



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAKURU**  
**CIVIL SUIT NO. 90 OF 2009**

VERONICAH WANJIRU.....PLAINTIFF

**VERSUS**

SAMUEL IKUMBU.....1<sup>ST</sup> DEFENDANT

HEIWA AUTO SPARES AND DISTRIBUTORS LTD.....2<sup>ND</sup> DEFENDANT

BARCLAYS BANK OF KENYA LTD.....3<sup>RD</sup> DEFENDANT

**JUDGMENT**

By an Amended Complaint dated 6th October 2010, the Plaintiff sued the above named Defendants and sought the following orders -

- (a) a permanent injunction restraining the Defendants by themselves their agents, servants or any other person whatsoever from selling, leasing, developing, subdividing, transferring or in any other way dealing with the property known as Title No. NAKURU MUNICIPALITY BLOCK 4/54 or interfering with the plaintiff's quiet and peaceful possession of the aforesaid suit property.***
- (b) a temporary injunction restraining the Defendants by themselves, their agents, servants or any other person whatsoever from selling, leasing, developing, subdividing, transferring or in any other way dealing with the property known as Title No. NAKURU MUNICIPALITY BLOCK 4/54 or interfering with the plaintiff's quiet and peaceful possession of the aforesaid suit property.***
- c. An Order for specific performance of the agreement dated 5th October 2007 and or handing over of the original title documents or giving consent to the Third Defendant by the First and Second Defendants to Equity Bank Ltd the financiers of the plaintiff.***
- d. In the alternative judgment for the plaintiff against the First Defendant for a sum of Kshs 5.71 million with interest at 14% from the date of payment till to date.***
- (e) In the alternative an order directing the Third Defendant in exercising its statutory power of sale of the suit property to give the plaintiff first priority to buy and the same be sold to the plaintiff by the Third Defendant by private treaty.***

**(f) Liquidated damages equivalent of 20% of the purchase price together with general damages for breach of contract.**

**(g) Costs of the suit.**

**(h) Interest on (c), (d) and (e) herein above.**

2. By a Notice of Discontinuance dated 5th May 2011 and filed in court on 10th May 2011, the Plaintiff discontinued her claim against Heiwua Auto Spares and Distributor Ltd (*the Second Defendant*), and Barclays Bank of Kenya Ltd (*the third Defendant*). Further at the hearing of the suit, Counsel for the Plaintiff indicated that the Plaintiff had abandoned prayers (a), (b), (c) and (e) of her Plaint. The therefore only the following reliefs -

**(a) judgment be entered for the Plaintiff against the 1st Defendant for the sum of Kshs 5,710,000/= with interest at 14% from the date of payment;**

**(b) liquidated damages equivalent to 20% of the purchase price together with general damages for breach of contract;**

**(c) costs of the suit; and**

**(d) interest.**

3. In addition to filing a defence against the Plaintiff's claim, the First Defendant (*hereinafter referred to as the Defendant*) filed a Counterclaim wherein he sought judgment against the Plaintiff for -

**(a) rent arrears up to the time the property was sold by Barclays Bank of Kenya at a public auction;**

**(b) general and liquidated damages for breach of contract;**

**(c) costs of the counter-Claim and interest; and**

**d. any other relief which this Honourable Court would deem fit and just to grant.**

4. The Plaintiff filed a Reply to the Amended Defence and Defence to the Counter-Claim on 14th June 2014 wherein she denied all the allegations by the Defendant and attributed all liability for breach of contract on him.

### **EVIDENCE**

5. The Defendant was the proprietor of the parcel of land known as Title Number Nakuru Municipality Block 4/54 (*the property*) which was registered under Heiwa Auto Spares and Distributors Limited. By a Lease Agreement made on 27th June 2005 (DEX 1), the Defendant agreed to lease the property to the Plaintiff for five years at a monthly rent of Kshs. 35,000/=. During the subsistence of this tenancy agreement, the parties entered into a further agreement on 5th October 2007 (PEX 1) by which the Defendant agreed to sell the property to the Plaintiff. The pertinent terms of the agreement were -

**(a) the purchase price for the plot is Kshs 18,000,000/= (eighteen million) payable as follows -**

1. Kshs 2,000,000/= by bankers cheque Nos. 000072 and 000073 each for Kshs 1,000,000/= and the vendor acknowledges receipt by signing hereof [sic].

2. Kshs 1,000,000/= is by post dated cheque No. 000077 payable on 30th October 2007 and the balance of Kshs 15,000,000/= shall be paid to the vendor within period [sic] of 90 days from the

*date hereof.*

3. *The vendor undertakes to follow up the issue of discharge of the title by Barclays Bank and shall ensure that all fees, land rents, rates and other outgoings have been paid to enable transfer and registration as would be necessary.*

4. *The purchaser is already in possession but shall cease paying any rent immediately the sum of Kshs 15,000,000/= is paid. The vendor shall henceforth cease having any control on the whole plot and shall duly notify all other tenants of the change of ownership after which they shall deal with the purchaser on the new terms.*

5. ....

*(6) if any party fails to comply with any term and/or condition herein contained he shall suffer liquidated damages in the sum of 20% of the purchase price and shall refund others all expenses incurred pursuant hereto.*

6. The Plaintiff paid the Kshs 3,000,000/= deposit which payment was duly acknowledged by the Defendant. She also retained possession and continued paying rent upto October 2008 although she remained in occupation until the property was sold on 13th October 2010. The sale agreement was not completed because the property was sold by the bank to a third party, Reliance Metal Limited, for Kshs 23,000,000/= in order to realise the loan it had advanced to the Defendant that remained unpaid. In both the Amended Plaintiff and the Counter-Claim, each party attributed the failure to complete the agreement on the other's actions.

7. The Plaintiff, PW1, blamed the Defendant for failing to settle the loan and obtain the discharge. She explained that on her part, she was ready to pay off the balance of the purchase price and had even secured finance of Kshs 14,000,000/= from Equity Bank under the letter of offer dated 21st November 2007 (PEX 4). However her financiers had conditioned the disbursement of these funds on her depositing with them the original title documents of the suit property. The agreement did not materialise when the Defendant failed to obtain the original title documents.

8. She also testified that acting on the agreement to sell the property to her, she carried out extensive renovations on the property. She had put up temporary structures on the property upon leasing it but after paying the deposit she carried out permanent renovations. PW2 a practising land valuer and the proprietor of Prime Valuers carried out a Valuation and prepared a Report of the improvements (PEX 3). The property which was initially comprised an old residential house had been renovated and extended to create a kitchen, a disco and a bar. He valued all the improvements by the Plaintiff at Kshs 2,710,000/=.

9. She therefore sought reimbursement of the funds utilised in renovating the property, the Kshs 3,000,000/= deposit and liquidated damages of 20% purchase price for breach of contract.

10. The Defendant, DW1, acknowledged receiving the 3,000,000/= and that the Plaintiff continued paying rent upto October 2008. He also testified that the Plaintiff was at all times aware that the property had been charged as security to the Bank and he undertook to redeem the title. He did not agree to give her the title documents to enable her take out the loan. The Defendant intended to utilise the balance to redeem the property. When she failed to pay the balance, the property was sold by the Bank on 13th October 2010 and added that he had made efforts to pay the loan and had even negotiated with the bank to agree on an all inclusive sum of Kshs 8,500,000/= (see DEX 4). She did not inform him that she wanted the title documents to secure the loan.

11. He accused the Plaintiff of carrying out renovations without his consent. The agreement was clear and title would only pass once the balance of the purchase price was paid. Its terms were that the Plaintiff would continue being a tenant. Whereas he acknowledged being indebted to the Plaintiff for the sum of Kshs 3,000,000/= deposit, he was of the view that this amount should be deducted from the rent

arrears owed and the liquidated damages for the breach of the agreement.

## **SUBMISSIONS**

12. The Plaintiff submitted that the claim for Ksh 5,710,000/= had been proved. The Plaintiff was entitled to a refund of the Kshs 3,000,000/= deposit she had paid. It was further submitted that the Plaintiff was also entitled to compensation for the renovations she carried out. Upon execution of the contract, the Defendant ceased having control of the property and acknowledged that his legal status *vis-a-vis* that of the Plaintiff had changed. Therefore the question of the consent of the Defendant or the Plaintiff could not arise. The only thing that was conditioned is the change of ownership which was to be effected upon payment of the balance.

13. It was also contended that the breach of the contract could not be attributed to the Plaintiff. She demonstrated in her evidence that she was ready to fulfill her obligation to pay the loan within the 90 days contract period. On the claim for rent arrears it was submitted that the Defendant failed to particularize his claim for rent arrears and only alleged that it was upto the time the property was sold by the Bank. His claim ought to be rejected for failing to meet the principles set out by the Court of Appeal in **HAHN VS SINGH [1985] KLR 716 -**

***“... special damages which must be not only claimed specially but proved strictly for they are not the direct natural or probable consequences of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and the nature of the acts themselves.”***

14. In the event the claim for rent arrears is awarded, it should only be for the 90 days contract period for this was the intention of the parties.

15. For the Defendant, it was submitted that a contract entered into between parties is binding on the parties in equal measure. The Defendant disclosed to the Plaintiff the material facts of the transaction including the charge that was registered in favour of Barclays Bank of Kenya Limited. The Plaintiff entered into the transaction with the full knowledge of the existence of the loan which had not been settled at the time of the agreement. It was because of her failure to settle the entire purchase price within the time frame of the agreement, that the Defendant was unable to obtain a discharge from the Bank.

16. It was submitted that the Plaintiff had also defaulted under the terms of the agreement as she did not pay the full purchase price before the expiry of 90 days completion period and had approached the court with unclean hands. She also breached the terms of the agreement when she attempted to use the title to secure the loan from Equity Bank. The Defendant had complied with his obligation to follow up the issue of discharge of the title from the Third Defendant by negotiating on the reduction of the loan to Kshs 8,500,000/= and that he depended on the balance of the purchase price to repay the loan in order to obtain the discharge. Because of breaching the contract, the Plaintiff should be ordered to pay the 20% penalty of Kshs. 3,600,000/= provided for in the contract.

18. Counsel also submitted that there was no evidence that the Defendant approached third parties with an intention to sell them the property and that if the court were to find that the Plaintiff is entitled to a refund, the same be offset from the Kshs. 3,600,000/= penalty that is owed to the Defendant.

19. It was further submitted that the terms of the contract were very clear that although in possession of the property, the Plaintiff had not acquired full ownership thereof. Therefore, she had a duty to obtain the consent of the Defendant before making any renovations. Without this consent from the Defendant, all the renovations and alterations made were illegal and unlawful. The Defendant cannot be held liable for the Plaintiff's actions done in breach of the agreement.

## **ISSUES FOR DETERMINATION**

20. The issues for determination are -

- (a) which party was liable for failure to complete the contract?
- (b) whether the Plaintiff is entitled to reimbursement of the costs of renovation,
- c. whether the Defendant is entitled to payment of the rent arrears and if so, for which period, and
- d. the amount of damages payable to the party against whom the breach was committed.

## **LIABILITY FOR BREACH OF CONTRACT**

21. The failure by the Defendant to settle the loan and have the property discharged by the bank was the primary cause of the collapse of the sale agreement because once the property was sold, neither party was in a position to comply with its terms. The issue for determination therefore is who had the obligation to ensure that this property is redeemed?

22. The sale agreement clearly provided that ***“the vendor undertakes to follow up on the issue of discharge of the title by Barclays Bank.”*** The obligation was upon him to ensure that the title documents are released by the Bank. Counsel for the Defendant submitted that he discharged this duty when he negotiated with the Bank for waiver of the interest and managed to have it agree to an all inclusive sum of Kshs 8,500,000/=. It was alleged that under the terms of the agreement, this sum was to be paid from the balance of the purchase price which was not paid in time by the Plaintiff.

23. On carefully considering the terms of the contract, I find that this interpretation does not reflect the intention of the parties. The contract, as admitted for both parties, was to be completed within a period of 90 days. It is before the expiry of this period that each party was to deliver on its part of the bargain. The Plaintiff was to pay the balance of the purchase price and the Defendant be ready to pass his interest to the Plaintiff by delivering the completion documents.

24. I observe that Clause 6 of the Letter of Offer of a loan dated 21st November 2007 from Equity Bank to the Plaintiff specifically provided for -

***“a first legal charge over title number NAKURU/MUNICIPALITY/BLOCK 4/54 to be registered and stamped to cover Ksh 13,500,000/= (consideration of the 15% maker-up on the security under Fanikisha products taken into consideration).***

25. Neither the Plaintiff nor the Defendant disclosed in their evidence exactly what happened. I think both ultimately made poor business decisions. A party who sells a property does so either to settle an oppressing debt or liability. The person who buys is out to increase or consolidate his investment. Both must therefore make strategic decisions. The Seller did take some action. He negotiated a substantial reduction of his liability with his Bankers. This information was communicated to the Purchaser. The purchaser did not utilize it.

26. Under the usual Law Society of Kenya conditions of Sale, all that counsel for the Purchaser would have done was to request counsel for the Bank holding the title to the property, to release the title subject to an undertaking to release the purchase price directly to the Bank upon successful, **firstly** of the Transfer to the Purchaser; and **secondly**, the charge securing the loan by Equity Bank to the Purchaser. This way, both the Plaintiff and the Defendant would have secured the completion of their transaction, and the suit herein would have been obviated or unnecessary.

27. Unfortunately neither counsel for the Plaintiff nor the Defendant thought of this mundane practice, and virtually leaving both parties in breach, the Plaintiff as buyer unable to come up with the balance of the purchase price and the Defendant unable to obtain the release of title from his Bankers. The result is a quagmire and this suit.

28. The Plaintiff cannot say she was ready to pay the balance of the purchase price of shs 15 million. She had merely negotiated with her Banker's and had an offer for a loan of Shs 14 million (*not*

Ksh 15 million). It was subject to perfection or registration of a charge over the property. It is a mystery that her legal advisers failed to advise the Defendant immediately. It is equally a mystery that the Defendant failed to inform the Plaintiff of the outstanding loan. In any event, as a buyer, that is something she or her Advocates would have done by way of a simple search in the Lands Registry.

29. Instead both the Plaintiff and the Defendant lay back, blaming each other for not producing title and not producing the purchase price. The law of contract as received from the good old Romans is that a contract is, as it were, “*act against act*” – (*contractus est quasi actus contra actus*).

30. The good old Romans also said - “*in pari delicto potior est condition defendantis*” (*that where both parties are equally to blame, the position of the Defendant is the stronger.*”

31. In this case, the property was all the time available for sale, both before and beyond the 90 days completion period and, the sale by public auction on 13.10.2010, some three years after the Agreement for Sale was made on 5th October 2007. The Plaintiff and the Defendant kept blaming each other. The Plaintiff says, there were strangers coming to view the property. The Defendants' Advocates say as late as 15th May 2008 some 120 or so days after the completion period had passed “*there were issues the Defendant was sorting out*” in an answer to a letter of offer by the Bank's Advocates, settling the debt at sh 8.5 million. It is thus not a wonder that nearly a year later, the offer for an amicable settlement was withdrawn, per the Bank Advocates' letter of 9th December 2008.

32. It seems to me that had the Defendant's Counsel communicated that information to the Plaintiff's counsel the offer to settle the debt at that reduced amount, perhaps the Plaintiff's Advocates may have given an undertaking to the Bank's Advocates and secured the release of the title. Having waited for seven (7) months before receiving an acceptance letter of the offer to settle the reduced sum, the Bank was perfectly entitled to withdraw the offer, advertised the property for sale and sold it leaving the parties to fall upon the Agreement for Sale. The question is who is in breach?

33. In order to be ready to complete the sale, the Defendant was to have the title released from his Bankers in terms of Clause 2 of the Agreement for Sale. He failed to have the title released. In other words he failed to perform his part of the Agreement for Sale. He breached Clause 2 thereof. He lost his advantage.

34. On her part, the Plaintiff demonstrated that she was ready to complete her obligation under the contract. She had secured by 21st November 2007 (*within 1<sup>1</sup>/<sub>2</sub> months of the Agreement for Sale (5.10.2007)*), a facility from Equity Bank Ltd for sh 14 million the disbursement of which was dependent upon registration of a charge over the property to secure repayment of the said facility or loan. Due to the Defendant's failure to have the title released from his Bankers, the said loan for Equity Bank lapsed. In the circumstances I find and hold that it was the Defendant who breached his undertaking to secure release of title. In the case of **OPENDA VS. AHN [1984] KLR 208**, the Court of Appeal held *inter alia* that -

***“... a purchaser is entitled to recover damages at large where a Seller refuses to implement an agreement for any reason other than defective title and compensation contemplated by the contract or which could reasonably have been in the contemplation of the parties as likely to be wasted if the contract is broken.”***

35. The consequences of breach of the Sale Agreement were spelt out in Clause 5 of the Agreement – if any party breached any term or condition of the Agreement he would be liable by way of liquidated damages put at 20% of the purchase price and refund of all other expenses incurred pursuant thereto. That would in my opinion include a refund of the deposit of the purchase price of Ksh 3,000,000/=. The sum of liquidated damages would be computed on the basis of Ksh 18,000,000 x  $\frac{20}{100} = 3,600,000/=$ .

36. On the question of refund of moneys expended by the Plaintiff on renovations, it is clear from the Sale Agreement that the Defendant permitted the Plaintiff to do as she wished with the

property. He therefore cannot argue that his consent was requisite before any renovations could be carried out. By his conduct, the Defendant represented that he had granted the Plaintiff all rights over the property save for the payment of rent and ownership which was pegged on payment of the full purchase price. The Plaintiff acted on this representation and on the promise that the Defendant would be ready to complete the agreement and would ultimately transfer his rights of ownership to her. Having failed to deliver on his promise, he is liable to compensate the Plaintiff for the loss she suffered of Kshs. 2,700,000/=.

### **WHETHER THE PLAINTIFF IS LIABLE TO PAY RENT ARREARS**

37. The Plaintiff did not deny that she remained in occupation of the suit premises up to October 2010 when it was sold by the Bank. She also admitted in her evidence that she only paid rent up to October 2008 and annexed receipts (PEX 5) to prove payment. From the sale agreement, it can be inferred that the intention of the parties was that Kshs. 35,000/= being the rent payable under the earlier lease agreement would continue to apply until the balance of the purchase price was paid. Although the Defendant did not particularize the period for which he was claiming the rent arrears or the amount, these particulars were very clear from the evidence and were readily admitted.

38. The Plaintiff under the terms of the agreement was obligated to pay Kshs. 35,000/= rent up until the period she paid the balance of the purchase, the remaining Kshs. 15,000,000/=. As at the time she parted with possession in October 2010, she had not paid this balance and had not been discharged from her obligation to pay rent. She was therefore in rent arrears from the October 2008, when she stopped paying rent to October 2010 when she parted with possession. There was no sufficient evidence of increment of this amount during this period. Hence, the Plaintiff was in rent arrears of a sum of Kshs. 840,000/= being the Kshs. 35,000/= monthly rent that remained unpaid for two years until October 2008.

### **CONCLUSION**

39. From the foregoing, I find that the Plaintiff and the Defendant were each able to prove their claims in part. The Plaintiff established that the Defendant failed to ensure completion of the sale agreement. She was also able to prove that she carried out substantive renovations with the sanction of the Defendant and for which she was entitled to compensation. Further the Defendant admitted that the deposit of Kshs 3,000,000/= had not been refunded. On his part, the Defendant proved on a balance of probability that the Plaintiff was in rent arrears which he was entitled to payment.

40. In summary therefore there shall be judgment for the Plaintiff under the Amended Plaint dated 6.10.2010 as follows -

(a)	(1)	<i>Refund of Deposit</i>	-	<i>shs. 3,000,000/=</i>
	(2)	<i>Special Damages as per Contract</i>	-	<i>shs. 3,600,000/=</i>
	(3)	<i>Refund for costs of Renovation</i>	-	<i>shs. <u>2,710,000/=</u></i>
		<i>Sub-Total</i>		<i>shs. 8,710,000/=</i>

(b) *Less Judgment on the counterclaim by the Defendant for Rent arrears – October 2008 to October 2010* shs. 840,000/=

*Nett Balance* shs 7,870,000/=

(c) *the net balance shall attract interest at court rates from the date hereof until payment in full.*

(d) *Having succeeded in part the Plaintiff in the main suit is awarded half the costs of the suit.*

**Dated, signed and delivered at Nakuru this 7<sup>th</sup> day of November 2014**

**M. J. ANYARA EMUKULE**

**JUDGE**