



Chemwolo v First Riverside Acres Limited & another (Environment & Land Case E277 of 2022) [2024] KEELC 1677 (KLR) (12 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1677 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E277 OF 2022**

**MD MWANGI, J
MARCH 12, 2024**

BETWEEN

ANDREW KIMUTAI CHEMWOLO PLAINTIFF

AND

FIRST RIVERSIDE ACRES LIMITED 1ST DEFENDANT

NCBA BANK KENYA PLC (FORMERLY, NIC BANK LIMITED) 2ND DEFENDANT

JUDGMENT

1. The Plaintiff herein purchased an apartment known as apartment No. 7C (formerly known as Apartment B14), hereinafter referred to as ‘the suit property’ from the 1st Defendant vide a Sale Agreement dated 11th April, 2018 for the sum of Kshs 20,000,000/=. The suit property is a three (3) bedroomed apartment. That purchase transaction is the genesis of this case.
2. The 1st Defendant is in the business of real estate purchase, construction and development. The Suit property herein is one amongst the 41 apartments constructed by the 1st Defendant Company on its parcel of Land known as L.R. No. 4275/64 located on Garden Road, off Riverside Drive in Nairobi. The apartments were to be collectively referred to as ‘First Riverside Acres’.
3. Upon purchasing the suit property, the Plaintiff automatically became a member of the Management Company and was to be allocated one (1) ordinary share of the Management Company at the price or sum of Kshs 1,000/-. In the agreement between the Plaintiff and the 1st Defendant, it was agreed that the Plaintiff’s membership in the Management Company was inseparable from the ownership of the suit property such that ‘completion of the lease of the premises was conditional on the allotment of the shares’, and vice versa.
4. The Plaintiff’s case, that was initiated by way of the plaint dated 31st August, 2022, was that despite him paying full consideration to the 1st Defendant, the 1st Defendant had willfully refused, neglected



and or failed to cause the due execution of a partial discharge of charge by the 2nd Defendant over the mother title that would allow the registration of a sublease in favour of the Plaintiff.

5. The Plaintiff asserted that the 1st Defendant had warranted to him in the sale agreement at clause 14 thereof that it had not given any overriding interests over the mother title and had no intention of doing so yet it had subsequently gone ahead and encumbered the mother title by charging it in favour of the 2nd Defendant as a security for a financial facility/loan. The Plaintiff asserted that at the time of the agreement, on or about 11th April, 2018, he had confirmed that there was no registered encumbrance against the mother title in favour of the 2nd Defendant or at all.
6. The Plaintiff stated that the 1st Defendant approached the 2nd Defendant for a loan of Kshs 50,000,000/= after his agreement with the 1st Defendant. The 2nd Defendant represented to the Plaintiff that if he paid the balance of the purchase price to an escrow account in the name of the 1st Defendant held in the 2nd Defendant's bank, it would execute a partial discharge of charge to enable the registration of the Plaintiff's sublease over the mother title.
7. The Plaintiff acted on the representation by the 2nd Defendant and deposited a total sum of Kshs 8,125,000/=, the balance of the purchase price, into the escrow account as advised by the 2nd Defendant. His complaint was that the 1st and 2nd Defendants did not honor their promise to him to execute a partial discharge of charge to enable the registration of the sublease in his favour.
8. The Plaintiff averred that he paid further amounts totaling to Kshs 984,720/= to the 1st Defendant through its Lawyers which was meant to facilitate the transfer of the suit property into the Plaintiff's name. The tabulation of the further amounts paid was as follows:Stamp duty on sub-lease - Kshs 800,000.00Stamping expenses/bank charges - Kshs 3,000.00Government registration/valuation - Kshs 7,000.00Legal fees on sale agreement - Kshs 170,000.00-----Total Kshs 984,720.00=====
9. On 4th December, 2021, the 2nd Defendant served the Plaintiff a copy of a 40 days' notice addressed to the 1st Defendant communicating its intention to sell the entire property known as L.R. No. 4275/64 (now registered as L.R. No. 4275/129). This of course included the Plaintiff's apartment No. 7C (formerly known as apartment B14).
10. The Plaintiff asserted that he was a bona fide purchaser for value without notice of any defect in title over the suit property. He accused the 1st and 2nd Defendants, jointly and severally, of acting in a fraudulent and illegal manner thereby exposing him to imminent loss of his property. He particularized the allegations of fraud and illegality against each of the Defendants at paragraph 22 of his plaint.
11. The Plaintiff prayed for judgment against the Defendants for:
 - a. A declaration that the purported exercise of the statutory power of sale by the 2nd Defendant is illegal, null and void to the fullest extent that it purports to deprive the Plaintiff of his ownership rights over Apartment No. 7C (Formerly Apartment No. B14) erected on L.R. No. 4275/129 (formerly registered as L.R. No. 4275/64).
 - b. A declaration that the Plaintiff is the lawful owner and proprietor of the Apartment No. 7C (Formerly Apartment No. B14) erected on L.R. No. 4275/129 (formerly registered as LR No. 4275/64) to exclusion of the Defendants or any other person.
 - c. A permanent injunction restraining the Defendants jointly and severally and or any person acting on their behalf from selling, alienating, auctioning, disposing or interfering in any manner whatsoever with the Plaintiff's possessory, ownership, legal and beneficial rights



over the Apartment No. 7C (Formerly Apartment No. B14 erected on L.R. No. 4275/129 (formerly registered as L.R No. 4275/64).

- d. An Order of Specific Performance directed at the 1st Defendant to deliver up to the Plaintiff all executed original Sub-Lease Instruments in Triplicate together with any and all accompanying completion documents over Apartment Unit No. 7C (formerly apartment no. B14) erected on L.R. No. 4275/129 (formerly registered as L.R No. 4275/64 necessary for the registration of the sub-lease in favour of Plaintiff, within 7 days of the judgment being delivered.
- e. That in the event of refusal and/or failure by the 1st Defendant to comply with order (d) above, the Deputy Registrar of the Environment and Land Court do execute the necessary sub-lease to enable registration of the sub-lease in favour of the Plaintiff.
- f. An Order of Specific Performance directed at the 2nd Defendant to execute and deliver up to the Plaintiff the Partial Discharges over any and every charge it has in respect of Apartment Unit No. 7C (formerly apartment no. B14) erected on L.R. No. 4275/129 (formerly registered as L.R No. 4275/64 within 7 days of judgment being delivered.
- g. That in the event of refusal and/or failure by the 2nd Defendant with order (f) above, the Deputy Registrar of the Environment and Land Court do execute the relevant discharge of charge documents in favour of the Plaintiff.
- h. An order that the 1st Defendant do refund to the Plaintiff the disbursements sum of Kshs.984,720 with interests at court rates.
- i. General Damages.
- j. Costs and interests.
- k. Such other Orders that the Court may deem fit.

Subsequent Developments

12. The 1st Defendant despite being served with summons to enter appearance did not enter appearance and or file a statement of Defence in this case. The 2nd Defendant on its part, entered appearance and filed a statement of Defence. From the onset, the 2nd Defendant communicated its intention to reach out to the Plaintiff and settle its case with the Plaintiff amicably.
13. On 19th July, 2023, when this matter was before the Deputy Registrar for a mention, the Plaintiff and the 2nd Defendant informed the Court that they had indeed reached an agreement. They recorded a consent settling the matter between themselves. The Consent was adopted by the Court on 19th September, 2023.
14. The Consent settled the matter between the Plaintiff and the 2nd Defendant. The terms of the consent was as hereunder:

“That this suit shall be marked as fully settled as against the 2nd Defendant upon the following terms:

- i. The 2nd Defendant be and is hereby permanently restrained from selling, alienating, auctioning, disposing of or interfering in any manner whatsoever with the Plaintiff's possessory, ownership, legal and beneficial rights over the Apartment Unit number 7C (formerly apartment number B14) (hereinafter



the Apartment) erected on land L.R No. 4275/129 (formerly registered as L.R No. 4275/64).

- ii. The 2nd Defendant shall facilitate the registration of the Plaintiff's sub-lease over the Apartment by Inter alia having its Advocates accompany the Plaintiff's Advocates to register the sub-lease at the Lands Registry for purposes of due registration of the sub-lease as against the Title of land L.R No. 4275/129 (formerly registered as L.R No. 4275/64).
- iii. The 2nd Defendant shall deliver up to the Plaintiff duly executed Partial Discharge of Charge over the land L.R No. 4275/129 (formerly registered as L.R No. 4275/64) together with all accompanying documents in favour of the Apartment within 30 days of receipt of the engrossed copies from the Plaintiff's advocates.
- iv. The 2nd Defendant shall facilitate the due registration of the Partial Discharge of Charge in favour of the Apartment by inter alia having its Advocates accompany the Plaintiff's Advocates to register the Partial Discharge at the Lands Registry against the Title of land L.R No. 4275/129 (formerly registered as L.R No. 4275/64).
- v. Parties undertake to abide by this consent and in default by the 2nd Defendant an order of specific performance and damages to issue.

Evidence adduced in Court

15. In view of the above consent, the Plaintiff's case proceeded to hearing as against the 1st Defendant only and by way of formal proof. It is noteworthy that judgement had been entered in favour of the Plaintiff against the 1st Defendant in default of appearance.
16. The Plaintiff, Andrew Chemutai Chemwolo, testified in the case as the only witness. He adopted his witness statement dated 31st August, 2022 as his evidence in chief. The witness statement affirms his case as stated in his plaint of even date. The Plaintiff further produced as exhibits in support of his case, the documents in his list and bundle of documents dated 31st August, 2022 and in the further list of documents dated 14th December, 2023.
17. The Plaintiff insisted that in spite of the consent with the 2nd Defendant, he still had a case against the 1st Defendant. He prayed for an order to compel the 1st Defendant to release the completion documents to enable him register the suit property in his name. He too sought a refund of the extra amounts paid to the 1st Defendant through its Lawyers being half of the legal fees in respect of the agreement.
18. The Plaintiff disclosed that the agreement between him and the 1st Defendant had an arbitration clause. However, this suit was against the 1st and 2nd Defendants jointly and severally. The 2nd Defendant was not a party to the agreement and was therefore not bound by the arbitration clause. That is why the Plaintiff filed this suit in Court instead of referring it to arbitration

Court's directions:

19. At the close of the hearing of the case, the Court directed the Plaintiff to file written submissions. The Plaintiff complied and filed the submissions dated 29th January, 2024. The Court has had the opportunity to read and consider the submissions and the cited authorities.



Issues for Determination

20. The issues for determination in this matter in view of the subsequent developments after the filing of this case are only two. The 1st issue is whether the Plaintiff was entitled to file this suit in court in view of the arbitration clause in the agreement between him and the 1st Defendant. The 2nd issue is whether the Plaintiff is entitled to the orders sought against the 1st Defendant including costs of the suit.

Analysis and Development

21. Whereas there is no dispute that there was an arbitration clause between the Plaintiff and the 1st Defendant, the dispute giving rise to this suit roped in a 3rd party who was not a party to the agreement between the Plaintiff and the 1st Defendant. In that regard, I agree with the Plaintiff's submissions that this made the arbitration clause inoperable. The Plaintiff was therefore justified in filing and prosecuting the dispute before this Court.
22. Secondly, upon service of the summons to enter appearance, the 2nd Defendant entered appearance and filed a statement of Defence without seeking to stay the proceedings and have the dispute referred to arbitration. That action of the 2nd Defendant amounted to submitting to the jurisdiction of the court.
23. When a party files pleading in Court, not only a defense, but any pleading, then that party submits to the jurisdiction of the Court. In the case of Mt. Kenya University –vs- Step Up Holdings (K) Ltd [2018] eKLR, the Court of Appeal held that:-

“We reiterate that in order to succeed, the law obligated the appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further procedural steps in the matter. The appellant herein entered appearance, and then responded to the Respondent's application for injunction before filing the application seeking an order for reference to arbitration. Critically the appellant's response to the Respondent's application for injunction amounted to the taking of a procedural step in the matter before the initiation of the reference process. We therefore find no error in the Judge's findings. They are accordingly affirmed.”

24. I now move to the 2nd issue.
25. In his testimony, the Plaintiff was able to demonstrate that he had fulfilled all his obligations under the agreement with the 1st Defendant. He had paid the entire purchase price and has had possession of the suit property since then. The Plaintiff therefore legitimately acquired ownership of the suit property and is entitled to a declaration to that effect as well as an order of permanent injunction to restrain the Defendants or any other person for that matter from interfering with his possession and ownership of the suit property.
26. The 1st Defendant has refused, failed and or neglected to transfer ownership of the suit property to the Plaintiff. The Plaintiff prays for an order of specific performance.
27. In the Case of Reliable Electrical Engineers Ltd v Mantrac Kenya Limited [2006] eKLR, Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles. The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or



illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy.”

28. In the case of *Amina Abdul Kadir Hawa vs. Rabinder Nath Anand & anor* [2012] eKLR, the court too held that in order for the relief of specific performance to be availed to the plaintiff, the following guiding principles or parameters should be met or demonstrated to exist:-
- (a) The remedy is an equitable remedy meaning that the court has to satisfy itself that on the facts presented to it (the court) it is equitable in the interests of both parties to grant the reliefs,
 - (b) It is available where damages will not be an adequate compensation meaning that if damages are adequate, even if all the other prerequisites have been met and favour the granting of the relief of specific performance the court can withhold it and award damages instead
 - (c) It is a discretionary relief which discretion should not be exercised arbitrarily but on the basis of applicable principles. The guiding principles applicable to the courts exercise of its discretion which is trite and which this court has judicial notice of is that the discretion has to be exercised judiciously with a reason.
 - (d) Even if the facts of the case demonstrate that a specific performance is a proper remedy to grant in the circumstances, it may nonetheless be withheld in circumstances where it is likely to cause hardship to the defendant even if circumstance giving rise to the hardship to be suffered by the defendant were not contributed to by the contracting parties and may have arisen even after the conclusion of the contract.
 - (e) The party entitled to earn the relief has to demonstrate that he/she has fulfilled all his/her obligations under the terms of the contract. Or alternatively that there is demonstrated proof that he/she is ready and willing to fulfill the same.
29. Having carefully considered the circumstances of this case, and guided by the above decisions, I am convinced and persuaded that the Plaintiff has met the parameters for the grant of an order of specific performance. He is therefore is entitled to an order of specific performance to enforce the agreement against the 1st Defendant.
30. As I noted earlier, judgement had already been entered in favour of the Plaintiff against the 1st Defendant in default of appearance. That means that the Plaintiff's claim for special damages had already been automatically granted in his favour.
31. The Plaintiff has additionally prayed for general damages for breach of contract. General damages however, are not awardable in law for breach of contract.
32. In *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.
33. 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.



34. In *Kenya Tourist Development Corporation v Sundowner Lodge Limited* [2018] eKLR the Court had this to say regarding general damages for breach of contract:

“...as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason. In *DHARAMSHI vs. KARSAN* [1974] EA 41, the former Court of Appeal held that general damages are not allowable in addition to quantified damages with Mustafa J.A expressing the view that such an award would amount to duplication....The same situation applies to the case at bar in that the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs. 30 million merely because he believed that the respondent “had suffered serious damages” (sic). What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove.”

35. In *Consolata Anyango Auma v South Nyanza Sugar Company Limited* MGR HCCA 53 of 2015 [2015]eKLR the Court explained the rationale for the position on general damages in cases of breach of contract as follows:

“The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This principle is encapsulated in the Latin phrase *restitution in integrum* (see *Kenya Industrial Estates Ltd v Lee Enterprises Ltd* NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, *Kenya Breweries Ltd v Natex Distributors Ltd* Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of *Hadley v Baxendale* (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see *Standard Chartered Bank Limited v Intercom Services Ltd & Others* NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see *Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others*, NRB CA Civil Appeal No. 192 of 92 (UR) and *Charles C. Sande v Kenya Co-operative Creameries Ltd*, NRB CA Civil Appeal No. 154 of 1992 (UR)).

In addition to the aforesaid broad principle, the respondent had a duty to mitigate damage. Viscount Haldane, LC., in *British Westinghouse Electric and Manufacturing Company v Underground Electric Railways Company of London Limited* [1912] AC 673 summarized the principle as follows:

The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him claiming any part of the damage which is due to his neglect to take such steps.

36. The Plaintiff’s claim for general damages is therefore disallowed.



37. As the Plaintiff's case has succeeded as against the 1st Defendant, I award him the costs of the suit against the 1st Defendant.

Final Orders

38. From the foregoing the Court issues the following orders:-

- a. A declaration be and is hereby issued that the Plaintiff is the lawful owner and proprietor of the Apartment No. 7C (Formerly Apartment No. B14) erected on L.R. No. 4275/129 (formerly registered as LR No. 4275/64) to exclusion of the Defendants or any other person.
- b. A permanent injunction is hereby issued restraining the Defendants jointly and severally and or any person acting on their behalf from selling, alienating, auctioning, disposing or interfering in any manner whatsoever with the Plaintiff's possession, ownership, legal and beneficial rights over the Apartment No. 7C (Formerly Apartment No. B14) erected on L.R. No. 4275/129 (formerly registered as L.R No. 4275/64).
- c. An Order of Specific Performance directed at the 1st Defendant to deliver up to the Plaintiff all executed original Sub-Lease Instruments in Triplicate together with any and all accompanying completion documents over Apartment Unit No. 7C (formerly apartment no. B14) erected on L.R. No. 4275/129 (formerly registered as L.R No. 4275/64) necessary for the registration of the sub-lease in favour of Plaintiff, within 7 days of this judgment.
- d. That in the event of refusal and/or failure by the 1st Defendant to comply with order (c) above, the Deputy Registrar of the Environment and Land Court is directed to execute the necessary sub-lease to enable registration of the sub-lease in favour of the Plaintiff without any further reference to this court.
- e. An order be and is hereby made that the 1st Defendant do refund to the Plaintiff the disbursements sum of Kshs.984,720 with interests at court rates from the date of filing suit until payment in full.
- f. The Costs of the suit are awarded to the Plaintiff against the 1st Defendant.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF MARCH, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Achieng for the Plaintiff

No appearance for the 1st and 2nd Defendants

Court Assistant: Yvette

M.D. MWANGI

JUDGE

