



**Kariuki v Thika Greens Limited (Environment & Land Case  
E069 of 2022) [2024] KEELC 1803 (KLR) (26 March 2024) (Judgment)**

Neutral citation: [2024] KEELC 1803 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E069 OF 2022**

**BM EBOSO, J  
MARCH 26, 2024**

**BETWEEN**

**JOHN NG'ETHE KARIUKI ..... PLAINTIFF**

**AND**

**THIKA GREENS LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The dispute in this suit revolves around the question as to whether there was breach of a sale of land contract which the two parties to the suit entered into on 9/4/2010. The contract related to sale of Plot Number 689, which was to be surveyed out of Land Reference Number 13131, comprised in Grant Number IR 28030. The land is located in Thika Municipality. Both parties have made counter allegations of breach. One of the key questions to be answered in this Judgment is whether there was breach of the said agreement by both or either of the two parties. I will outline the parties' respective cases, evidence, and submissions before I dispose the specific issues that fall for determination in the suit.

**Plaintiff's Case**

2. The plaintiff initiated the primary suit through a plaint dated 17/6/2022. In summary, the plaintiff's case is that on 9/4/2010, he entered into an agreement for purchase of  $\frac{1}{4}$  of an acre plot designated as Plot Number 689 [the suit property]. The said plot was to be surveyed as a subdivision out of Land Reference Number 13131, located in Thika Municipality. The agreed purchase price was Kshs 980,000. The plaintiff was required to pay Kshs 294,000 as deposit on or before execution of the sale agreement. Balance of the purchase price was to be paid on completion date, which was agreed to be 90 days from the date of execution of the agreement [9/4/2010].
3. The plaintiff contends that he duly paid the deposit of Kshs 294,000 and he was given vacant possession of the suit property. It is the case of the plaintiff that it was a term and condition of the sale agreement



that the defendant had to carry out “certain survey works, obtain change of user for land and produce the lease”. The plaintiff contends that the defendant “has failed and/or neglected to complete its part of the bargain by completing the works and providing the plaintiff with his sublease”.

4. The plaintiff seeks the following verbatim reliefs against the defendant:
  - (a) Specific performance of the said agreement.
  - (b) Documents for breach of contract [*sic*].
  - (c) Costs of the suit
  - (d) Any other remedy as to this court may appear just to grant [*sic*]

#### **Defendant’s Case**

5. The defendant filed a statement of defence and counterclaim dated 13/10/2022. Through the defence and the counterclaim, the defendant confirms that it entered into an agreement for sale of Plot Number 689 to the plaintiff at a purchase price of Kshs 980,000. The defendant further admits that the plaintiff paid the deposit of Kshs.294,000, adding that the balance of the purchase price [Kshs.686,000] was to be paid on or before 29/9/2010, “being Ninety (90) days from 30th June 2010.”
6. It is the case of the defendant that the plaintiff breached the contract. The defendant itemized the following particulars of breach: (i) failing, refusing and/or neglecting to pay balance of the purchase price on or before 29/9/2010; (ii) failing to deliver to its advocates a suitable professional undertaking; (iii) failing to commence and complete construction within 36 months from 29/9/2010; (iv) failing and/or neglecting to hand over to its advocates a duly executed sublease; (v) failing, refusing and/or neglecting to hand over to its advocates payments relating to stamp duty, registration fees and all other disbursements; (vi) failing and/or neglecting to relevantly respond to letters to aid in the completion of the sale agreement; (vii) being generally uncanny, mischievous and engaging in afterthought actions and moves; (viii) holding out and/or masquerading as a member of Waterfalls Country Homes Management Ltd; and (ix) illegally and unjustifiably occupying the suit property from July 2021.
7. The defendant contends that it was a term of the agreement that in the event any portion of the purchase price remained unpaid on the completion date, the unpaid amount would attract interest at 16% per annum till payment in full. The defendant adds that, as at 17/6/2022, the plaintiff owed the defendant the sum of Kshs 2,567,600 made up of balance of the purchase price [Kshs 686,000] plus interest at 16% p.a reckoned from 29/9/2010 [Kshs 1,881,600].
8. By way of counterclaim, the defendant seeks the following verbatim reliefs against the defendant:
  - a. A declaration that the plaintiff is in breach of the agreement dated 10th April 2021 [*sic*].
  - b. The plaintiff pays the defendant Kshs.2,567,600/= being the balance of the purchase price of Kshs.686,000/= plus the interest accruing from 29th September 2010 of Kshs,1,881,600/=.
  - c. The plaintiff pays the defendant Kshs.5,220,000/= as exemplary damages.
  - d. An injunction restraining the plaintiff either by himself, servants and/or agents from asking possession or entering, encroaching, trespassing, working on, constructing, using, acquiring, or in any manner interfering with part or whole sub-plot number 689 until payments are made in respect of (b) and (c) above.
  - e. The costs of the counter-claim and interest thereon at court rate.
  - f. Such other orders or other reliefs as the court may deem fit.



### **Plaintiff's Evidence**

9. The plaintiff, John Ng'ethe Kariuki, testified as PW1. He adopted his witness statement dated 17/6/2022 as part of his sworn evidence-in-chief. He produced the 24 exhibits contained in his list and bundle of documents dated 17/6/2022.
10. It was PW1's testimony that in 2010, the defendant, a limited liability company registered in Kenya, was selling serviced plots in Thika Municipality at Kshs 980,000. PW1 stated that on 9/4/2010, he entered into an agreement with the defendant for the purchase of the suit property. He stated that he paid 30% of the purchase price as deposit. He also paid legal fees. PW1 added that the completion date was 90 days from the date of the agreement. He stated that there was delay on part of the defendant in completing his obligations under the agreement in terms of procuring a change of user and completing survey works in the scheme. PW1 testified that the agreement provided that he would take vacant possession of the suit property upon payment of the deposit. He added that he paid a monthly levy of Kshs 3,000 for the maintenance of infrastructures and amenities such as roads, water supply, electricity, and security. He stated that he was willing to pay the balance of the purchase price provided he is assured of being issued with a title to the suit property.

### **Defendant's Evidence**

11. The defendant led evidence by Catherine Kioi who testified as DW1. She adopted her witness statement dated 13/10/2022 as part of her sworn evidence-in-chief. She stated that she had been the Chief Finance Officer of the defendant company since 2011.
12. DW1 stated that through an agreement of sale dated 4/4/2010 [sic], the defendant agreed to sell to the plaintiff Plot Number 689 which was "demarcated" from Land Reference number 13131 at a consideration of Kshs 980,000. DW1 added that similar plots were sold to other purchasers on similar terms and conditions. She stated that the scheme was referred to as Thika Greens Phase 1.
13. DW1 added that the interest to be sold in plot number 689 was leasehold for 99 years, and the transfer of the property was to be by way of sublease from the defendant to the plaintiff or his nominees. She stated that for the purpose of the agreement, time was deemed to be of the essence.
14. DW1 stated that the plaintiff was to commence and complete construction of a residential house on the plot within 36 months from the date of completion of the purchase of the suit property failure to which the defendant was entitled to charge the plaintiff an extra annual service charge, unless the same was waived by the management company.
15. DW1 added that a deposit of Kshs 294,000 had been paid to the defendant by 10/4/2010, stating that the plaintiff failed to pay the balance of Kshs 680,000 [sic] by 29/9/2010, the completion date. It was the evidence of DW1 that on its part, the defendant took steps to perform its obligations under the agreement by forwarding the following documents to the plaintiff: (i) a duly executed agreement for sale; a draft sublease - for perusal and approval; (ii) copy of the certificate of incorporation of the management company; (iii) approval for the change of user; (iv) a notice notifying all the purchasers about approval relating to change of user and the new title number relating to Thika Greens Phase 1, to wit LR. No.28239 comprised in I.R. No. 132402; (v) a copy of the sublease in favour of the plaintiff for perusal and approval. DW1 stated that the defendant incorporated Waterfalls Country Homes Management Limited for the purpose of managing and maintaining the development. She added that each of the other purchasers subscribed for one share in the said management company and had since substantially completed construction of their residential houses and had been issued with registered subleases.



16. DW1 stated that the plaintiff owed the defendant a total of Kshs 2,567,600 as at 17/6/2022, being the balance of the purchase price of Kshs 686,000 plus interest in the sum of Kshs 1,881,600, accrued from 29/9/2010. DW1 further stated that the value of similar properties within Phase 1 had appreciated to Kshs 6,300,000 from Kshs 980,000. DW1 urged the court to grant the defendant exemplary damages for breach of the agreement in the sum of Kshs 5,220,000 being the current market price of Plot Number 689 less the market price of the plot as at 2010.
17. DW1 produced the following fifteen exhibits: (i) agreement of sale dated 9/4/2010; (ii) the defendant's advocates letter to the plaintiff's advocates dated 28/6/2010; (iii) the defendant's advocates letter to the plaintiff's advocates dated 7/12/2010; (iv) the Commissioner of Lands' memo dated 17/9/2010 addressed to the defendant; (v) a memo dated 12/11/2011 to the owners of Waterfalls Country Homes Management Limited from the defendant; (vi) the defendant's advocate's letter to the plaintiff's advocates dated 8/3/2013; (vii) the certificate of incorporation for Waterfalls Country Homes Management Limited; (viii) the valuation report of 12/4/2022 of a sample plot within LR. No. 28239; (ix) the plaintiff's advocate's letter to the defendant's advocate dated 29/11/2010; (x) the plaintiff's advocate's letter to the defendant's advocate dated 20/12/2010; (xi) the plaintiff's advocate letter to the defendant's advocates dated 27/2/2013; (xii) the plaintiff's advocates letter to the defendant's advocate dated 8/3/2013; (xiii) the plaintiff's advocates letter to the defendant's advocates dated 5/4/2013; (xiv) the plaintiff's advocates letter to the defendant's advocates dated 22/3/2013; and (xv) copies of photographs taken from the site of plot number 689 showing the plaintiff had started construction on the plot.

### **Plaintiff's Submissions**

18. The plaintiff filed written submissions dated 10/11/2023 through G.M. Muhoro Advocate. Counsel for the plaintiff submitted that on the completion date, none of the parties had fully performed their obligations under the agreement. Counsel further submitted that despite breach of the agreement, none of the parties elected to terminate the agreement. Counsel argued that the plaintiff had demonstrated that he was ready and willing to complete his obligations under the agreement but had been hindered by the failure of the defendant to respond to his advocate's inquiries regarding the production of title documents. Counsel added that on the other hand, the defendant had not demonstrated any action on its part that proved it was ready and willing to complete its obligations under the agreement.
19. Counsel urged the Court to grant the plaintiff an order of specific performance and costs of the suit. Counsel added that the said order would not cause any hardship to the defendant. Counsel submitted that the plaintiff paid 30% of the purchase price, took possession of the suit property and continued to honour conditions and terms of occupying the premises by paying service charge to the defendant. Counsel added that the plaintiff had persistently and relentlessly, through its letters to the defendant and to the defendant's advocates, acted diligently by requesting the defendant to furnish documents to facilitate the issuance of the title to the suit property. Counsel argued that the act of the defendant giving the plaintiff vacant possession of the suit property was an act in pursuance of the completion of the agreement.
20. Counsel for the plaintiff argued that the defendant did not oppose the plaintiff's claim for an order of specific performance, adding that the defendant preferred that the agreement be completed on condition that it be awarded interest on the unpaid portion of the purchase price and be awarded exemplary damages for the plaintiff's failure to complete his part of the agreement. Counsel contended that in so pleading, the defendant, by implication, was telling this Court that it would not suffer any serious hardship as the plaintiff was already in occupation of the land. Counsel submitted that, in any



event, the land was still available for sale as it had not been transferred to a third party. Counsel relied on the case of *Joseph Kiprono Maswan v Veronica Mukami Nkatha Reithi & Another* [2021] eKLR.

21. On the defendant's counterclaim, counsel submitted that as at the time of trial, the defendant had not given any notice of breach of contract. Counsel faulted the defendant for failing to apportion to itself any blame for the failure to complete the agreement. Counsel submitted that the Court should reject the defendant's prayer for an award of exemplary damages given that during trial, the defendant's witness failed to explain the basis upon which the Court would grant the relief. Counsel faulted the defendant for seeking exemplary damages despite failing to make any attempt to terminate the agreement nor to demand that the plaintiff completes payment of the purchase price. Counsel further faulted the defendant for failing to produce a current valuation report of the suit property to prove that the value of the land had appreciated to Ksh 6,300,000. Counsel argued that by the defendant failing to terminate the contract, it kept itself bound by the terms of the agreement. Counsel further argued that the defendant had not demonstrated that it suffered loss for non-completion of the agreement. Counsel relied on the decision in the case of *Penthouse Group Limited & Aggrey Mchambi v Gloria Adisa Diffu* [2021] eKLR.

### **Defendant's Submissions**

22. The defendant filed written submissions dated 24/11/2023 through Patrick Law Associates. Counsel for the defendant identified the following as the four issues that fell for determination in the suit: (i) Whether the plaint is merited; (ii) Whether the reliefs sought in the plaint are grantable [*sic*]; (iii) Whether the counterclaim is sustainable; and (iv) Whether the reliefs sought in the counterclaim are grantable [*sic*].
23. On whether the plaint was merited, counsel for the defendant submitted that the relationship between the plaintiff and the defendant was based on the agreement for sale. Counsel added that the plaintiff misconceived and misapprehended the transaction he was undertaking. Counsel argued that the plaintiff did nothing more to facilitate the completion of the transaction other than paying the deposit of Kshs 294,000, adding that the plaintiff was in breach of the sale agreement. Counsel contended that the defendant had performed its obligations exceedingly, without fault.
24. On whether the reliefs sought in the plaint were available, counsel submitted that the reliefs were not available. Counsel argued that in deciding whether or not to grant the order of specific performance, the Court should be careful not to order specific performance where it would cause severe hardship to the defendant. Counsel faulted the plaintiff for failing to specifically itemize or plead with certainty the clause of the agreement which the defendant should be ordered to perform. Counsel further faulted the plaintiff for not furnishing the Court with evidence of payment of the balance of the purchase price; a duly executed sublease; all payments on account of stamp duty registration fees, and all other payments due and payable in connection with the registration; copies of the plaintiff's identification card and PIN certificates; and three sets of the plaintiff's-coloured passport size photographs.
25. On whether the counterclaim was sustainable, counsel submitted that the plaintiff failed to pay the balance of the purchase price by 29/9/2010 in breach of the agreement for sale dated 4/4/2010. Counsel further submitted that it was a term of the agreement that if any portion of the total purchase price remained unpaid by the plaintiff on the completion date, interest would accrue on the unpaid sum from the date of default until payment in full. Counsel added that as at the date of filing the suit, the plaintiff owed the defendant Kshs 2,567,600, being the balance of the purchase price of Kshs 686,000 plus accrued interest amounting to Kshs 1,881,600.



26. On whether the reliefs sought in the counterclaim were available, counsel submitted that the defendant sought a declaration that the plaintiff breached the sale agreement; an order that the plaintiff pays the defendant Kshs 2,567,600; an order that the plaintiff pays the defendant Kshs 5,220,000 as exemplary damages; an injunction restraining the plaintiff from asking possession or entering encroaching, trespassing, working on, constructing, using, acquiring or in any manner interfering with part or the whole of plot number 689 until payments, costs and interests. It was the position of counsel that the reliefs were merited.
27. On exemplary damages, the defendant's counsel submitted that the value of the suit property had appreciated to Kshs 6,300,000 from Kshs 980,000 in 2010. Counsel added that exemplary damages were available based on the nature of the defendant's claim. Counsel relied on the decision of the Court of Appeal in *John Richard Okuku Oloo v South Nyanza Sugar Co Ltd* [2013] eKLR.
28. On the plea for an injunction, counsel submitted that the defendant sought an order restraining the plaintiff from taking possession or in any manner interfering with part or the whole of the suit property until he made payments in full. Counsel added that the plaintiff had not adduced any evidence of full payment of the purchase price, costs, and disbursements, adding that his occupation and use of the plot was a violation of the terms of the agreement, hence he was a trespasser. Counsel added that equity and the balance of convenience favoured restraining the plaintiff's until he settled all amounts owing to the defendant. Counsel urged the court to dismiss the primary suit and allow the counterclaim.

### **Analysis and Determination**

29. I have considered the pleadings, the evidence and the submissions tendered by the parties. I have also considered the relevant legal frameworks and jurisprudence. The following are the five key issues that fall for determination in the primary suit and in the counterclaim: (i) Whether the defendant breached any of the terms of the agreement for sale of land; (ii) Whether the plaintiff breached any of the terms of the agreement for sale of land; (iii) Whether the plaintiff is entitled to the reliefs sought in the primary suit; (iv) Whether the defendant is entitled to the reliefs sought in the counterclaim; (v) What order should be made in relation to costs of the primary suit and the counterclaim. The first and second issues are intertwined. I will therefore analyze and dispose them simultaneously.
30. Did either of the parties breach any of the terms of the sale agreement? Both parties produced the relevant sale agreement. The cover page of the sale agreement which was produced by the two parties bears the date of 9/4/2010. The inner pages do not bear the date of the agreement. It is therefore not clear where the defendant got the dates of 4/4/2010 and 30/6/2010 from. The court has no doubt that the common agreement which the parties exhibited is dated 9/4/2010.
31. The first part of the agreement contains the description and the addresses of the parties to the agreement. The second part contains seven (7) recital paragraphs of the agreement. The substantive clauses of the agreement are ten (10) in total.
32. The plaintiff did not set out particulars of the alleged breach by the defendant. The gist of the plaintiff's case is that it was a term and condition of the agreement that the defendant would carry out certain survey works, obtain change of user for the land and produce leases. The plaintiff contends that the defendant has failed and /or neglected to complete "its part of the bargain" by "completing the works and providing the plaintiff with his sublease." On its part, the defendant contends that the plaintiff, among other breaches, failed to pay balance of the purchase price and illegally took possession of the suit property.



33. The plaintiff did not point out through evidence any particular clause of the sale agreement which the defendant had breached in terms of the above allegation. On its part, the defendant led evidence demonstrating that it duly obtained a change of user and carried out subdivision survey works culminating in issuance of subleases to the purchasers who had completed paying purchase price for their respective plots. In the absence of particulars of breach and relevant supporting evidence of breach, the court has no basis upon which to make a finding to the effect that the defendant breached the agreement for sale. Put differently, the plaintiff has failed to establish breach by the defendant.
34. Did the defendant demonstrate breach by the plaintiff? Clause 1.3 of the sale agreement required the plaintiff to pay balance of the purchase price [Kshs 686,000] on or before the completion date. Clause 6 defined completion date as ninety (90) days from the date of execution of the sale agreement. The agreement is dated 9/4/2010. For reasons that are not clear the defendant contended that balance of purchase price fell due and payable on 29/9/2010.
35. Based on the clear terms of the agreement, the 90 days completion period is to be reckoned from the date of the agreement, which is 9/4/2010. The 90 days period lapsed on 8/7/2010. The defendant demonstrated that the plaintiff did not bother to pay balance of the purchase price within the agreed period of 90 days. Payment of balance of the purchase price was an unconditional covenant and obligation on part of the plaintiff. Failure to discharge the obligation was therefore a breach of a key term of the agreement.
36. The defendant also alleged that the plaintiff breached the agreement by illegally and unjustifiably occupying the suit property. Under clause 3 of the sale agreement, the plaintiff was to be given possession of the suit property upon paying purchase price in full. There was no evidence to suggest that the plaintiff paid purchase price in full. There was also no evidence to suggest that the plaintiff was given possession of the suit property. There was, however, evidence by the defendant demonstrating that the plaintiff was in illegal occupation of the suit property. Clearly, without paying the agreed purchase price together with all the other monies agreed to be paid under the agreement for sale, the plaintiff had no legitimate basis for occupying the suit property.
37. The court is, on the basis of the above evidence, satisfied that the defendant has proved breach of the sale agreement by the plaintiff. On his part, the plaintiff has failed to establish breach by the defendant. Those are the findings of the court on the first and second issues.
38. Is the plaintiff entitled to any of the reliefs sought in the plaint? There was no evidence suggesting that the defendant had opted to terminate the agreement on account of the above breach by the plaintiff. Secondly, it does emerge from the defendant's defence and counterclaim that the defendant elected to go for the contractually agreed remedy of interest at 16% p.a together with what the defendant calls "exemplary damages".
39. It does emerge from the parties' pleadings and evidence that the agreement dated 10/4/2010, though breached by the plaintiff, has never been terminated by the defendant. In the circumstances, the contract dated 10/4/2010 is enforceable by the plaintiff subject to him remedying the breach by paying the balance of the purchase price together with the agreed contractual interest at 16% per annum. To this extent, it is the finding of the court that notwithstanding the breach, in the absence of termination by the defendant, the remedy of specific performance is available to the plaintiff subject to him first remedying the breach and paying the agreed contractual interest of 16% per annum.
40. Is the defendant entitled to the reliefs sought in the counterclaim? Parties contemplated a scenario of breach by the plaintiff through default to pay balance of the purchase price within the agreed



period. Parties mutually agreed on the appropriate remedy in the event of such breach. Clause 5 made provision for a mutually agreed remedy for the above breach in the following terms:

“in the event that any proportion of the total purchase price shall remain unpaid by the purchasers on the completion date interest shall accrue thereon at the rate of 16 % per annum from the date of default until payment in full thereof both days inclusive.”

41. This being what the parties mutually agreed on as the remedy available to the defendant, that is what the court will give to the defendant. Under the contract, the sum of Kshs 686,000 was to attract interest at 16% p.a from 9/7/2010. For unknown reasons, the defendant sought interest from 29/10/2010. The defendant will, in the circumstances, be granted the balance of the purchase price together with interest at 16% p.a from 29/9/2010 as sought.
42. Is the defendant entitled to exemplary damages? Exemplary damages are a punitive form of general damages. Our superior courts have, on numerous occasions, stated that the purpose of damages in a claim founded on breach of contract is to put the aggrieved party in the position he would have been in had the breach not occurred. The courts have emphasized that general damages, by whatever name, are not available in a claim for breach of contract. In *Kenya Tourist Development Corporation v Sundowner Lodge Limited* the Court of Appeal stated thus:

“.....as a general rule, general damages are not recoverable in cases of alleged breach of contract.”
43. In the present suit, parties mutually agreed on interest at 16% p.a as an adequate remedy in the event that any portion of the purchase price was not paid on completion date. In the circumstances, there is no proper basis for an award of exemplary damages which, as observed, are a punitive form of general damages. The relief of exemplary damages is not available in the circumstances of this case.
44. On the plea for an injunction, the court has observed that the plaintiff was entitled to be given possession only after paying balance of the purchase price together with all the other monies payable by him under the agreement. The plaintiff has not paid the agreed purchase price together with the agreed interest and disbursements. Until he pays the monies, he is not entitled to possession of the suit property. To the above extent, the plea for an injunction is available to the defendant.
45. On costs, this suit would perhaps not have been necessary if the defendant had terminated the agreement on account of breach by the plaintiff. Taking into account the circumstances of the dispute, the court takes the view that parties should bear their respective costs of the suit.

### **Disposal Orders**

46. For the above reasons, the primary suit and the counterclaim are disposed as follows:
  - a. Subject to the plaintiff unconditionally paying the following: (i) balance of the purchase price [Kshs.686,000]; (ii) interest on the said balance at 16% from 29/9/2010 till the date of payment in full; and (iii) all costs payable under clause 7 of the agreement for sale dated 9/4/2010, the defendant shall cause to be registered in the name of the plaintiff a sublease in relation to the suit property, Plot No 689, Thika Greens.
  - b. In the event that the plaintiff does not pay all the above moneys within 90 days from today, the defendant shall be at liberty to terminate the sale agreement and refund to the plaintiff the deposit of Kshs.294,000 without interest.



- c. The plaintiff is hereby restrained from asking possession, entering, encroaching on, trespassing on, working on, constructing on or using the suit property unless the above moneys are paid in full during the subsistence of the agreement dated 9/4/2010.
- d. Parties shall bear their respective costs of this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 26TH DAY OF MARCH 2024**

**B M EBOSO**

**JUDGE**

In the presence of:

Mr Muhoro for the Plaintiff

Court Assistant: Hinga

