



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 572 OF 2014**

**NOUVETTI REALTORS LIMITED ..... PLAINTIFF**

**VERSUS**

**JOSEPHINE MOWI WAMBUGU ..... DEFENDANT**

**JUDGEMENT**

1. The Plaintiff seeks an order for payment of Kshs. 2,000,000/= being a refund of the deposit it paid to the Defendant, together with interest computed under the agreement of Kshs. 3,737,500/= from the date of demand until payment in full. The Plaintiff also seeks damages for breach of contract, costs of the suit and interest.

2. The Plaintiff's claim is based on the sale agreement that it entered into with the Defendant on 26/7/2012 for the purchase of L.R. No. Mavoko Town Block 12/419 at the agreed price of Kshs. 7 million. The Plaintiff paid the deposit of Kshs. 4.5 million as per clause 1.1 of the agreement. It later learnt that the Defendant had transferred the Suit Property to Mr. Samuel Njoroge Kagiri on 8/5/2013. The Defendant only refunded the sum of Kshs. 2 million to the Plaintiff through two instalments of Kshs. 1 million each paid on a diverse date between 6/11/2013 and 27/12/2013.

3. It was a term of the agreement at clause 11.0 that in the event of interest becoming payable, it would be payable at *three per cent (4%) point* above the maximum lending rate of Barclays Bank of Kenya applicable from time to time. One of the warranties the vendor gave the purchaser in the agreement was that there was no other contract or agreement binding on her which would prevent her from entering into or performing the terms of the agreement. Despite demand for payment being made of the Defendant, she failed to pay the balance of the deposit of the purchase price prompting the Plaintiff to file this suit. The Defendant was served but did not enter appearance or file defence.

4. The Plaintiff requested for judgement on 2/7/2014 but the court only entered interlocutory judgement despite the fact that this was a liquidated claim. The suit was heard by Justice Gacheru on 25/11/2014. Parties agreed that proceedings would be typed then they highlight submissions after which I would write and deliver the judgement.

5. Thomas Malinda Musau gave evidence for the Plaintiff. He adopted his witness statement filed in court on 9/5/2014. It was his evidence that the Defendant neither gave the Plaintiff notice to complete the sale nor did she demand the balance of the purchase price from the Plaintiff.

6. On 3/9/2013, the Defendant sent the Plaintiff Kshs. 1 million implying that she had cancelled the transaction without following the terms of agreement. She further paid Kshs. 1 million on diverse dates between 6/11/2013 and 27/12/2013 bringing the total of the refund to Kshs. 2 million. The Defendant's lawyer while forwarding part of the refund of purchase price stated that the balance would be paid once the Defendant got a suitable purchaser.

7. The witness produced a copies of the sale agreement, title deed in the Defendant's name, bank outward payment customer advice dated 26/7/2012, the application for remittance from the Plaintiff's account of Kshs. 4.5 million, the inward payment customer advice dated 27/12/2013, together with a copy of the search dated 19/3/2014 showing that Samuel Njoroge Kagiri was the registered owner of the Suit Property.

8. The Plaintiff also produced copies of cheque numbers 00221 and 0022 for Kshs. 500,000/ each dated 3/9/2013 and a copy of the cheque for Kshs. 500,000/= dated 6/11/2013. These cheques were drawn in favour of the Plaintiff. The letter from A. Kamau Chege & Company Advocates dated 3/9/2013 which forwarded cheque number 000221 and 000222 to the Plaintiff mentioned that the balance would be paid once their client sourced a suitable purchaser for the property.

9. The Plaintiff filed submissions on 22/1/2016. The main issue for determination is whether the Defendant breached the terms of agreement and whether the Plaintiff is entitled to the orders it seeks in the plaint.

10. The Plaintiff denies receiving any notice to complete the sale. It also submits that the Defendant did not show willingness to deliver the

documents of title but instead rescinded the contract unilaterally by forwarding cheques amounting to Kshs. 2 million. The Plaintiff argues that the Defendant had no right to rescind the sale agreement and that it was entitled to receive a notice under the agreement that the Defendant had acquired all the documents and was ready to complete the sale.

11. The Plaintiff relies on Clause 10 of the agreement which provided that if the Defendant failed to fulfil any of the conditions relating to completion, the purchaser was to give the vendor 21 days written notice requiring the vendor to remedy the default before the expiry of that notice. If the vendor failed to comply, the purchaser would be entitled to an unconditional refund of the deposit plus interest at the rate prescribed by Clause 11.0 of the agreement.

12. The court has considered the matter and finds that the Plaintiff has proved its case on a balance of probabilities. The Defendant was in breach of the agreement. The court however, notes that Clause 11.0 on the sale agreement stated in words that the interest rate was three per cent while in figures it appears as 4%. The Plaintiff neither lead evidence on what the maximum bank lending rate for Barclays Bank of Kenya Limited was nor did it give a breakdown of how the sum of Kshs. 3,737,500/= it claims in the Plaintiff was arrived at.

13. The court enters judgement for the Plaintiff for Kshs. 2 million plus interest at court rates from the date of filing suit until payment in full. No evidence was led on damages for breach of contract. The court declines to grant that claim. The Plaintiff will have the costs of the suit.

**Dated and delivered at Nairobi this 12<sup>th</sup> day of June 2018.**

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Laichana for the Plaintiff

Mr. F.N. Njanja for the Defendant

Mr. V. Owuor- Court Assistant