



**Irungu v Muchoki (Environment and Land Case 484 of 2017)
[2018] KEELC 4919 (KLR) (23 February 2018) (Judgment)**

Joseph Kangethe Irungu v Peter Ng'ang'a Muchoki [2018] eKLR

Neutral citation: [2018] KEELC 4919 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND CASE 484 OF 2017**

JG KEMEL, J

FEBRUARY 23, 2018

BETWEEN

JOSEPH KANGETHE IRUNGU PLAINTIFF

AND

PETER NG'ANG'A MUCHOKI DEFENDANT

JUDGMENT

1. Joseph Kangethe Irungu entered into an agreement for sale with Peter Nganga Muchoki on 16/6/16 in which they agreed to buy and sell all that portion of land measuring 40X80 feet out of Loc.17/Saba Saba/3049 at the price of Ksh. 600,000/= whereupon which a deposit of Kshs. 200,000/= was paid. It was a term of the contract that:
 - a) The balance of Kshs. 400,000/= would be paid upon the parties obtaining consent to transfer.
 - b) The Completion date shall be 90 days from date of signing agreement.
 - c) The vendor was to submit all the completion documents to the purchaser to wit; duly executed transfer in the name of purchaser; copies of PIN, ID, Original title, original LCB Consent; rent clearance certificate plus 3 passport size photos.
2. The Agreement further provided for special conditions as below; -
 - a) In the event of default/breach by purchaser, the vendor shall be entitled to rescind the agreement and forfeit 50% if the purchase price paid as liquidated damages.
 - b) In the event of default/breach by the vendor, the purchaser is entitled to rescind the agreement and the vendor shall refund the entire deposit paid plus 100% of the purchase price as liquidated damages.



- c) Parties agreed to bind themselves by the terms of the agreement.
3. It is the Plaintiffs case that the Defendant has defaulted on the agreement and on 21/3/17 issued a notice to the Defendant to complete the sale and purchase of the property which notice went unheeded. A second demand dated 3/7/17 did not elicit any response forcing the Plaintiff to file this suit.
4. The Plaintiff has filed suit seeking the following orders;
 - a) Damages for breach of agreement for sale.
 - b) Liquidated damages as pleaded in paragraph 12 in the sum of Kshs 400,000/-.
 - c) Interest on (i) and (ii) above at Court rates until payment in full.
 - d) Costs of the suit.
 - e) Any other relief this Honourable Court may deem fit to grant.He has pleaded both breach of contract and fraud on the part of Defendant.
5. The Defendant entered appearance but did not file any defence. On 23/11/17 the Plaintiff sought and obtained interlocutory judgement against the Defendant whereupon he set the matter for formal proof. At the formal proof the Defendant was present but since he did not enter appearance nor file a defence he had no right of address to the Court. His presence notwithstanding, he had failed to come on record in the proceedings. In any event an interlocutory judgement had been entered against him.
6. The Plaintiff relied on his witness statement on record and produced the following documents;
 - a) Sale Agreement dated 15/6/16.
 - b) Official search dated 10/6/16
 - c) Demand notice dated 23/3/17.
 - d) Demand letter dated 3/7/17

Determination

7. It is not in dispute that the Plaintiffs case is uncontroverted. That being the case he retains the burden to proof his case, albeit, on a balance of probabilities.
8. As to whether the defendant breached the agreement for sale, Black's Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as;

“a violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”



9. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of *Rufale Vs Umon Manufacturing Co. (Ramsboltom)* (1918) L.R. 1KB 592, Scrutton L.J. held as follows:

“The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”

10. Equally in the case of *Attorney General of Belize et al Vs Belize Telecom Ltd & Anoter* (2009), 1WLR 1980 at page 1993, citing Lord Person in *Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board* (1973) 1 WLR 601 at 609, held as follows:

“The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”

11. Based on the above decisions, the starting point for me will be the agreement that the parties signed and the terms therein. According to the agreement the Plaintiff was to pay the balance of the purchase price on obtaining consent to transfer the land. It is the Plaintiffs position that the Defendant failed to meet the obligations set out in the agreement to wit; obtaining land control board consent to transfer, giving vacant possession, delivery of completion documents on completion prompting the Plaintiff to issue a notice to complete way after the completion date.

12. It was a term of the contract that the vendor would obtain Land Control Board consent to transfer interalia which the Plaintiff alleged he failed. Section 6 of the *Land Control Act* Cap 302 states;

“(1) Each of the following transactions that is to say— (a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area; (b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act”.

13. It is the Plaintiff’s case that the Defendant was obligated to obtain the Land Control Board consent but he did not. No material has been placed to the Court to show the contrary. Under section 8 of the *Land Control Act* the application must be made within six months of the making of the agreement for the controlled transaction by any party thereto. There is no evidence that an application for consent out of time was sought and obtained. I hold and find that the Agreement of sale agreement as entered into by the parties is void to the extent of want of Land Control Board consent and this non-performance of an important obligation is attributed to the Defendant who was in part breach of this undertaking.

14. The completion date for the agreement was 90 days from the date of signing i.e. 15/6/16 meaning by 14/9/16. The Plaintiff issued a notice to complete on 23/3/17 and followed with another and reminder on 3/7/17 but both went unheeded by the Defendant. That fact of the matter is that the Defendant did not complete the transaction as per the agreement and I find and hold that he was in breach of the aforestated agreement.



15. The Plaintiff has annexed a copy of the official search dated 10/6/16 which indicates the owners of Loc.17/Saba Saba/3049 as Peter Nganga Muchoki and Martine Wamwea Nganga yet the agreement for sale is between the Plaintiff and the Defendant to the exclusion of the co-owner Martine Wamwea Nganga. This further puts the probity of the agreement into question.
16. The Plaintiff though pleaded fraud has not proved it at all. This claim is unfounded.
17. Is the defendant entitled to damages? Having held that the defendant is guilty of breach of the contract, the next thing I need to determine is the question of damages. In the case of Hadley Vs Baxendale (154) 9. Exch 214 where Anderson P at page 354 stated as follows:

“Where two parties have made a contract which one of them has broken the damages which the other ought to receive should be such as may fairly and reasonably be considered either as arising naturally i.e according to the usual course of things, from such breach itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made a contract as the probable result of a breach of it.”

18. Further in the case of Millicent Perpetua Atieno Vas Louis Onyango Otieno (2013) e KLR, the Court of Appeal quoted with approval Halsbury's Law of England, Volume 12, 4th Edition at paragraph 1183 on the type and measure of damages recoverable by a purchaser upon breach by a seller of land.

“where it is the vendor who wrongfully refuses to complete the measure of damage 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.....”

19. The agreement contains a clause on default. The defendant being in default, the agreement provided that;

“in the event the vendor is unable to complete this agreement, the purchaser may rescind the agreement and the vendor/beneficiary shall refund the entire deposit paid and 100% of the purchase price as liquidated damages but less any outgoings and disbursements that may have been reasonably incurred at the express and or implied direction of the purchaser in addition to any other remedies available in law”.

It is clear that the parties anticipated an event of default. I find no valid reason to deny the plaintiff in the sum of Kshs 400,000/- as agreed in the agreement by the parties.

20. In addition to special damages above the plaintiff has pleaded for general damages. I am aware of the propositions in various decisions which have held that general damages are not payable in a breach of contract. In this instant case damages are to put the party wronged in the same position as before and in my considered view the award in Para 19 is sufficient in that regard. I decline to award any general damages.
21. In my conclusion the Defendant is in breach of contract and the claim being undefended I grant the Plaintiff's prayers as follows; -
 - a) Liquidated damages in the sum of Kshs. 400,000/=



- b) Interest on a) above at Court rates until payment in full.
- c) Damages for breach of contract are declined.
- d) Costs of the suit are in favour of the Plaintiff.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 23RD DAY OF FEBRUARY, 2018

J G KEMEI

JUDGE

