu of specific performance and for vacant possession.
3. The Defendant admitted the existence of the sale agreement but contended that the balance of Kshs.2 million was payable on or before 30/4/2007, that the said payment was not conditional on the happening of any event outside the contract; that there was a delay in completing the construction of the apartment and the Plaintiffs were notified of those challenges at all times.
4. The Defendant further contended that the termination of the agreement was lawful as the Plaintiffs had not paid the balance of the purchase price. That the rejection of the part payment of the balance was in order and that the apartment had since been sold to a 3<sup>rd</sup> party. The Defendant denied that it was liable to pay any damages or the sum of Kshs.1,298,000/- being the additional rent allegedly paid by the Plaintiffs. In conclusion, the Defendant contended that the only available remedy to the Plaintiffs was reimbursement of the deposit paid.
5. At the trial, each party called one witness each. The parties did not file any agreed issues but from

- the pleadings and the evidence on record, the issues that arise for determination may be summarized as follows: what were the terms of the sale agreement between the parties? What was the completion date? Who between the Plaintiffs and the Defendants was in breach thereof? What remedies are available to the innocent party?
6. It was the testimony of PW1 Stephen Anthony Foster that by a sale agreement dated 22/2/2007; the Plaintiffs had agreed to purchase the apartment for Kshs. 5 million, that he paid a deposit of Kshs. 3 million in January, 2007 and that the completion was agreed to be 1<sup>st</sup> of June, 2007. However, the apartment was not completed within the agreed time nor were the completion documents delivered to the Plaintiffs. That although the apartment was not ready, the Defendant issued the Plaintiffs with a termination notice dated 30/7/08. That pursuant thereto, the Plaintiffs sent the Defendant the balance of Kshs.2 million by a letter dated 12/11/08 which was however rejected. That as at that time the completion documents had not been sent to the Plaintiffs.
  7. DW1 Nicholas Stock told the court that the apartment was sold to the Plaintiffs at Kshs. 5 million on cash basis. He admitted that the sale agreement was in writing and that the deposit of Kshs. 3 million was paid on 1<sup>st</sup> February, 2007 and the balance of Kshs. 2 million was payable on or before 30/4/07. That on 30/7/07, the Defendant gave notice of completion by which time to further payment of the balance had been made whereby the Defendant terminated the agreement in accordance with the terms of the contract. That thereafter, the Defendant entered into an agreement for the sale of the apartment to a 3<sup>rd</sup> party.
  8. Both parties were in agreement that the agreement governing their relationship was the one dated 22/02/2007 appearing at pages 13 to 23 of PExh1. The subject of the sale was Flat No. D1 in LR No.330/375 together with 1 share in the management company; the purchase price was Kshs. 5 million of which Kshs. 3 million was payable on or before the execution of the agreement and the balance of Kshs. 2 million was payable on or before 30<sup>th</sup> April, 2007. The Plaintiffs were only entitled to possession upon payment of the purchase price together with any other incidentals. Clause 11 of that agreement provided that:-

***“11. The completion date shall be fourteen months from the date hereof or within seven (7) days of registration of the lease in the purchasers’ favour and the charge in favour of the purchasers financier or within seven (7) days of issuance of the certificate of occupation of that flat by the Nairobi City Council which ever shall come first and the parties agree that time shall be of essence.”***

9. Clause 15 of the agreement made time of essence as far as the obligations of the Defendant under the agreement was concerned and allowed the Plaintiffs to rescind the agreement if the Defendants for any reason were unable to perform their obligations under the agreement as at the completion date. Clause 16 allowed the Defendant to cancel and terminate the agreement on giving seven (7) days notice to the Plaintiffs if payments were not made on the completion date whereupon the Plaintiffs were to forfeit 10% of the purchase price being Kshs.500,000/=
10. From the foregoing, it is clear that the purchase price was payable in full by the 30<sup>th</sup> April, 2007. Clause 7 of the agreement did not attach any conditions whatsoever to the payment of the deposit as well as the balance of the purchase price.
11. Further, the completion being fourteen (14) months after the execution of the sale agreement or within seven (7) days of the issuance of the completion certificate of occupation by the Nairobi City Council or registration of the lease in favour of the Plaintiffs, which ever was earlier, the completion date was therefore 22<sup>nd</sup> April, 2008. From the testimony of DW1, the Certificate of Occupation was issued by the Nairobi City Council on 14<sup>th</sup> May, 2008. This was produced at page 63 of DExh1. PW1 however said this document was never brought to his attention and was he first seeing it in court at the time he was giving evidence. In this regard, my view is and I so hold that in terms of clause 11 of the agreement, the completion date was 22<sup>nd</sup> April, 2008.
12. The witnesses who testified were agreeable that the Plaintiffs did not pay the balance of the purchase on 30<sup>th</sup> April, 2007. That the Plaintiff only attempted to liquidate the same in or about August/September, 2008. To that extent, the Plaintiffs were clearly in breach of their part of the contract. However, under Clause 16 of the agreement, they were at liberty to pay that balance within seven (7) days of receipt of a termination notice from the Defendant after the completion

date.

13. The parties were also in agreement that come the 22<sup>nd</sup> April, 2008, the completion date, the Defendant was not ready to give vacant possession of the apartment. The constructions were still going on. The certificate of occupation came after that date. Indeed, not until the 20<sup>th</sup> June, 2008, that the Defendant's advocates intimated that the completion of the apartment was a few weeks away.
14. In view of the foregoing, I make the following findings. That the Plaintiffs were in breach of Clause 7(b) of the agreement by failing to pay the balance of the purchase price on 30/4/2007. However, that breach was curable by the window given under Clause 16 of the agreement for them to pay the same within seven (7) days of the demand after the completion date. On the other hand, the Defendant was in clear breach of Clauses 11 and 12 of the agreement in that, it had not performed its part of the contract as at the completion date, 22<sup>nd</sup> April, 2008. What is the effect of the said breaches by the parties?
15. The Defendant submitted that it was entitled to rescind the contract since the purchase price was not paid on the authority of **Jonah Kisese Nthenge & Anor Vs Neema Welfare Association (2008) eKLR**. According to the Defendant, the Plaintiffs were not able, ready and willing to pay the balance on the completion date. It was submitted on the part of the Plaintiffs that the Plaintiffs did not pay the balance of the purchase price as the Defendant was still embroiled in a legal tussle with the contract as at 30/4/2007; that the Defendants did not send to the Plaintiffs the completion documents in accordance with the agreement; that the payment under Clause 16 was subject to the completion date and documents under Clause 12 of the agreement. That the actions of the Defendant were clear that it was not ready and willing to complete the contract and that its issuance of the termination notice was malicious and necessitated by the desire to resell the property for a higher sum of Kshs. 7.5million which it did.
16. It is trite law that courts do not draw contracts for the parties. The parties are bound by the terms of the contracts which they have entered into. The duty of the court as held by Lord Denning in the case of **Alien Vs Thorn Electrical Industries Ltd (1967) 2 All ER 1137** is to give the words used by the parties their natural and ordinary meaning in the context in which they are used. In **Bourne Vs Norwich Crematorium Ltd 91967) 2 All ER 576 at 578**, the court held:-

***“One must not at the end of the day distort that which has to be construed and give it a meaning which in its contract one does not think it can possibly bear.”***

17. In **Halsburys Laws of England Vol. 9 4<sup>th</sup> Edn. pg 338 at paragraph 482** the Learned Writers observe that:-

***“Apart from the express agreement or notice making time of the essence, the court will require precise compliances with stipulations as to time whenever the circumstances of the case indicate that this will fulfill the intention of the parties.***

18. A reading of the agreement dated 22/2/2007 will show that the Plaintiffs were bound to either pay the balance of the purchase price on 30/4/07 or within seven (7) days of receipt of termination notice under Clause 16. Further, Clauses 11 and 15 of the agreement made time of essence on the part of the obligations borne by the Defendant. Clause 15 of the Agreement allowed the Plaintiffs to rescind the contract if the Defendant failed to complete the contract on the completion date. The Plaintiffs were also allowed to extend the completion date from time to time in lieu of rescinding the contract. Since the Plaintiffs did not exercise their right to rescind the contract after the completion date, they are presumed to have extended the completion date.
19. From the evidence on record, the Defendant was finally ready to complete the contract in the month of July, 2008. On 30<sup>th</sup> July, 2008 it issued a notice through its Advocates Ms Tongoi & Co. as follows:-

***“We write to inform you that the flat is now ready for occupation as construction works are complete. We are instructed however that your clients have intimated to ours verbally that they are unable to pay the balance of the purchase price immediately and requested a two month***

*extention a fact confirmed by your above noted letter.*

**Unfortunately our client will not grant any extention and in the circumstances we are instructed to issue a completion notice in terms of Clause 16 of the agreement for sale between your clients and ours.**

***TAKE NOTICE therefore that in terms of the said agreement, if the balance of the purchase price now standing at Kenya shillings Two million (Kshs.2,000,000/-) is not received within seven (7) days from the date hereof, you shall be required to return forthwith all the documents delivered to yourselves at your clients expense and procure the cancellation of any entry relating to the subject agreement.....” (underlining supplied)***

20. That letter did not specify what documents were to be returned by the Plaintiff’s advocates. The latter replied thereto on 06/8/08 as follows:-

***“Ours has made arrangements with a new financier to pay the balance of the purchase price. In order to facilitate the release of the loan kindly let us have the completion documents as outlined in the sale agreement on our undertaking to forward the balance of the purchase price upon receipt of the same.” (underlining supplied)***

Ms Tongoi & Company responded on 11/8/08 that:-

***“We regret that our client will not accept the new arrangement as contained in your said letter. Accordingly, our client has opted to cancel and terminate the agreement with you in respect of the sale of the subject flat in the terms of Clause 16 o the said agreement.”***

21. Of course subsequent attempts by the Plaintiffs to pay the balance were rebuffed by the Defendant who proceeded to execute a sale agreement with 3<sup>rd</sup> parties on 21/11/2008 for Kshs.7.5million for the subject apartment.

22. The Defendant decided to exercise its remedy under Clause 16 of the agreement. The relevant part of that clause provides:-

***“..... The vendor shall be entitled to cancel and terminate this agreement on seven (7) days notice being served on the purchasers or their duly authorized agents if payments are not made to it on completion date stipulated in clause 12 above and should the vendor exercise the right to terminate the agreement the purchasers shall forfeit to the vendor ten (10%) of the purchase price being Kenya Shillings Five Hundred Thousand only (Ksh.500,000/=)” (Emphasis added)***

23. Clause 16 was categorical as to what completion was contemplated by the parties under Clause 12 of the Agreement. Clause 12 required the Defendant to deliver to the Plaintiff’s advocates various documents, inter alia, a duly executed lease in respect of the apartment, rates clearance certificate from the City Council of Nairobi, Occupation Certificate from the City Council of Nairobi, duly completed Stamp Duty Valuation Form and a duly registered building and floor plan. As at the date the Defendant issued the completion or termination notice. None of these documents had been supplied to the Plaintiff’s Advocates. Indeed the Plaintiff’s Advocates demanded for the same in their letter of 06/08/08 but none were availed to them.

24. To my mind, when a party issues a completion or termination notice as in this case, that party must himself be ready, able and willing as at the date of that notice to complete the contract. It was never contended or even suggested during trial, that the Defendant was ready, able and willing to complete the contract in terms of Clause 12 of the Agreement. In the case of **British and Common Wealth Holdings PLC Vs Quadrex Holdings Inc (1989) 3 All ER 492**, the Court of Appeal of England held at page 507 that:-

***“As I have mentioned, it is a pre-condition to the service of a valid notice to complete that the giver of the notice is ready, willing and able to complete the contract..... But the fact that, after one party has committed a repudiatory breach, the other elects to affirm the contract does not***

***mean that he has waived he b reach in general. It is a common occurrence in such cases for the innocent party to affirm the contract but sue for damages for the breach.”***

25. I subscribe to the position enunciated in that case. My view of the matter is, once both the parties breached the terms of the contract as to performance as initially agreed, the Plaintiffs by failure to pay the balance by 30/4/07 and the Defendant by completing the contract on 22/4/08, the parties were expected to each give the other a reasonable time and or notice to complete. Although time had been agreed to be of essence, by the continued postponement of the completion date, the parties were deemed to have given each other reasonable time to perform their respective part of the contract. It should be remembered that after 30/4/07, the Defendant never demanded for the balance of the purchase price until 30/7/08. On the other hand, after 22/4/08, the Plaintiffs never pressed for the completion of the contract by the Defendant. I am of the view therefore that, neither the Plaintiff could insist on the 30/4/08 nor Defendant on the forthwith payment of the balance, while the Defendant itself had not completed the contract on 30/4/08 and had also not supplied or delivered to the Plaintiff the completion documents set out in Clause 12 of the Agreement. Each had to be reasonable on their demands under the contract.
26. In view of the foregoing, I find that the completion/termination notice of 30<sup>th</sup> July, 2008 was not in terms of Clause 16 since the Defendant had not delivered the documents set out in Clause 12 as set out in Clause 16. Even after being asked to supply the same by the Plaintiffs' Advocates in their letter of 06/08//08, the Defendant was unable or failed to do so. The Plaintiffs showed their willingness to complete the contract by subsequently sending the cheques for the balance on 26/09/08 (page 41 DExh1) and on 12/11/08 (page 44 DExh1). As at that time, the Defendant had not entered into the sale agreement with the 3<sup>rd</sup> parties for the sale of the apartment (Pages 25 to 34 DExh1). My view is that, the notice of 30/7/08 was irregular, was actuated by malice with the intention to dispose off the apartment to a 3<sup>rd</sup> party at a profit a fact that came to pass. Clearly, the Defendant was in breach of the contract.
27. Of course the innocent party is entitled to relief. The Plaintiffs prayed for specific performance in lieu thereof damages. This court cannot order specific performance now that a lease in favour of 3<sup>rd</sup> parties had been entered into or executed on 31/03/2009 (pages 46-62 DExh1). What the Plaintiffs will be entitled to is damages. On the issue of the claim for Kshs.1,298,000/= being the rent paid as a result of seeking alternative rental place, I do not think it is awardable. This is because after the completion date, 22/04/08, the Plaintiffs did not demand completion or give any notice to the Defendant about the breach. The Plaintiff affirmed that breach and are presumed to have extended the completion date in terms of Clause 15 of the sale agreement.
28. As regards the refund of the deposit of Kshs.3,000,000/-, the Plaintiffs will be entitled to the same. Since the Plaintiffs showed that they were ready to pay the balance, they attempted to pay the same shortly after the wrongful termination notice of 30/7/08, the Defendant denied the Plaintiff the benefit of the increase in value of the apartment. It would be inequitable to allow the Defendant to benefit from its own wrong doing by keeping the difference between what it would have received from the Plaintiffs had it completed the contract with them and the sum it finally received from the 3<sup>rd</sup> parties upon resale. This was Kshs.2,500,000/=. To my mind, that is the actual loss and damage which the Plaintiffs suffered as a result of the Defendant's conduct. The Defendant cannot be allowed to retain that position of advantage obtained wrongfully. That will be unconscionable.
29. Accordingly, the Plaintiffs have proved their case on a balance of probability and there will be judgment in their favour for:-
- Kshs.3,000,000/= less 50,000/= paid to the 1<sup>st</sup> Plaintiff.
  - Kshs.2,500,000/= being the damages suffered as a result of loss of value.
  - The sum in (a) above shall attract interest at court rate from the date of filing the suit until payment in full. However, the sum in (b) shall attract interest at court from the date of this judgment.
  - Costs to the Plaintiffs in any event.

It is so decreed.

DATED and DELIVERED at Nairobi this 05<sup>th</sup> day of June, 2015.

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**A. MABEYA**

**JUDGE**