



**Weru v Ganza Limited & another (Environment & Land Case
E032 of 2020) [2024] KEELC 285 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 285 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E032 OF 2020**

**MD MWANGI, J
JANUARY 30, 2024**

BETWEEN

SHAFFIE A WERU PLAINTIFF

AND

GANZA LIMITED 1ST DEFENDANT

HOME HOUSING LIMITED 2ND DEFENDANT

JUDGMENT

Background

1. The Plaintiff's case is that the Defendants, by way of a letter dated 6th February, 2014, jointly made an offer to him to purchase a property known as Maisonette No. 42 on title No. Kabete/Kibicho/906 situated in Kiambu County, (hereinafter referred to as the suit property) at the price of Kshs 10,000,000/= . It was a term of the offer that 20% of the purchase price was to be paid on acceptance of the offer and the balance paid progressively as per the construction stages until the completion of the project. The details were set out in the agreement entered into between the parties.

Plaintiff's case

2. It is the Plaintiff's case that by the said offer, the Defendants jointly and severally made representations that the material project was to be completed on or before 31st August 2015. Pursuant to the said representation, the Plaintiff applied for and was granted a mortgage facility by the Standard Chartered Bank of Kshs 9,000,000/= at the rate of 14.9% interest per annum for the purposes of partially paying the purchase price.
3. The Plaintiff pleads that he paid a sum of Kshs 2,000,000/= as deposit. Despite paying the deposit, the Plaintiff asserts that the Defendants have failed to even commence the construction.



4. It is the Plaintiff's contention that the Defendants made the representations fraudulently when they knew it was false or were reckless, and not caring whether it was true or false.
5. By reasons of the aforesaid matters, the Plaintiff asserts that the deposit became returnable to him. It is his case that he has been denied use of the said monies paid to the Defendants. He therefore claims amongst other orders, the refund of the said deposit with interest at commercial rates from the date of payment until payment in full. The Plaintiff prays for:
 - a. Refund of Kshs 2,000,000/=
 - b. General damages for loss of opportunity
 - c. General damages for fraudulent misrepresentation
 - d. Costs of this claim
 - e. Interest on (a), (b) & (c) at commercial rates and on (d) at Court rates until payment in full.
 - f. Any other or further relief that this Court deems fit to grant.

The Defendants' response

6. The Defendants' response to the Plaintiff's claim was by way of the amended statement of Defence amended on 6th December, 2021. The Defendants admitted making an offer to the Plaintiff for the purchase of Maisonette No. 42 on Title No. Kabete/Kibicho/906 for Kshs 10,000,000/= and the terms of payment of 20% deposit upon acceptance of the offer. The Defendants further admitted that they were aware that Standard Chartered Bank was partially financing the purchase of the suit property.
7. The Defendants while admitting receipt of the deposit of Kshs 2,000,000/= from the Plaintiff denied being in breach of any of their contractual obligations stating that the Maisonette has been completed and notices to that effect issued to the Plaintiff. The Defendants reiterate that they contacted the Plaintiff severally informing him of the completion of the house as well as issuance of a completion notice. The Plaintiff however refused, neglected and or failed to respond to the communications and notices sent to him. The Defendants aver that the Plaintiff is indeed the one in breach of the contract between him and the Defendants.
8. The Defendants deny the allegations of false representation reiterating that the Plaintiff was severally contacted but the communications went unanswered. The Defendants therefore deny that the Plaintiff is entitled to a refund of the deposit paid. Upon breach on his part, the Defendants aver that he was required to forfeit the twenty per cent of the purchase price; the deposit of Kshs 2,000,000/=. The Defendants therefore pray for the dismissal of the Plaintiff's suit with costs.

Evidence adduced at the hearing

9. This case proceeded to full hearing. The Plaintiff testified as the witness in his own case. The Defendants too called one (1) witness.
10. The Plaintiff adopted his witness statement dated 23rd July 2020 filed alongside his plaint, as his evidence in chief. He further produced the documents in his list of documents as exhibits in support of his case. The Plaintiff in the witness statement reiterates the averments in his plaint.
11. Under Cross-examination from Ms. Odongo, the Advocate for the Defendants, the Plaintiff clarified that the Defendants had not entirely failed to commence construction as he had stated at paragraph 10 of the plaint. He confirmed that they had indeed started construction of the house but it stalled



along the way. Under Clause 8 of the letter of offer, the Plaintiff insisted that the estimated completion date was 31st August, 2015.

12. The Plaintiff agreed that clause 14 of the letter of offer was the specific clause on the completion date for the Sale, which was expressed as,

‘The date falling fifteen (15) working days after the date on which the project architect issues a Certificate of practical Completion for the house.’
13. In the agreement subsequently signed by the parties and dated 14th August, 2015, the completion date was defined in the same terms as in Clause 14 of the Letter of Offer.
14. The Plaintiff confirmed that he paid the deposit of Kshs 2,000,000/= after signing both the letter of offer and the agreement for sale which he allegedly signed on the same date. He nonetheless stated that he had no clue whether he was bound by the terms of the agreement or not.
15. The Plaintiff stated that he did not default in terms of the agreement. He was not aware that the Law Firm of Mohammed Muigai Advocates had revoked the undertaking to the Defendants in respect of the balance of the purchase price.
16. In re-examination by his Advocate, Ms. Anyango, the Plaintiff stated that both clauses 8 and 9 of the Letter of Offer made reference to “Completion” but referred to different dates. The Plaintiff stated that while the Letter of Offer is dated 6th February, 2014 and the agreement is dated 14th August, 2015, he had signed both on the same date. He averred that as a layman, the Completion date was not clear to him.

Evidence adduced on behalf of the Defendants

17. The Defendants called one Charles Maina Irungu as their witness in their case. He stated that he was an accountant working for both Defendants. He oversees projects undertaken by the Defendants. He adopted his witness statement dated 17th November, 2021 as his evidence in chief. He further produced the 11 documents on the Defendants’ list of documents as exhibits in support of the Defence case.
18. In cross-examination, the Defendants’ witness admitted receipt of Kshs 2,000,000/= from the Plaintiff being the deposit for purchase of the subject property. He asserted that Clause 8 of the Letter of Offer referred to the estimated time of completion of construction while Clause 14 addressed the completion date of the Sale. Both Clauses though referred to ‘Completion date’.
19. DW1 further confirmed that the Plaintiff’s email address was neither indicated in the letter of offer nor in the agreement. The Defendants consequently sent the notices to the plaintiff through the email address of the law firm of Mohammed Muigai Advocates being, info@mohammedmuigai.com and sharon@mohammedmigai.com. The email was not copied to the Plaintiff.
20. DW1 too confirmed that in the letter of offer, the Plaintiff’s Advocates were not indicated. That was also the position in the agreement for sale.
21. In the Defendant’s list and bundle of documents, at Page 21, there was a letter from Mohammed Muigai Advocates indicating that they were acting for Standard Chartered Bank (K) Ltd; the financier. They were not acting for the Plaintiff. That letter is dated 13th November, 2013. It was an undertaking for Kshs 9,000,000/=. The letter withdrawing the undertaking on the other hand is dated 15th February, 2018. By that date, Maisonette No. 42 had not been completed yet.



22. In re-examination, DW1 affirmed that the completion date for the transaction was as per Clause 14 of the letter of offer. He further asserted that it was the Plaintiff who informed the Defendants that his legal representatives were Mohammed Muigai Advocates.
23. In responding to questions from the Court, DW1 stated that the completion Notice was issued on 17th November, 2020. It was notifying the Plaintiff that the house was ready for occupation and that he was required to pay the balance of the purchase price of Kshs 8.0 million and other closing costs in accordance with the agreement for sale. By then, this case was already before the court.

Court's directions

24. At the close of the hearing the court directed parties to file written submissions. The Plaintiff's submissions are dated 8th August, 2023. The Defendants' submissions are dated 7th December, 2023. I have had the opportunity to read the submissions which now form part of the record of this court.

Issues for Determination

25. Having considered the pleadings filed in this case, the evidence adduced at the hearing and the respective submissions by the parties, the court is of the view that the issues for determination in this matter are: -
 - a. Whether the Plaintiff has proved his case against the Defendants.
 - b. Whether the Plaintiff is entitled to the remedies sought in his case.
 - c. What orders should issue regarding the costs of the suit?

Analysis and Determination

26. The Plaintiff in his pleadings and submissions places heavy reliance on the Letter of Offer issued to him by the Defendants dated 6th February, 2014. In his submissions, particularly on his claim for fraudulent representation, the Plaintiff refers to Clause 8 in the Letter of Offer terming it as fraudulent.
27. The Letter of Offer of 6th February, 2014 is on the face of it clearly stated to be, "Subject to Contract". Clause 12 thereof further provided that the Vendor's Advocates were to prepare the Sale Agreement and the purchaser was to execute the same within 30 days of its initial issue.
28. It is not in dispute that a sale agreement was indeed signed between the parties. Both parties make reference to it and each indeed produced it as one of their exhibits.
29. This agreement upon being signed by the parties superseded the Letter of Offer. The Letter of Offer on its own did not constitute a binding and enforceable contract between the parties. The agreement for sale is what constitutes the binding and enforceable terms of engagement between the parties.
30. The Plaintiff who was the purchaser accuses the Defendants of failing to complete the construction of the house, the subject matter of their agreement on or before the 31st August, 2015, which according to the Plaintiff was the completion date in accordance with the Letter of Offer. However, as I have already explained, the Letter of Offer was superseded by the agreement signed between the Plaintiff and the Defendants.
31. It is trite Law as expounded by the Court Appeal in the case of *Prudential Assurance Company of Kenya Ltd -versus- Shukhwinder Singh Jutley & Another* [2007] eKLR, that where the intention of parties has been reduced into writing, it was generally not permissible to adduce extrinsic evidence whether



- oral or written to show the intentions of the parties or contradict or vary or add to the terms of the documents including implied terms.
32. The parties in this case having signed the agreement between themselves cannot purport to refer to any other document to demonstrate their intentions.
 33. The Completion date then can only be the Completion date defined in the agreement. Under clause 1 (Definitions and Interpretations), the Completion date is defined to mean, ‘the date falling 14 working days after the issuance of the Architects Completion Certificate.’
 34. The Definition does not specify a date when the completion is to happen. Instead it has pegged Completion on the issuance of the Architects Completion Certificate.
 35. It is noteworthy that the agreement was expressly stated to be subject to the [*Law Society Conditions of Sale*](#) (1989) edition. Clause 4 of the agreement provides that:

“The sale is subject to the Law Society Conditions of Sale (1989) Edition in so far as they are not inconsistent with or amended by the provisions of this agreement or are specifically hereby excluded.”
 36. The Plaintiff as earlier on noted in his testimony while responding to a question from the Advocate for the Defendants clarified that the Defendants had not failed to commence the project as pleaded, rather the project had stalled.
 37. The Defendants on their part countered the Plaintiff’s allegation by affirming that the House No. 42 had in fact been concluded. DW1 however, in responding to a question by the Advocate for the Plaintiff confirmed that the Architect’s Certificate of completion had not been issued.
 38. Where in a contract for sale the time for completion was not made to be of essence and the purchaser feels that the vendor is unnecessarily delaying the completion, the purchaser may issue a Notice at the expiration of which he will retreat the contract as at the end. (See [*J.T.M Construction & Equipment Ltd -vs- Circle B. Farms Ltd*](#) – Claim No. 2007 HCC 05110).
 39. The Court of Appeal in the case of [*Housing Company of East Africa Limited -vs- Board of Trustees NSSF & 2 others*](#) [2018] eKLR, while upholding the above position cited its earlier decision in the case of [*Njamunyu -vs- Nyaga*](#) [1983] KLR 282 in which it had stated that:-

“... before an agreement such as this can be rescinded the party in default should be notified of the default and given reasonable time within which to rectify it. Once notice of default has been given, failure to rectify will result in rescission of the contract”.
 40. The Plaintiff in this case by issuing his demand Letter of 13th June, 2019 (PE7) to the Defendants was for all intents communicating his intention to terminate/rescind the agreement. He accused the Defendants of breaching the agreement by failing to commence the project. He consequently demanded a refund of the deposit paid to them with interest at commercial bank rates within 10 days.
 41. I earlier stated that the agreement between the parties was expressly stated to be subject to the [*Law Society Conditions of Sale*](#) 1989 Edition. Under Clause 4 (4) of the [*Law Society Conditions of Sale*](#) which applies, unless a special condition provides that time is of essence in respect of the Completion date, either party may serve on the other party notice to complete the transaction. Upon service of the completion notice, it shall become a term of the contract that the transaction shall be completed within 21 days of service. Where the vendor fails to comply with the completion notice the purchaser will be at liberty to give notice to the vendor to pay to him any sums paid by way of deposit or otherwise



- under the contract and interest on such sums at the contract rate from 4 working days after service of the notice until payment.
42. Interestingly, and obviously, during the pendency of this case, the Defendants too purported to issue a notice to rescind the contract by sending out a Completion notice which was addressed to the Plaintiff through Mohammed Muigai Advocates.
 43. This was clearly an attempt, from whatever aspect one looks at it from, by the Defendants to steal a match against the Plaintiff. The Defendants' witness admitted in his testimony that Mohammed Muigai Advocates were Advocates for Standard Chartered Bank (K) Ltd which was to finance the Plaintiff with part of the purchase price. They were not Advocates for the Plaintiff. The notice was therefore non-compliant with clause 17 of the agreement.
 44. Again, and as DW1 confirmed in his testimony, an Architect's Completion Certificate had not been issued at the time the Defendants purported to issue the Completion Notice. The Completion as per agreement was to be 14 working days after the issuance of the Architect's Completion Certificate.
 45. Recital 6 of the agreement required the Vendor upon default by the purchaser to give a 30 days' notice in writing specifying the default and requiring the Purchaser to remedy the same before the expiry of the notice. The notice too had to be sent through the correct address for service in accordance with the agreement. The proper rescission of the agreement by the Vendor is what would give the Defendants the right to retain the deposit of 20% of the purchase price paid by the Purchaser. Having not complied with the terms of the agreement, the right to retain the deposit has not crystallized.
 46. Consequently, I will allow the Plaintiff's claim for a refund of the deposit amount paid, Kshs 2,000,000/= but with interest at court rates from the date of filing this suit until payment in full.
 47. General damages not awardable for breach of contract. In the case of *Dharamshi v Karsan* [1974] EA 41, it was held that general damages are not awardable for breach of contract in addition to the quantified damages as it would amount to a duplication.
 48. In *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR, the Court of Appeal reiterated that general damages are not awardable for breach of contract.
 49. The court finding is that no fraud was distinctly proved against the Defendants. The clause in the letter of offer that the Plaintiff bases his claim for fraudulent representation on, as I have already stated is not applicable after parties signed a contract/agreement.
 50. In the case of *Kuria Kiarie and 2 Others versus Sammy Magera* (2018) eKLR, the court held that: -

“The law is clear and we take it from the case of *Vijay Morjaria versus Nansingh Makhusingh Darbar & another* (2000) eKLR, where Tunoi JA (as he then was) states as follows: -

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleading. The acts alleged to be fraudulent must be set out, and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved, and it is not allowable to leave fraud to be inferred from the facts.”
 51. The claim for Damages for loss of opportunity too has not proved.



52. In the case of *David Bagine vs Martin Bundi* (1997) eKLR, the Court of Appeal quoted with approval the judgement of Lord Goddard CJ in *Bonham Carter vs Hyde Park Hotel Ltd* (1948) 64 TLR 177 where he stated that:-

“The Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough for them to note down the particulars and, so to speak, throw them at the head of the court saying, ‘this is what I have lost, I ask you to give me these damages;’ they have to prove it.”

53. The Plaintiff did not even attempt to prove loss of opportunity.

54. In any event, the Plaintiff merely invested a deposit of Kshs 2,000,000/=. He did not pay for the entire purchase price of the house. He is seeking to reap where he did not sow. The refund of Kshs 2.0 million with interest as directed is reasonable and sufficient compensation to the Plaintiff.

55. The plaintiff shall have costs of the suit too as against the Defendants.

56. The conclusion therefore is that judgement is entered in favour of the Plaintiff against the Defendants jointly and severally for the sum of Kshs. 2,000,000/= with interest at court rates from the date of filing suit until payment in full. The Plaintiff is also awarded the costs of this suit.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JANUARY 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Anyango for the Plaintiff

Ms. Odongo for the Defendants

Court Assistant: Yvette

M.D. MWANGI

JUDGE

