



**REPUBLIC OF KENYA**

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

**ELC CIVIL CASE NO. 205 OF 2016**

**HENRY NG'ANG'A WAWERU ..... 1ST PLAINTIFF**

**JOSEPHINE MUKUHI NG'ANG'A ..... 2ND PLAINTIFF**

**VERSUS**

**DINARA DEVELOPERS LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiffs, **HENRY NG'ANG'A WAWERU AND JOSEPHINE MUKUHI NG'ANG'A** are husband and wife. They initiated this suit on 3/3/2016 through a plaint dated 3/3/2016. They seek the following orders against the defendant, **DINARA DEVELOPERS LIMITED**:

*a) An order of specific performance compelling the defendant to perform its duty and obligation under the Agreement for Sale dated 4/3/2017.*

*b) In the alternative, special damages of Kenya shillings four million, eight hundred and twenty thousand [4,820,000/=].*

*c) Costs of this suit together with interested thereon.*

*d) Any other relief as this honourable court may deem fit.*

2. The plaintiffs' case is that at all material times, the defendant, as proprietor of **Land Title Number MUGUGA/GITARU/653** entered into an agreement dated 4/3/2015 for sale of two apartments. Under the agreement the defendant undertook to erect sixty apartments together with parking spaces, driveways and related amenities on the suit property, out of which it agreed to sell to the plaintiffs two [2] apartments, A8 and A9, each consisting of two bedrooms, at a purchase price of KShs.3,990,000/= per apartment.

3. Under the agreement for sale, the purchasers were required to pay a deposit of KShs.500,000/= on 4/3/2015 and a further deposit of KShs.2,000,000/- before the end of March 2015. The balance of the purchase price was to be paid in consecutive monthly instalments of KShs.365,333/= effective April 2015. The anticipated completion date was to be June 2016 or the 30th day from the date when the architect would issue a certificate of practical completion. In tandem with the agreement, the plaintiffs paid the defendant a sum of KShs.2,500,000/=.

4. In breach of the agreement, the defendant failed to commence construction of the sixty apartments as per the terms and conditions of the agreement. It is this alleged breach of the agreement that prompted the plaintiffs to bring this suit seeking the orders set out in paragraph 1 above.

5. On 5/4/2016, the plaintiffs' advocates, Kosgey & Masese Advocates, filed an affidavit of service sworn by Peter Mburu Waithaka, a process server, indicating that on 9/3/2016, the said process server served upon the defendant summons to enter appearance. On 14/4/2016, the Deputy Registrar of this court certified that the defendant had been properly served and directed that the suit herein be set down for hearing under **Order 10 rule 9 of the Civil Procedure Rules** as an undefended suit. Hearing of the suit proceeded *ex parte* under **Order 10 rule 9 of the Civil Procedure Rules** on 25/5/2017.

6. Two witnesses testified on behalf of the plaintiffs. PW1, Henry Ng'ang'a Waweru, adopted his written statement dated 3/3/2016 as his sworn evidence in chief. He testified that the defendant is the proprietor of Land Title Number Muguga/Gitaru/653. On 18/2/2015, by way of a public advertisement in the Daily Nation Newspaper, the defendant made an offer to the general public to sell sixty apartments to be erected on the suit property [*Diamond Heights Apartments*] at an off-plan price of KShs.3,990,000/= for a two bedroomed apartment. On 4/3/2015, the plaintiffs and the defendant entered into an agreement pursuant to which the defendant offered to sell to the couple two [2] apartments, Nos. A8 and A9 out of the 60 apartments that were to be constructed on the suit property, on the terms and conditions contained in the agreement for sale. He further testified that in breach of the said agreement, the defendant failed to commence construction works. Up to the time the 1st plaintiff testified in court on 25/5/2017, the defendant had not commenced construction works on the suit property. The apartments were supposed to be ready for occupation in June 2016. The 1st plaintiff contended that the defendant was in breach of the agreement and urged the court to grant them the prayers set out in the plaint.

7. **PW 2-Edgar Wekesa Lupao** gave evidence on 27/7/2017. He testified that he is a registered valuer and estate agent. On 25/5/2017, he received instructions from the plaintiffs to prepare a valuation report for an off-plan project. He proceeded to the suit property to inspect it. The piece of land was empty. The suit property had been subdivided and new title numbers given to the parcels. He gathered data and prepared a report based on the value of similar flats in the same neighbourhood. He assessed the value of the suit property to be KShs.6,500,000/= as at June 2017. He produced a valuation report of even date.

## **Determination**

8. The plaintiffs have made a claim for the equitable remedy of specific performance. In the alternative, they have prayed for special damages of KShs.4,820,000/=. They have also prayed for costs and interest. The suit herein is undefended.

9. The criteria on the appropriateness and efficacy of the equitable remedy of specific performance is well settled. The historical foundation upon which the equitable relief of specific performance of a contract was granted was that the alternative remedy of damages would not be sufficient or adequate. Over the years, the criteria has changed. The approach of whether damages are an adequate remedy has been replaced with that of whether specific performance will do more perfect and complete justice than an award of damages. Put it differently, the criteria is whether specific performance will be a more appropriate remedy than an award of damages in the circumstances of a particular case.

10. The defendant offered to build sixty apartments with the attendant amenities. The plaintiffs signed a contract to purchase only two [2] out of the sixty apartments. As at the time of the hearing of this suit, the ground had not been broken. PW2 testified that the suit property has been subdivided into smaller parcels and no construction works have started. Against this background, it is my view that the equitable remedy of specific performance would not be an appropriate and efficacious remedy in the circumstances of this case.

11. This leaves an award of damages as the only viable remedy in the circumstances of this case. The alternative prayer made by the plaintiffs is framed as follows:

***a) In the alternative, special damages of Kenya shillings four million, eight hundred and twenty thousand [4,820,000/=].***

I have deliberately underlined the words "*special damages*" because of reasons that will shortly emerge.

12. *Chitty on Contracts, Volume 1, General Principles*, Page 1601, Paragraph 26-006 captures the essential features of general and special damages thus:

***“General damages are given in respect of such damage as the law presumes to result from the infringement of a legal right or duty: damage must be proved but the claimant cannot quantify exactly any particulars items in it. The main meaning of special damages is that precise amount of pecuniary loss which the claimant can prove to have followed from the particular facts set out in his pleadings. Special damage must be specifically pleaded and evidence relevant to it cannot be adduced if only general damages have been pleaded, since the purpose of pleading special damages is to prevent surprise at the trial by giving the defendant prior notice of any item in the claim for which a definite amount can be given in evidence.”***

13. At paragraph 17 of the plaint, the plaintiffs pleaded for special damages of KShs.4,820,000/=. This is the same figure and tabulation that is replicated in paragraph 12 of the 1st plaintiff’s witness statement. Uncontroverted evidence has been adduced to support this limb of the claim. However, in their written submissions dated 15/8/2017, the plaintiffs have asked the court to grant them KShs.8,245,000/=.

14. In view of the well established principles upon which a plea for special damages is awarded, I cannot award special damages outside what was specifically pleaded in the statement of claim. Similarly, I cannot award a relief which was not sought in the pleadings. In the present case, the sum pleaded is KShs.4,820,000/=.

15. In light of the foregoing, I hereby enter judgment in favour of the plaintiffs against the defendant in the following terms:

- a) Special damages at KShs.4,820,000/=.***
- b) Interest at court rate from the date of filing suit.***
- c) Costs of the suit.***

**Dated, signed and delivered at Nairobi on this 31st day of October, 2017.**

**B M EBOSO**

**JUDGE**

**In the presence of:**

Halima Abdi:                      Court Assistant