



**REPUBLIC OF KENYA**

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

**ELC. CASE NO. 788 OF 2015 (FORMERLY KISUMU HCC NO. 147 OF 2010)**

**ELIZABETH A. ONGONG'A.....PLAINTIFF**

**VERSUS**

**THE ARCH-DIOCESE OF**

**KISUMU TRUSTEES [REGISTERED].....1<sup>ST</sup> DEFENDANT**

**THE RIGHT REV. ARCH-BISHOP ZACHAEUS OKOTH.....2<sup>ND</sup> DEFENDANT**

**TUMSIFU AGENCY.....3<sup>RD</sup> DEFENDANT**

**ERASTUS IAN KHANDIRA.....4<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**ELIZABETH A. ONGONG'A** (the plaintiff herein) filed this suit against the defendants on 24<sup>th</sup> September 2010 seeking judgment in the following terms:

- a) A declaration that the unilateral variation or alteration or increase of the purchase price by the defendants from Kshs. 3,600,000 to Kshs. 6,500,000 was oppressive, fraudulent, illegal and in breach of contract.**
- b) An order of specific performance compelling the defendants to complete by transferring the same to her upon payment of the balance of the purchase price in the sum of Kshs. 2,230,000 by the plaintiff.**
- c) A permanent injunction restraining the defendants by themselves, their agents, servants or any of them or any person acting through them or otherwise from selling the property earmarked for the plaintiff at Sifa Gardens to a third party or in any other way transferring the said property to a third party.**
- d) In the alternative, general damages plus the refund of the full sums paid by the plaintiff to the defendants together with interest thereon at the current commercial rates.**
- e) Costs of the suit plus interest at court rates.**

The basis of the plaintiff's claim is that the 1<sup>st</sup> defendant is the registered proprietor of a parcel of land situated within Kisumu being **KISUMU MUNICIPALITY BLOCK 6/290** on which it desired to develop for selling several residential units known as SIFA GADENS. The plaintiff applied for one unit in July 2006 and was referred by the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the 3<sup>rd</sup> and 4<sup>th</sup> defendants who offered her one unit at the cost of Kshs. 3,600,000 which offer the plaintiff accepted by paying 20% being Kshs. 720,000 on 20<sup>th</sup> July 2006 on the understanding that a formal sale agreement would be executed. It is the plaintiff's case that a binding contract was thereby concluded between her and the defendants and that 60% of the purchase price was to be paid during the construction of the unit and the final 20% upon completion and handing over which would be within a reasonable time being about 24 months. As at the time of filing this suit, the plaintiff has paid a total of Kshs 1,370,000 and has always been ready and willing to pay the difference of Kshs. 2,230,000 but the defendants have prevented her from doing so and have not only failed to complete the construction but also to draw up the formal sale agreement and instead, wrote to the plaintiff on October 2009 informing her that the new price for the unit has been increased from Kshs. 3,600,000 to Kshs. 6,500,000. The defendant further threatened to refund the deposit and sell the unit to a willing buyer. The plaintiff finds this to be unconscionable, illegal, fraudulent and against the rule of equity and justice. Particulars of illegality breach of contract and fraud are pleaded in paragraph 18 of the plaint.

The defendants filed a joint defence denying the plaintiff's averments and adding that the suit against the 1<sup>st</sup> and 3<sup>rd</sup> defendants is unsustainable as the 2<sup>nd</sup> defendant was only an agent and in any event, there was no contract between the plaintiff and 1<sup>st</sup> defendant. That although the plaintiff filled an application form, it was only for screening purposes and was subject to contract and no sale agreement was executed as required by **Section 3 (3) of the Law of Contract Act** and there is no basis upon which the reliefs claimed by the plaintiff can be granted.

The parties having confirmed before the Deputy Registrar on 26<sup>th</sup> September 2018 that they were ready for hearing, the suit was placed before me on 6<sup>th</sup> November 2018 for hearing during the service week at the **KISUMU ELC**.

On the hearing date **Ms. IMBAGA ADVOCATE** held brief for **Ms. OLANGO** advocate for the defendants and sought an adjournment for the reasons set out in the record. **MR. ORENGO** advocate for the plaintiff objected and the court, for the reasons which are clear on the record, dismissed the application for adjournment and ordered the case to proceed. **Ms IMBAGA** then, of course due to lack of any further instructions, left the court and therefore the only evidence available to the court is that of the plaintiff.

The plaintiff adopted as her evidence the statement filed on 4<sup>th</sup> March 2011 together with the list of documents and a supplementary list of documents dated 23<sup>rd</sup> July 2014. In her said statement, she has basically expounded on her pleadings as to how she expressed an interest to purchase a house in **SIFA GARDENS** and paid Kshs. 3,000 application fees to the 4<sup>th</sup> defendant who issued her with a receipt and advised her to pay the 20% deposit being Kshs. 720,000 at **SAVINGS & LOANS (K) LTD** which she did and even identified on the ground the house No. 30 which was then allocated to her. She was then informed that a formal agreement would be drawn but that has never been done. That since 20<sup>th</sup> July 2011, she has paid a total of Kshs. 1,370,000 but in October 2011, she received a letter that the purchase price has been increased from Kshs. 3,600,000 to Kshs. 6,500,000 and if she didn't pay the new price, the house would be sold to someone else.

As the defendants did not attend the trial, the plaintiff's evidence is un-controverted. In my view, the following issues fall for my determination:

- 1. Whether there is any enforceable contract between the plaintiff and the defendants over the purchase of a house at SIFA GARDENS. If so, Whether the plaintiff is entitled to an order compelling the defendants to transfer the same upon payment of Kshs. 2,230,000.**
- 2. Whether the plaintiff paid the deposit of Kshs. 1,370,000 towards the purchase price and is entitled to a refund and at what rate of interest.**
- 3. Whether the plaintiff is entitled to general damages.**
- 4. Whether the claim against the 3<sup>rd</sup> defendant can be maintained.**
- 5. Who shall meet the costs of the suit.**

It is clear that there was really no binding contract between the plaintiff and the defendants over the sale of any house. All that the plaintiff did was to sign an application form to purchase a house at the said **SIFA GARDENS**. Indeed the form that she filled on 20<sup>th</sup> July 2016 and which is part of her own document reads as follows:

***"The above details are not warranted information and sales are subject to sale agreement and other conditions of Mortgage Institutions."*** Emphasis added.

And in her own statement at paragraph thirteen (13), the plaintiff states as follows:

***"Mr. KHANDIRA also informed me that their lawyers would be drawing a formal agreement for the sale of the house to me. That in the stage at which I would be required to pay legal fees of Kshs. 30,000, survey fees of Kshs. 9,000 and stamp duty of 4% of the purchase price. That sale agreement was supposed to be prepared by their advocates and brought to me for signature. To date they have not presented the sale agreement to me to sign."*** Emphasis added.

Clearly there was no contract between the plaintiff and the defendants over the purchase of a house at **SIFA GARDENS** by the plaintiff's own admission. There can therefore no justification in this court compelling the defendants to transfer any house to the plaintiff in the absence of any binding agreement between the parties. Courts do not make contracts for parties but will only enforce what the parties have themselves agreed upon – **JIWAJI & OTHERS V JIWAJI & ANOTHER 1968 E.A 547**.

The plaintiff made some payment to the defendants amounting to Kshs. 1,370,000 as shown in the deposit slips. First, the sum of Kshs. 720,000 was made into the 1<sup>st</sup> defendant's account at **SAVINGS & LOAN (K) LTD** on 20<sup>th</sup> July 2006. Thereafter, she made twelve (12) deposits of Kshs. 50,000 each through receipts Nos.:

- 1. 257- dated 12<sup>th</sup> February 2007.**
- 2. 299 - un-dated**
- 3. 331 - dated 24<sup>th</sup> August 2006**

4. 692 - dated 25<sup>th</sup> March 2008
5. 863 - dated 28<sup>th</sup> August 2008
6. 868 - dated 8<sup>th</sup> September 2008
7. 883 - dated 9<sup>th</sup> June 2008
8. 891 - un-dated
9. 1248 - dated 9<sup>th</sup> October 2009
10. 1305 - dated 30<sup>th</sup> October 2009
11. 1306 - dated 16<sup>th</sup> November 2009
12. 1310 - dated 25<sup>th</sup> November 2009

Copies of the above receipts were filed as part of her documents but they add upto Kshs. 1,320,000 and not Kshs. 1,370,000 as indicated in the plaintiff's statement. As that sum was paid and received by the defendants for a consideration that was not fulfilled, it is available as refund to the plaintiff.

With regard to the interest rate applicable, the plaintiff seeks a refund of the sum paid together with interest at commercial rates. Again since there was no contract, the parties did not bind themselves to any rate of interest. The applicable rate of interest will therefore be the court's rate.

As there was no contract between the parties, nothing was breached and therefore there can be no damages for the breach of any contract. In any event even if the parties herein had entered into a contract, the legal position, as was held in the case of **PROVINCIAL INSURANCE CO. EAST AFRICA LTD V. NANDWA [1995-1998 2 E.A 288]** citing **DHARAMISHI V. KARSAM 1974 E.A 41**;

*“... No general damages may be awarded for a breach of contract.”*

It is clear also from the documents herein that the 3<sup>rd</sup> defendant was only an agent of the other defendants. They are described as such in the form that was made available to the plaintiff to fill when she applied for the house. The law is that where the principal is disclosed, the agent is not to be sued- **ANTHONY FRANCIS WAREHAM V. KENYA POST OFFICE SAVINGS BANK C.A CIVIL APPLICATION NO. 1 and 48 OF 2002**. The suit against the 3<sup>rd</sup> defendant is hereby dismissed but with no order as to costs.

Finally, with regard to the costs of the suit, they follow the event. The plaintiff is entitled to costs.

The up-shot of the above is that there shall be judgment for the plaintiff against the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants in the following terms:

1. Refund of Kshs. 1,320,000 plus interest at court rates.
2. Costs
3. Interest

**Judgment Dated, Delivered and Signed this 9<sup>th</sup> day of November, 2018 in Open Court at Kisumu**

**Plaintiff - present**

**Mr. Orengo for her - absent**

**Defendants absent.**

**Right of Appeal**

**B. N. Olao**

**Judge**

**9<sup>TH</sup> NOVEMBER**