

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 247 OF 2024 (OS)

ARCHER DRAMOND MORGAN LIMITED.....
....APPLICANT

VERSUS

MAGDALENE N. WAIGANJO.....1ST
RESPONDENT

IRENE W. OMUNG'ALA.....2ND
RESPONDENT

**(BOTH TRADING IN THE NAME AND STYLE OF NYOKABI
WAIGANJO, OMUNGALA & ASSOCIATES ADVOCATES)**

JUDGEMENT

1. This is a Judgement in respect of the Applicant's Application by way of an Originating Summons dated 14th February, 2024.

Background Facts

2. The Applicant filed the Originating Summons dated 14th February 2024 seeking the following orders;

a) A determination be made on all questions arising out of or connected with a contract of sale between the Applicant (Purchaser) and a one Margaret Nyawira

Nderitu (Vendor) relating to the sale of Apartment No. 104 on LR No. 330/797 pursuant to an agreement for sale dated 23/1/2017.

b) The Court to order that the Respondents do immediately refund to the Applicant the sum of Kshs. 900,000 paid as deposit equivalent to 10% of the purchase price plus interest from 30/8/23 at court rates till payment in full and in default execution to issue.

c) The costs of this suit be borne by the Respondents.

3. This Application was supported by the Affidavit of **John Roki Waithaka**. He stated that in August 2016, the Applicant entered into negotiations with **Margaret Nyawira Nderitu** for the purchase of Apartment No. 104 on LR No. 330/797, located within Dhanjay Apartments at Valley Arcade, Nairobi. The parties formalized the transaction through an Agreement for Sale dated 23 January 2017. It required the Applicant to pay a deposit in accordance with Clause 3.2. Pursuant to this obligation, the Applicant paid Kshs. 900,000 into the Respondents' bank account to be held as

stakeholder. The Respondents are Advocates of the High Court of Kenya practicing as such as partners in a firm.

4. However, following the Vendor's death on 11th April 2017 and other emerging issues, completion of the transaction was delayed beyond the agreed contractual period. The prolonged delay ultimately led to a mutual termination of the Agreement for Sale in or about February 2023 between the Applicant and the deceased Vendor's family. The Applicant's advocates notified the Respondents of the termination and repeatedly demanded a refund of the Kshs. 900,000 deposit through letters dated 10th February 2023, 12th April 2023, and 8th June 2023, all of which went unanswered. A formal 21-day rescission notice dated 30th August 2023 was also served without response or refund.

5. Consequently, the Applicant contended that the Respondents are unlawfully withholding the deposit and are indebted and obligated to refund the full amount together with interest from the date of termination. The agreement having been executed in Nairobi and the property falling

within the Court's jurisdiction, this Court was properly moved to grant the orders sought.

6. The Respondents responded to the Application vide the Replying Affidavit sworn on 16th June 2024. They stated that the suit is fundamentally incompetent as it is time-barred under **Section 4 of the Limitation of Actions Act, Laws of Kenya**, which prescribes a six-year limitation period for actions founded on contract. The Agreement for Sale relating to Apartment No. 104 on L.R No. 330/797 (Dhanji Apartments) was executed between the Applicant and **Margaret Nyawira Nderitu** (now deceased) on 23rd January 2017. Consequently, any contractual claim arising therefrom ought to have been instituted on or before 23rd January 2023. Having been filed outside this statutory period, the present suit is statute-barred and therefore legally untenable.

7. In view of the foregoing, the suit is null and void ab initio and constitutes an abuse of the Court process. It discloses no sustainable cause of action against the Respondents. It ought to be struck out with costs for being filed in

contravention of the mandatory provisions of the Limitation of Actions Act.

8. The Applicant also filed a further Affidavit sworn on 4th March 2025. The Applicant denied any breach of the Agreement for Sale, emphasizing that **Clause 7.1** incorporated the **Law Society Conditions of Sale (1989 Edition)** and **Clauses 4.3** and **4.4** required either party to issue a mandatory twenty-one-day completion or rescission notice, which the Respondents failed to serve. The claim that the suit is time-barred is misplaced because the cause of action arose only upon expiry of the Applicant's rescission notice dated 30th August 2023, when the refund became due and payable. Moreover, even if breach were established, **Clause 4.4(b)** limited the Vendor's remedy to forfeiture of only 10% of the deposit, amounting to Kshs. 90,000, and not the entire Kshs. 900,000. As stakeholders, the Respondents lacked authority to release the full deposit to the deceased Vendor's estate, and by doing so, exceeded their mandate and became liable to refund the Applicant the sums claimed.

Issues for determination

9. The Court has carefully considered the Application and the response therewith as well as the written submissions and frames the following issues for determination;

a) Whether the suit is time-barred.

b) Whether the Applicant proved its case against the Respondents on a balance of probabilities.

c) Whether the Applicant is entitled to a refund of the deposit paid or was the same forfeited.

Analysis

10. **Order 37 Rule 3 of the Civil Procedure Rules** as cited by the Applicant states as follows;

**3. Summons by vendor or purchaser of land
[Order 37, rule 3.]**

A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract).

11. The Applicant states that it entered into a sale agreement dated 23 January 2017 for the purchase of Apartment No. 104 on L.R. No. 330/797. The Applicant paid a deposit of Kshs. 900,000 into the Respondents' bank account, which they were to hold as stakeholders pending completion of the transaction. The parties later mutually agreed to rescind the agreement, and the Applicant now seeks a refund of the deposit from the Respondents.

a) Whether the suit is time-barred.

12. It was the Respondents' case that the Applicant and the Respondents' Client entered into an agreement dated 23rd January, 2017. The Applicant breached the agreement by failing to pay the balance of the purchase price and failing to complete the transaction within 90 days. The ninety days period lapsed on the 23rd April, 2017. The Applicant's cause of action if any arose upon the lapse of 90 days. The Respondents issued a notice to complete vide a letter dated 26th April, 2017. The 21 days lapsed on the 17th May, 2017 and the Respondent issued a seven-day rescission notice on the 17th May, 2017, which lapsed on 24th May, 2017. Therefore, the Applicant's cause of action arose on the 24th May, 2017. Finally, even if the Applicant's cause of action were not statute-barred, the Applicant is not entitled to the deposit of the purchase price, having breached the agreement.

13. **Section 4(1) of the Limitation of Actions Act** provides as follows:

4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued-

(a) actions founded on contract;

14. According to the Applicant, the allegation that the instant suit is statutorily time-barred holds no water. This is because the funds hereof became due and payable upon the expiry of the relevant rescission notice dated 30th August 2023 served by the Applicant. That this is when time started running. Time started running when the 21-day notice issued by the Applicant's lapsed and the Respondents failed to make a refund of the deposit they were holding as stakeholders. The Applicant had 6 years from the Respondents' date of non-compliance to institute these proceedings. For that reason, these proceedings filed on 7th May, 2024 were well within the statutory timelines.

15. It is undisputed that the parties entered into a sale agreement dated 23rd January 2017 and that they had agreed on a 90-day completion period. Further, vide a letter dated 17th May 2017, the Respondent gave the Applicant a

7-day expiry notice, upon which the Contract was to be rescinded. The letter dated 22nd June 2017 confirmed that the sale agreement stood rescinded.

16. However, in the letter dated 12th February 2018, the Applicant informed the Respondents that it had had discussions directly with the Respondents' client and that the two parties agreed to proceed with the transaction. Following this letter was the Respondents' letter dated 26th February 2018 (*written on a "without prejudice basis"*) which stated that the Respondents' client sought another payment of 20% of the purchase price.

17. Thereafter, the Applicant wrote on 2nd May, 2018 acknowledging the death of the Vendor (*who had passed away on 11th April, 2027*). He agreed to top up the deposit to 2 million by making a further payment of Kshs. 1,100,000/= . There is no evidence that this top up was either made or received by the Respondents.

18. Eventually, vide a letter dated 10th February 2023, the Applicant wrote to the Respondent and stated as follows;

Nyokabi Waiganjo & Co.

Advocates

Hazina Towers, 12th Floor

Monrovia Street

Nairobi.

Dear Madam,

**RE: SALE OF APARTMENT NO. 104 ON L.R NO.
330/797 (DHANJAY APARTMENTS)**

**YOUR CLIENT (VENDOR): MARGARET NYAWIRA
NDERITU (NOW DECEASED)**

**OUR CLIENT (PURCHASER): ARCHER DRAMOND
MORGAN LTD**

The above matter refers.

**We have been informed by our Client that both
the Purchaser and Vendor's representatives have
engaged directly and unanimously resolved to
terminate the above referenced transaction.**

**With this regard, kindly let us have your Client's
refund Cheque for sum of Kshs. 900,000**

**payable in the name of our Client being the
purchase price deposit placed to enable us
proceed and close our file.**

**Thanking you for your great indulgence and that
of your Client in this matter.**

Yours faithfully,

FOR: E. M. WACHIRA & CO.

ADVOCATES

19. Firstly, based on the chronology above, one can only conclude that the cause of action arising from the Sale Agreement dated 23/01/2017 expired on or around the midnight of 22/01/2023. However, the Parties had in their agreement at Clause 7.1 incorporated the **Law Society Conditions of Sale (1989 Edition)**. That further in accordance with **Clauses 4.3** and **4.4** of the said Agreement for Sale, either Party was obliged to serve a compulsory **Twenty-One (21) days'** rescission/completion notice. It was this recession notice that was to formally call into effect the act(s) of default and bring forth the legal sanctions set out in the agreement. The requirement for a rescission/completion notice is set out in the very agreement referred to by the parties and which they seek to enforce. The Court cannot ignore its requirements. It was a document that was to be issued in the future in the event of a default. For that reason, the cause of action in the event of default would inevitably be tied down to the date when the recession/completion notice was issue or was issued.

20. To this Court the only **Twenty-One (21) days** recession notice that it can see is the one dated 30/08/2023. The Respondents' letter of 17/05/2017 was a mere **Seven (7) days** recession notice. It fell a shy by **fourteen (14) days** short of the **Twenty-One (21) days** Recession Notice agreed upon by the parties.

21. It therefore follows that this suit filed on 7/05/2024 was well within the limitation period and the statute bar raised by the Respondents fails.

b) Whether the Applicant proved its case against the Respondent on a balance of probabilities.

22. Secondly, on whether the Applicant is entitled to a refund of the full deposit paid or part thereof; in submissions the Applicant maintained that it is not guilty of breach of the relevant contract. That Clause 7.1 of the relevant Agreement for Sale hereof incorporated the **Law Society Conditions of Sale (1989 Edition)**. Further as per Clauses **4.3** and **4.4** of the said Agreement for Sale, either Party was obliged to

serve a compulsory **Twenty-One (21) days'** rescission/completion notice which the Respondents failed to do. **Clause 4.4** stipulates as follows;

"Without prejudice to the Vendor's other rights in Law, if completion does not take place by reason of default by the Purchaser the Vendor after issuing a Twenty-One (21) days' rescission notice requiring the Purchaser to complete its part of the transaction, and if the Purchaser does not make good the default, the Vendor shall at her sole discretion shall:

a. Extend the time for completion and charge interest on the balance of the Purchase price

b) the 12% per annum from the date of completion until payment in full.

Rescind the Agreement in which case the Purchaser shall forfeit Ten (10%) of the Deposit paid.

c) Sue the Purchaser for Specific Performance of the Contract."

23. While the Court acknowledges the above provision of the contract and the Applicant's sentiments, there is one question that needs to be answered. In this case, which party was at fault?

24. The Court notes that parties have advanced various reasons why the transaction did not proceed within the period of ninety (90) days as defined. The Applicant blames the Vendor as the property was still encumbered. The Respondents blame the Applicant for failure to release the balance of the purchase price on time.
25. The Court takes note that parties had expressly agreed that in the event of breach or failure to complete the offended party would issue to the offending party a rescission/Completion notice. The Court has made reference to the specific clause above.
26. The issuance of the recession notice would enable the party in default make the necessary amends within the **twenty-one (21) days** period stated. The Court would also be in a position to verify if the acts complained of were acts of default or breach as per the agreement.
27. The Court has made reference that it can only see one recession notice issued by the Applicant to the Vendor. The Respondents averment at paragraph 15 of the Replying

Affidavit do not reveal any **Twenty-One (21) days** recession/completion notice issued.

“15. THAT upon instructions from our client I responded to the said letter vide our letter dated 22/6/2017 (annexed and marked "MNW7" and informed them the Sale Agreement was already rescinded after we had given them 7 days to pay the balance of the purchase price vide our letter to them dated 17/5/2017 (annexed and marked "MNW8" we also informed them that their client (Applicant) already forfeited the deposit of the purchase price and our client was already in engagement with another buyer and hence there has no longer a contract existing between our client and the Applicant.”

28. The importance of issuing a completion Notice has been the subject of previous Courts Rulings. In **Marete v Ndegwa & 2 others [2024] KECA 545 (KLR)** the Court was of the view that an aggrieved party would be entitled to rescind once it issued the necessary notice to complete. It stated as follows;

“Similarly, in the instant case, the appellant had made time of the essence by seeking for indulgence. In Housing Company of East Africa Limited vs. Board of Trustees National Social Security Fund & 2 others (supra), this Court cited with approval the case of J.T.M. Construction & Equipment Ltd-vs. Circle B. Farms Ltd, Claim Number 2007 Her 05110, where the Supreme Court of Judicature of Jamaica stated that;

“70. It is settled that 'when time is of the essence there is no leeway for delay'. Completion must be on the date specified. Failure to complete by the date set in the notice is a breach of contract. In such circumstances, the general principle is that the court will not assist the party served with the notice where he fails to complete within the time specified. It follows that all remedies will be available to the aggrieved party, including rescission.”

29. In **Beatrice Muthio Nzioka v Charles Akelo Ong’wen [2014] KEELC 46 (KLR)** the Court maintained

that a Completion Notice had to be issued first before it could be enforced.

“I am also of the view that the remedy of rescission as provided for in the Law Society Conditions of Sale (1989 Edition) was not available to the Defendant, as it could only arise upon objection or requisition by the Plaintiff after delivery of title by the Defendant, which was not done in this case. The Defendant could therefore not use rescission to cover up for his own breach. Lastly, the 3-days’ notice to complete given by the Defendant was neither provided for in the sale agreement, or in the Law Society Conditions of Sale (1989 Edition) which provide for 21 days completion notice for the first notice and 10 days’ notice for subsequent notices in clause 4(7). This court therefore finds that the sale agreement was not validly rescinded by the Defendant for the foregoing reasons.”

30. Based on the letter dated 10th February 2023 by the Applicant, it is the Court’s understanding that the parties “engaged directly and unanimously resolved to terminate

the transaction". Therefore, no party was at fault for the termination of the transaction. How then can the Applicant turn around and blame the Respondents' Client for the termination of the said transaction? In addition, there was no mention on what was to be done regarding the initial deposit paid by the Applicant.

31. That is the same rationale in **Sisto Wambugu v Kamau Njuguna [1983] KECA 69 (KLR)** and **Macho & another v Athuman & 2 others [2025] KECA 2078 (KLR)**. This is to the effect that the aggrieved party has to issue a recession/completion notice as contemplated by the agreement. It is this notice that would give the defaulting party the reasonable opportunity to rectify or complete or do so as contemplated by the sale agreement. Looking at the agreement by the parties, they contemplated a period of **twenty One (21) days**. Any thing less was contrary to the agreement.

32. In the case of **Ogongo v Kamau [2024] KEHC 15598 (KLR)** the Court found;

“It bears repeating that, rescission nullifies the contract as if it never existed. Therefore, no party may lay claim on the rescinded contract. From the evidence, the parties rescinded the contract by mutual agreement, and therefore, no party herein should lay claim based on the rescinded contract. The court so finds.

Be that as it may, the appellant did not establish that they agreed that he keeps part of the deposit paid to him-to be precise, Kshs. 198,000-as compensation for his lorry was not engaged in any gainful activities during the subsistence of the contract. Restoring the parties to their pre-contractual positions. Which is; the appellant to make full refund of the deposit to the respondent.”

33. The Court finds that the recession notice given by the Respondents was defective, while that given by the Applicant was effective and was not responded to. Perhaps because the Respondents in reliance to their earlier notice (*now held as defective*) had released or utilized the monies held as a stake.

34. On this second issue, the Court answers it in the affirmative and finds in favour of the Applicant.

c) Whether the Applicant is entitled to a refund of the deposit paid or was the same forfeited.

35. The Court is persuaded that the Applicant is entitle to the funds paid to the Respondents as stake holders. The funds were not paid to the deceased Vendor, so the Applicant can only look up to the Respondents for the refund. The Applicant paid the monies to them and the Respondents undertook the sacred duty of holding the stake on behalf of the Vendor and the Purchaser. This meant that if the sale fell through, the Respondents would be answerable for the refund, such as is this case.

36. The Court has taken note that the Respondents have given an account of how they disbursed the funds. This they however did without being released from their obligations as stake holders.

37. The Court has taken note that the Applicant was not in a position to complete this transaction within the stipulated time. There is no evidence that the balance of the purchase

price was available. On the other hand, the Respondents have not demonstrated that the Vendor was ready to complete. The Court has not been shown that all the completion documents were available, even if for arguments sake, so as to support the averment that the rescission notice issued was lawful.

38. In the circumstances, this is a proper case for rescission of contract. The Applicant is entitled to refund of the deposit paid as this transaction fell apart at many fronts. The Vendor and the Purchaser could not stand to benefit when each was in default.

39. As to interest, the Court takes note that the stake is ordinarily held in the client's account of a law firm. Such funds do not attract interest unless the parties give strict instructions for the investment of the funds. The Respondents should therefore refund the sum of Kshs 900,000/= which they held as stake holders within the next Sixty (60) days from the date hereof. In default the amount will earn interest at Court rates from the date of this judgement until payment in full.

40. As to costs, the same ordinarily follow the event. However, the Applicant's conduct during the sale does not reveal a party who was serious with the transaction. It never demonstrated that it had the balance of the purchase price. It kept seeking for more time. The Court is not persuaded that it is deserving of the costs of the Motion.

Determination

41. The Applicant's application by way of the Originating Summons dated 14th February 2024 is allowed in the following terms;

(a) *The Court HEREBY orders and directs that the Respondents do immediately refund to the Applicant the sum of Kshs. 900,000 paid as deposit equivalent to 10% of the purchase price, in any event within the **next Sixty (60) days** from the date hereof.*

(b) *In default of payment within the stipulated time, interest to accrue on the said amount or any balance thereof at Court rates from the*

*date of this Judgement until payment in full and
in default execution to issue.*

(c) There be no orders as to costs.

42. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MILIMANI
THIS 28TH DAY OF APRIL, 2026.**

NJOROGE BENJAMIN K.

JUDGE

In the presence of:

Miss Kemunto holding brief for Mr. Wachira for the
Applicant.

Mr. Ngome the Respondents.

Mr. John Paul - Court Assistant.