



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CASE NO. 1527 OF 2016**

**CLIVE MUTISO.....1<sup>ST</sup> PLAINTIFF**

**ANGELA ACHIENG OBARE.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**MITUNDU HOLDINGS LIMITED.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiffs entered into an agreement with the Defendant on 27/6/1996 for the purchase of one maisonette which the Defendant was to develop on L.R. No. 209/10659, situated in Woodley Nairobi (“the Suit Property”). The purchase price was agreed at Kshs. 3,900,000/=. The agreement stipulated how the installments were to be paid. The Plaintiffs claim that they paid two installments but the Defendant filed to complete the construction of the house. The Plaintiffs filed **HCCC No. 977 of 2002** seeking specific performance of the agreement. The Plaintiffs abandoned all the reliefs they sought in the plaint and stated that they would only pursue damages for breach of contract and a refund of the deposit they paid together with interest at the rate of 19% p.a. for the period the court may deem just. They also sought the costs of the suit.

2. In the Amended Defence dated 30/1/2018, the Defendant denied the Plaintiffs’ claim and maintained that the Plaintiffs failed to comply with the terms of the sale agreement and to make payment of the purchase price on the dates agreed. The Defendant averred that it had rescinded the contract, counterclaimed for damages for breach of contract against the Plaintiffs and sought costs of the suit and the counterclaim.

3. The 1<sup>st</sup> Plaintiff gave evidence. He confirmed that the Plaintiffs entered into an agreement for the sale of one of the maisonettes in Woodley. The sale agreement provided that a deposit of Kshs. 390,000/= would be paid to the Defendant on execution of the agreement; a further Kshs. 390,000/= would be paid within 30 days of the execution of the agreement; the third installment of Kshs. 390,000/= would be paid on or before 31/10/1996; and the balance of Kshs. 2,700,000 would be payable on completion. The 1<sup>st</sup> Plaintiff stated that they paid the first two installments on time. On receipt of the demand letter dated 21/1/1997, the Plaintiffs paid a further sum of Kshs. 390,000/=.

4. The Plaintiff received the letter dated 21/1/1997 which was a notice to complete the transaction but the Plaintiffs contend that no house had been built and it was therefore not possible to complete the sale transaction. The Plaintiffs received the letter dated 12/2/1997 rescinding the transaction and another letter dated 18/2/1997 forwarded the deposit which the Plaintiffs had paid. The Plaintiffs claim they accepted this cheque but maintained that the Defendant failed to complete the construction of the house.

5. The Plaintiffs produced copies of the letter of offer dated 20/5/1996; the agreement for sale; various letters exchanged between the Plaintiffs and the Defendant’s advocates; and copies of the cheques paid to the Defendant. On cross-examination, the Plaintiff conceded that he was aware that the Suit Property was sold to a third party while this suit was pending in court. The Plaintiffs further admitted that they did not pay the full purchase price because the Defendant had not built the house. The 1<sup>st</sup> Plaintiff explained that he expected the Defendant to construct the house and deliver it to the Plaintiffs through a formal completion. He maintained that the house was never completed. He conceded that he did not pay the third installment on time but maintained that the Plaintiffs had been ready and able to complete the sale as their advocate communicated in his letter of 13/1/1997.

6. Irene Njonjo, a director of the Defendant gave evidence. She stated that the Defendant made an offer to the Plaintiffs for the sale of one maisonette which was to be constructed on the Defendant’s land L.R. No. 209/10650/7 in Woodley. She confirmed that the Plaintiffs paid the first two installments of Kshs. 390,000/= each. The third installment which was due on 31/10/1996 was not paid. She stated that the Defendant rescinded the agreement on 6/1/1997. She added that on 21/1/1997 the Defendant’s advocate purported to extend the period for the Plaintiffs to pay the third installments without the Defendant’s authority. She stated that the Plaintiffs forwarded a bankers cheque for Kshs. 390,000/= on account of the third installment on 12/2/1997. The Defendant claimed that it rejected the payment since it had already rescinded the agreement. A refund cheque was prepared and released to the Plaintiffs’ advocate.

7. The Defendant urged that the Plaintiffs failed to comply with the notice since the full purchase price was not paid before 11/2/1997.

Parties held discussions in an attempt to resolve the matter amicably and a new offer was made to the Plaintiffs who were to make an additional deposit of Kshs. 1,000,000/= for the house to be completed and the balance was to be paid on the completion date within 6 months. She stated that the Plaintiffs were to be given credit for the payments they had previously made totaling Kshs. 780,000/=. A dispute arose and no new agreement was drawn up in respect of the second transaction. The Defendant's witness stated that the Plaintiffs failed to bank the cheque for the refund of the third installment and requested for a replacement cheque when that cheque went stale.

8. The witness stated that the Defendant entered into another agreement and sold the house on 13/4/2006 for Kshs. 2,314,175/= and the property was transferred to the new buyers. The Defendant maintained that the Plaintiffs breached the agreement dated 27/6/1996 and that it was entitled to damages in the sum of Kshs. 1,585,825/= for the loss it incurred on the re-sale of the Suit Property together with interest from 31/10/1996 to 21/1/1997. The witness produced documents similar to those produced by the Plaintiff.

9. The witness conceded that the house was not completed because the Defendant ran into financial difficulties when the Plaintiffs failed to pay the other installments. She stated that the Defendant had to borrow money to complete the house and was forced to sell it before completion in order to pay off the loan. She stated that the Defendant rescinded the agreement on 11/2/1997 and that the counterclaim was based on the assertion that the Defendant was ready to complete and that everything was dependent on funding from the Plaintiffs. The counterclaim was based on the fact that the house fetched a lower sum because it was incomplete and the failure to complete the house was blamed on the Plaintiffs.

10. Parties filed submissions which the court has considered. The Plaintiffs submitted that the Defendant could only be entitled to interest on the late payment as provided in the agreement. They submitted that the Defendant did not complete the house and therefore failed to fulfill special condition A of the agreement. The Plaintiffs maintained that the agreement was never rescinded and that the Defendant could only have given notice to complete after the completion date and after fulfilling its part of the bargain. The Plaintiffs submitted that they were entitled to the refund of the deposit of Kshs. 780,000/= and interest under paragraph 5 (i) of the sale agreement from the date of the payment until payment in full.

11. The Defendant submitted that it issued a completion notice dated 21/1/1997 and that the agreement was rescinded when the Plaintiff failed to comply with the completion notice. The Defendant submitted that the Plaintiffs forfeited the deposit paid by virtue of condition 4 (7) (d) (ii) of the Law Society of Kenya Conditions of Sale 1999, which were incorporated into the sale agreement. The Defendant maintained that it lawfully detained the deposit. The Defendant denied that the Plaintiffs were entitled to interest at 19% p.a. arguing that the Law Society Conditions did not provide for this. It added that interest was only payable to a purchaser if the vendor failed to comply with the completion notice and a notice claiming the purchase price plus interest had been issued to the vendor. The Defendant argued that if the Plaintiffs were entitled to interest then this should be computed from 7/7/2002 which is the date this suit was filed and at the rate of 12% p.a. which is the court rates under Section 26 of the Civil Procedure Act. The Defendant urged the court to award it damages in the sum of Kshs. 1,585,825/= being the loss of the bargain together with interest at 19% p.a. as prayed in the counterclaim.

12. The issue for determination is whether the court should grant the orders sought in the plaint or the Defendant's counterclaim. The sale agreement set out the mode of payment of the purchase price at paragraph 3 as follows: Kshs. 390,000/= had already been paid; Kshs. 390,000/= was to be paid within 30 days of execution of the agreement; Kshs. 390,000/= was to be paid on or before 31/10/1996 while the balance of Kshs. 2,730,000/= was to be paid at completion. It is not in dispute that the first two instalments were paid and that the third instalment was paid late and that it was returned to the Plaintiffs. The main dispute revolves around when the balance of the purchase price was to be paid. Clause 8 required the vendor to provide the certificate of occupation which could only be obtained once the house was completed. Special condition (b) gave the completion date as 9 months after the execution of the agreement and condition (c) stated that possession would be granted to the purchasers on or before completion.

13. The court notes that the letter from Munene and Company Advocates dated 27/5/1996 informed the Plaintiffs' advocate that the house was at the foundation stage and would not be completed in the next seven months. The letter stated that a further deposit of 10% was payable after execution of agreement and a similar payment would be due four months later. The balance of Kshs. 2,730,000/= was payable on completion.

14. The sale agreement contemplated that the Defendant would complete the house and grant the Plaintiffs possession before the substantial payment of the purchase price amounting to 70% of the purchase price was to be paid. The agreement did not provide that the Defendant was to use the purchase price to finish up the house. The Defendant did not complete the house and claims that it was forced to sell it to a third party at a lower price. At the time the Defendant gave notice to the Plaintiffs, it was not ready and able to transfer the Suit Property to the Plaintiff since it had not completed the house.

15. The court finds on the evidence that the Plaintiffs have proved their case on a balance of probabilities. The Defendant failed to prove its counterclaim, it is dismissed. The Defendant will refund the Plaintiffs the sum of Kshs. 780,000/= plus interest at 19% from the date of filing suit, that is 31/5/2002 until payment in full. The Plaintiffs will have the costs of the suit and the counterclaim.

**Dated and delivered at Nairobi this 18<sup>th</sup> day of October 2019**

**K.BOR**

**JUDGE**

**In the presence of: -**

Ms. B. Mueni holding brief for Mr. Anzala for the Defendant

Mr. V. Owuor- Court Assistant

No appearance for the Plaintiffs