



**Ngesa v Gaceri (Environment & Land Case E034 of 2021)  
[2024] KEMC 97 (KLR) (26 July 2024) (Judgment)**

Neutral citation: [2024] KEMC 97 (KLR)

**REPUBLIC OF KENYA  
IN THE GITHONGO LAW COURTS  
ENVIRONMENT & LAND CASE E034 OF 2021  
AT SITATI, SPM  
JULY 26, 2024**

**BETWEEN**

**FELLISTUS KAMBUA NGESA ..... PLAINTIFF**

**AND**

**CECILIA GACERI ..... DEFENDANT**

**JUDGMENT**

1. By a plaint dated 11<sup>th</sup> August, 2023 verified by an affidavit of similar date, the plaintiff prayed for:
  - a. An order against the defendant for refund of the part consideration paid plus interest from 8<sup>th</sup> September, 2020 liquidated damages and general damages for breach of contract as pleaded.
  - b. Costs and interest at court rates.
2. Accompanying the plaint were the written witness statement of the plaintiff together with a bundle of 3 exhibits to be called in evidence.
3. The defendant opposed the suit by a written statement of defence dated 14<sup>th</sup> September, 2022 in which she prayed for a dismissal of the plaint with costs. The firm of John Muthomi & Company Advocates represented the plaintiff while the defendant was represented by Basilio Gitonga, Murithi & Company Advocates.

**The Plaintiff's Case**

4. PW1 Fellistus Kambua Ngesa adopted her witness statement dated 11<sup>th</sup> August, 2021. By it she told the court that on 8<sup>th</sup> September, 2020 she recorded a sale agreement with the defendant to purchase Land reference Nyaki/Nkabune/1339 measuring 1/8 Acre at the agreed price of Kshs 480, 000/-. She added that she paid Kshs 300, 000 and the balance of Kshs 180, 000 was to be paid upon the transfer by the vendor.



5. The plaintiff stated further that in breach of the agreement the defendant declined to transfer the land hence this suit. She added that there was a penalty clause in the sale agreement whereby the guilty party would pay Kshs 960, 000 as liquidated damages for breach of any clause of the sale agreement. She stated further that despite a demand letter dated 12<sup>th</sup> July, 2021 being served on the defendant, she had still refused to comply with the contractual duties.
6. In support of the claim, the plaintiff produced the following exhibits: Sale agreement dated 8<sup>th</sup> September, 2021. Acknowledgement of receipt dated 30<sup>th</sup> December, 2021 for the sum of Kshs 100,000. Letter of demand dated 12<sup>th</sup> July, 2021.

### **The Defence Case**

7. DW1 Cecilia Gaceri utilised her adopted witness statement dated 26<sup>th</sup> January, 2023, wherein the defendant averred that while it was true that she had recorded a sale agreement with the plaintiff over the subject land, there was no act of breach on her side. To the contrary, she averred that the plaintiff grew greedy and wanted to change the ground situation yet she had known that at the time of recording the sale agreement, the land was still registered in the name of the defendant's deceased husband and the succession cause was pending.
8. In support of her defence, she produced the Grant of Letters of Administration Intestate dated 30<sup>th</sup> November, 2021 issued by the Chief Magistrate's Court –Meru- in Succession Cause 79 of 2021. She then closed her defence.
9. The only issue to be determined is whether or not the plaintiff has proved her case on a balance to probabilities to show that the defendant had breached their sale agreement.

### **Determination**

10. From the tested evidence on both sides, it was established that the parties recorded a sale agreement which was not implemented with the result that the plaintiff has not acquired ownership of the subject land. The question to be decided is whether or not there was a breach to warrant the grant of the reliefs sought.

### **Recoverability Of The Consideration Paid**

11. There is no dispute that the sale agreement was dated 8<sup>th</sup> September, 2021. On that date the subject land was registered in the name of the defendant's deceased husband and as of that date, the defendant had no legal capacity to lawfully transact that land for lack of Letters of Administration. She subsequently obtained the letters of Administration on 30<sup>th</sup> November, 2021 which was 2 months after the recording of the agreement.
12. After obtaining the Letters of Administration, the Defendant went ahead to receive a further payment of Kshs 100, 000 towards the earlier sale agreement to give effect to her intention to sell the land to the plaintiff. If there was no capacity in the initial stage, the capacity was acquired subsequently and the court finds that the conduct of the parties pointed towards an intention to transact but without clear terms.
13. A fortiori, the incapacity of not having the letters of administration at the time of recording the sale agreement could be viewed through the lenses of the equitable legal principle of money had and received. This was discussed in the authority of *Jordan Properties Limited v Maragret Njoki Migwi* [2020] eKLR (L.Njuguna J.) where the superior court had this to say on the issue:



14. In Kenya Airways Limited versus Satwant Singh Flora [2013] eKLR which authority was cited with approval by the Court of Appeal in Five Forty Aviation Limited v Erwan Lanoe [2019] eKLR, the court in laying guidelines to be applied by the court when determining rights and obligations of parties where one party pleads alleged illegality of the contract as justification for refusal to be bound under such a contract held that; -

.....

- (iii) No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.”
- (iv) No Court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality (emphasis mine)
- (v) .....

The learned Judge went on to hold that:

16. Contracts which are illegal and/or against public policy or morality are void. According to the authors in Law of Contract by G.C. Cheshire and C.H.S Fifoot, 5<sup>th</sup> Edition, at page 279, illegal contracts are usually divided into two classes-those illegal at common law and those prohibited by statute. Section 65(3) of the repealed Registered Land Act Cap 300- which was the operative law at the time of registration of the charge in favour of Barclays Bank, provides that; -

“The charge shall be completed by its registration as an encumbrance and the registration of the person in whose favour it is created as its proprietor and by filing the instrument.”

As an encumbrance, it means that the suit land would not be available for sale to the appellant herein.

17. From the above analysis of the law and the pleadings, it is evident that the respondent, at the time of executing the agreement subject of this suit did not have the capacity to enter into the said agreement for the reasons that her interests on the said land were not absolute. Any contract in that respect was void for want of capacity to contract. Further, the said contract was illegal and in violation of an express provision of the statute. By the respondent agreeing to dispose the suit land to the appellant without the consent of the chargee, it clearly points to the intentions to deny the said chargee of its right of exercising statutory power of sale under the charge. Such a contract is not only in contravention of the law but also against public policy.”

14. On the specific question of the recoverability of the considerations paid for the defective contracts, the learned Judge in Jordan Properties (supra) had this to say:

- “19. Having opined that the contract herein was void, the question that needs to be answered is; would money paid under the said contract be recoverable?

In other words, did the trial court err in dismissing the suit before it (which was for recovery of the Kshs. 6,000,000/- allegedly paid to the respondent)? To answer this question, I rely on the case of Root Capital Incorporated v Tekangu Farmers’ Co-operative Society Ltd & another [2016] eKLR where Jailus Ngaah J in handling a similar issue held that; -



“According to Halsbury’s Laws of England (supra) paragraph 883 a claim for the return of money paid over in these circumstances may take one of the four basic forms. It may be:

- (1) a personal action for a debt (for instance, on a loan);
- (2) a personal restitutionary claim for money had and received;
- (3) an action in tort for the return of identifiable coins or notes or their value; or
- (4) a proprietary claim in equity even where the money has been paid into a mixed fund. However, all the cases on recovery of money paid under illegal contracts concern actions in debt or for money had and received.”

20. The Learned Judge making reliance on the Supreme Court of United Kingdom’s decision in *Patel versus Mirza* (2016) UKSC 42, observed that a defendant who has benefited from an illegal contract to possess or keep what he has been paid under the contract is a cause based on unjust enrichment is sustainable. That a defendant’s enrichment is prima facie unjust if the claimant has enriched the defendant on the basis of a consideration which fails. The consideration may have been a promised counter-performance (whether under a valid contract or not), an event or a state of affairs, which failed to materialize.

21. It is my opinion from the above, therefore, that the appellant herein was entitled to recover any amount paid under the said contract (though illegal).”

The foregoing principles were relevant to this case.

15. In spite of subsequently obtaining the letters of administration, the defendant refused and/or failed to transact the transfer of the land to the plaintiff even after she had received the Kshs 300, 000 towards the land sale. That refusal and/or failure yield or refund the money was contrary to the law and entitled the plaintiff to the reliefs for the refund of the consideration. The court, therefore allows the plaintiff to recover this Kshs 300, 000 consideration paid at 14% interest from the date of filing the suit till payment in full.

### **General Damages For Breach Of Contract**

16. As for the prayer for general damages for breach of contract, the same is rejected because it is a well settled principle of law that no general damages shall be paid for breach of contract. In the authority of *Pwani Telecomms Limited v Taita Taveta County Government* (2021) eKLR (Ong’ingo J.) had this to state on the issue of payment of general damages for breach of contract:

“32. In its plaint, the plaintiff also claimed loss of income and business at Kshs. 2,790,000 and general damages for breach of contract. On loss of income and business, the plaintiff in its submissions conceded that no evidence was adduced to support this claim. Accordingly, when it comes to general damages, it is well settled in law that it cannot be awarded on a claim anchored on a breach of contract. In affirming that position, the Court of Appeal in the case of *Joseph Urigadi Kedeva vs. Ebby Kangishal Kawai Kisumu Civil Appeal No. 239 of 1997 (UR)* which was cited by the Court in *James Maranya Mwita v South Nyanza Sugar Co. Ltd* [2017] eKLR emphatically expressed itself thus:

.... As to the award of Kshs. 250,000/= as general damages, Mr. Adere submitted that there can be no award of general damages for breach of contract.....We respectfully agree. There can be no general damages for breach of contract.....”



33. The Court in the case of *Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd* [2015] eKLR explained why general damages cannot be awarded in cases of breach of a contract as hereunder: -

The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred.

17. This principle is encapsulated in the Latin phrase *restitution in integrum* (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009] eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC* No. 704 of 2000 [2004] eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004] eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR))”On the strength of the foregoing authorities, the court dismisses the prayer for general damages for breach of contract as untenable in law.”

### **Recoverability Of The Penalty Amounts Of Kshs 960, 000**

18. In law, a penalty clause in a valid contract is by itself enforceable. This was held to be so by the Court of Appeal in *Samuel Ngige Kiarie v Njowamu Construction Company Limited & another* [2019] eKLR E. M. Githinji, Asike-makhandia & P. Kiage, JJ.A) :

Looking at the literal interpretation of clause 3 it is clear that the parties had intent to impose a penalty of Kshs. 25,000 on the 1st respondent in the event of a delay in the payment of the two instalments of the balance of the purchase price. Like many other contracts that foresee certain contingencies that may come up during the pendency of the agreement that may force a purchaser to delay in remitting the funds on time, such a clause is put in order to safeguard the vendor from losses incurred as a result of the delay. It also serves as a deterrent to the purchaser not to inordinately delay in remitting the required payments.”

19. The learned Judges went to hold that:

It is trite law that parties to a contract are bound by the terms and conditions stipulated therein. That is the case in the instant appeal since the facts confirm that the parties acknowledged having entered into the agreement for the sale of the suit land. None complained of fraud or coercion and they are accordingly bound by its terms. This what this Court had in mind in *National Bank Of Kenya V Pipeplastic Samkolit (k) Ltd & Another* [2001] eKLR;

“The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.”

20. Unlike in the foregoing authority where the contract was found valid and enforceable, in the present case the contract itself was null and void due to the legal incapacity of the defendant to contract.



Consequently, the penalty amounts contained in the now impugned contract were unrecoverable following the finding of the illegality of that contract and all its clauses. In other words, the penalty clause was as dead as a dodo. There was no subsequent verbal or written agreement to revive the penalty clause. This prayer for payment of the penalty clause, therefore, fails and is dismissed.

### **Final Orders**

21. From the foregoing analysis, the court partly allows the plaintiffs claim and partly rejects it as follows:
- a. The prayer for refund of the consideration of Kshs 300, 000/= is allowed with interest at 14% from the date of filing the suit till payment in full.
  - b. The prayer for general damages is declined.
  - c. The prayer for penalty payment of Kshs 960, 000 is declined.
  - d. The prayer for costs is allowed in favour of the plaintiff.

It is so ordered. Right of appeal is 30 days.

**DATED, READ AND SIGNED AT GITHONGO LAW COURTS THIS 26<sup>TH</sup> DAY OF JULY, 2024**

**HON.T.A. SITATI**

**SENIOR PRINCIPAL MAGISTRATE**

**GITHONGO LAW COURTS**

