

REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT NAIROBI

ELCA E206 OF 2024

INC SUPPLIES LIMITED

-

APPELLANT

VS

KENNETH WAIGANJO KIHARA

-

RESPONDENT

JUDGMENT

1. This appeal arises from the judgment of Hon Thomas Nzyoki, CM in MCELC 5135 of 2019 -Milimani. The Appellant and the Respondent were the Plaintiff and the Defendant, respectively.
2. Vide the amended plaint dated the 23/8/2023 the Plaintiff sued the Defendant for interalia damages for breach of contract in the sum of Kshs 5,039,250/- together with interest from the 3/6/2019 until payment in full; damages for loss of contract and /or loss of bargain of Kshs 10 Million; lastly, costs of the suit.
3. It was the Plaintiff's suit that, via the sale agreement dated 25/7/2016, the parties mutually agreed to purchase and sell a portion of 1/2 acre of LR No 2951/344 [suit land], that was held jointly by the Defendant and his brother, Victor Kihara. The agreed purchase price was Kshs 25 million.
4. The highlights of the express terms of the contract included: payment of a deposit of Kshs 4 million on or before execution; payment of the balance of the purchase price of Kshs 21 million upon confirmation by the Defendant that all the completion documents were ready and available; the completion date was to be 90 days from the date of the agreement, that is, from 25/10/2016.
5. It was averred that on diverse dates in May - June 2016, the Plaintiff paid to the Defendant the agreed deposit of Kshs 4 Million and other incidentals on account for purposes of meeting the expenses for the subdivision of the mother title and attendant registration of the

resultant titles. In the meantime, the Plaintiff was ready and willing to perform the essential terms of the agreement and pay the balance of the purchase price, subject, of course, to the Defendant meeting his end of the bargain by availing the completion documents in accordance with the agreement of sale.

6. The Plaintiff averred that the Defendant breached the agreement and has pleaded particulars of breach of contract as well as special damages under paragraphs 11 and 12 A and B of the amended plaint.
7. It is contended that the contract was repudiated on 3/6/2019. That, as at the date of the repudiation of the contract, the value of the property had appreciated to Kshs 35 Million , the basis for which the Plaintiff claims damages for loss of contract and or loss of bargain in the sum of Kshs 10 Million, being the profit that the Plaintiff would have made under the contract but for the breach.
8. In his defence to the amended Plaint, the Defendant denied the Plaintiff's claim in its entirety and, in particular, denied that he breached the contract or that the Plaintiff is entitled to the relief sought therein. He attributed the blame to the Plaintiff on the grounds that he failed to honour the contract.
9. Upon hearing the parties, the trial court entered judgment as follows;

“Having held that the Defendant was in breach, I hold the view that the Plaintiff deserves the costs incidental to prosecuting this suit.

In the sum, bearing in mind the facts of this case and the relevant law discussed above, I enter judgment against the Defendant and order as follows;

- a. The Defendant shall pay to the Plaintiff the sum of Kshs 5,039,250/-, being refund paid as deposit and monies to process the title to the 2nd defendant.
- b. The claim for loss of bargain was not proved and is hereby dismissed.

- c. The sum of Kshs 5,039,250/- shall accrue interest at court rates from 3/6/2019, when the contract subject to this suit was repudiated, until the date of full payment.
 - d. The defendants shall bear the costs of this suit and accrued interest on costs at court rates from the date of this judgment”
10. It is the above decision, in particular, the dismissal of the claim for loss of contract and/or bargain that has triggered this instant appeal on the grounds outlined below;
- a. The learned Magistrate erred in law and in fact in failing to give due weight to the solid evidence tendered in the valuation report that supports the finding that the appellant's loss of bargain directly and naturally resulted from the respondent's breach, referred to the market as at the date of the breach of the contract on 3/6/2019.
 - b. The holding of fact by the Learned Magistrate that there was no evidence of the value of the property as at the breach on 3/6/2019 is unsupported.
 - c. The Learned Magistrate completely misdirected himself on the legal principles obtaining in a loss of bargain, thereby arriving at a plainly wrong decision.
11. Consequently, the Appellant seeks the following reliefs;
- a. That the part of the decision of the Learned Magistrate delivered on 29/11/2024 disallowing the claim for damages for loss of bargain be set aside and substituted with an order that judgment be entered for the Appellant for loss of bargain of Kshs 10 Million.
 - b. That the Appellant be awarded the costs of the appeal.
- The written submissions
12. On 29/7/25, the parties elected to canvass the appeal by way of written submissions. The Appellant caused his submissions to be filed on 8/9/25 while the Respondent failed to comply with the directions of this court with respect to the filing of the written submissions.

13. As to what is the correct measure and assessment date for the loss of bargain in a failed land sale, counsel for the Appellant submitted that where a vendor wrongly refuses to complete a purchaser's damages includes loss of bargain, which is calculated taking the market value at the assessment date less the contract price.
14. Some decided cases were cited before the court; In the case of **Gami Properties Limited vs NSSF & The Chief Land Registrar [2021] KECA 673, KLR** , the court distilled the principles as to the measure and assessment of loss of bargain as follows: the measure of assessment is the market value price and the assessment date is flexible. Breach is the default, but the court may select any just date and must then assess on the evidence before it.
15. In the second case referred by the Counsel for the Appellant to the court, was **Wandiga & Anor Vs Chege 2013 KEHC, 3312, KLR.** The thread in this case is drawn from the measure applied by the authors of Halsbury's, which resonates with the finding in the **Gami** case above.
16. From the above decisions, the Appellant was emphatic that in the instant appeal, the operative date was 3/6/2019, when the contract stood repudiated.
17. It was further submitted that the Appellant discharged its burden of proof regarding how the court should assess the loss of bargain by presenting in evidence the valuation report dated 27/6/23, which valued the suit land at Kshs 35 million as of 3/6/2019 [hereinafter referred to as the repudiation date]. It was also pointed out that the Respondent did not challenge this expert evidence in the lower court, nor did another expert valuation report contest it. Therefore, it was argued that, to the extent that the court rejected the claim on the basis of no valuation report, this rejection was unfounded.

Analysis and determination.

18. Having considered the record of appeal in total, the written submissions and all the material placed before the court, I find the

key issue for determination is: Whether the appeal is merited. Put differently, whether the Appellant is entitled to his claim of loss of contract and/or loss of bargain.

19. This being a first appeal, it is the duty of the Court to review the evidence adduced before the lower Court and satisfy itself that the decision was well-founded. In the case of **Selle & Another vs. Associated Motor Boat Co. Ltd & Others [1968] EA 123**, this principle was enunciated thus:

"...this Court is not bound necessarily to accept the findings of fact by the Court below. An appeal to this Court ... is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

20. Whether or not the Court will interfere with the decision of the trial Court will be guided by the principles set out in the case of **Mbogo & Another vs Shah [1968] EA** where the Court held as follows;

" an appellate Court will not interfere with the exercise of the trial courts discretion unless it is satisfied that the Court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous or unless it is manifest from the case as a whole that the Court has been clearly wrong in the exercise of judicial discretion and that as a result there has been injustice."

21. Black's Law Dictionary, 9th Edition, defines loss of bargain as damages for the breach of contract that should put the injured party in the position it would have been if both parties had performed their contractual duties.

22. In their book, The Law of Real Property, 8th Edition, Page 694, Sir Robert Megarry and Sir William Wade state as follows:

“An action for damages is the primary remedy under the law of contract, though it is less important in relation to contracts for the sale of land than specific performance. The measure of damages is the loss to the claimant from the non-performance of the contract. A vendor, for example, can recover the difference between the price agreed to be paid and the net value of the property left on his hands, giving credit for any deposit paid by the purchaser. A purchaser can claim for the loss of a bargain, i.e the amount by which the net value of the property when conveyed to him at the due date would have exceeded the purchase price. But the court may order such damages to be assessed at some other date where justice so requires; this may be the date of the hearing if the property has risen in value meanwhile. Where the purchaser claims damages for his loss of bargain he cannot in addition recover his costs, e.g. for investigation of title. If he is to be placed in the position in which he would have been had the contract been performed, he would necessarily have incurred those costs.” [Emphasis added]

23. Damages must be a result of the natural and direct result of the repudiation of the contract by the vendor. This is the principle enunciated in **Halsbury’s Laws of England, Volume 12, 4th Edition at paragraph 1183** as follows;

“...Where it is the vendor who wrongfully refuses to complete, the measure of damages is, similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at

the date of repudiation was greater than the agreed purchase price, damages for loss of bargain....” [Emphasis added]

24. In this case, it is undisputed that the parties entered into a valid agreement for the sale of the suit land, as stated in the preceding paragraphs of this judgment; there is no need to reiterate. It is also not disputed that the Respondent was found in breach of the agreement. Contracts are entered into to be fulfilled, and if they are breached, damages become the liability of the offending party and are payable to the injured party. The freedom to contract is a fundamental principle in the law of contract, which supports the practice of commerce. If parties were free to contract and then walk away at will, the very foundation on which commerce is based would be undermined. The trial Court has already made a pronouncement on the breach of the agreement by the Defendant, and I need not revisit it, especially since it was neither disputed nor challenged on appeal.

25. Courts have made pronouncements on delinquent sellers who enter into agreements and breach them at will. In the case of **Eldo City Ltd v Corn Products Kenya Ltd & Another (2013) eKLR** where the Court when confronted with a similar case held:

“In my view, to uphold the position where a party can pull out of a transaction when the parties are already at consensus ad idem, will not be prudent in the world of economics. To my mind, that freedom should be limited up to the point the parties are still negotiating. Once all terms have been agreed and settled, that freedom should dissipate. Otherwise, mischievous parties with no intention of selling their merchandise may engage serious purchasers in a wild goose chase knowing very well that they can pull out at any stage. I think this is not to be encouraged.”

26. The role of the court has been said to interpret contracts and adjudicate on disputes that arise therefrom. In the case of **National**

**Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & Another,
Civil Appeal No.95 of 1999 (2001) KLR 112 (2002) EA 503,**
where the Court held that: -

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved”.

27. The attention of the court was drawn to the defence of the Respondent/Defendant at para 7 of thereof where he stated as follows;
“if there was any breach the same can be amended on monetary terms as per the terms of the contract.”
28. Further in the sale agreement, the parties contemplated events of default which are clearly expressed under clauses 9-11 of the sale agreement dated 25/7/2016. The cumulative effect of the parties' conduct, as expressed in their contract, showed that default was anticipated.
29. Going back to the decision of the trial court, the court at para 2 on page 12 stated as follows;
“ the date when the contract was repudiated by the Plaintiff following the breach by the defendants was on 3/6/2019. However, the Plaintiff relied on the valuation report by Hanson Valuers Limited, dated 21/8/23, and produced in court. In my view, it is unjust to award the loss of bargain based on the valuation of Kshs 35 million done on 21/8/202 In the absence of any valuation of the property as at 3/6/2019, I find that the Plaintiff has failed to prove the claim for special damages under the loss by argument.”
30. I have perused the valuation report dated 21/8/2023 and it is expressed on page 8 of the said report as thus ;
“In this valuation, we have adopted the market comparison approach. Having regard to the foregoing particulars and the prevailing economic circumstances. It is our considered opinion that

the market value of the unencumbered leasehold interest in ½ acre upon LR No 2951/344, New Kitisuru area, Nairobi County, as at 3/6/2019 is Kshs 35 Million Only”.

31. In the aforesaid, I find that the Learned Magistrate erred in arriving at an erroneous decision despite the valuation that had been placed before it. For that reason, the court finds that this is a decision fit for interference by this court under its appellate power.

32. In the end the appeal is merited and it is allowed as follows;

- a. The appeal be and is hereby allowed.
- b. The dismissal of the claim for loss of contract and /or loss of bargain is set aside and is substituted with an award of Kshs 10 Million with interest at court rates from 3/6/2019.
- c. Seeing that the appeal is not contested, I make no orders as to costs

33. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 9TH DAY OF DECEMBER 2025 VIA MICROSOFT TEAMS.

**J. G. KEMEI
JUDGE**

Delivered Online in the presence of:

1. Ms Migiro for the Appellant
2. N/A for the Respondent
3. CA - Ms Yvette Njoroge