



**Gachehu v Wathigo (Environment & Land Case E160 of 2023)  
[2024] KEELC 3266 (KLR) (7 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 3266 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E160 OF 2023**

**JA MOGENI, J**

**MARCH 7, 2024**

**BETWEEN**

**PETER CHEGE GACHEHU ..... PLAINTIFF**

**AND**

**JAMES GATUNE WATHIGO ..... RESPONDENT**

**RULING**

1. On 26/02/2024 when the parties in this matter appeared in court for the hearing of their suit, they recorded a consent where the judgment was entered in favour of the plaintiff for a principal sum of Ksh. 3,975,000. The parties were however not able to agree on the issue of interest and the court gave them a mention date on when they would submit orally on the issue of interest.
2. On 5/03/2024 the parties attended court and not having reached an agreement on the issue of interest, the defendant submitted that they were opposed to the defendant paying the interest because the parties had another agreement dated 27/11/2018. That in the agreement dated 13/07/2018 there are special conditions. That the agreement contemplated a delay in the completion of the sale agreement and eventual handing over of the purchased property.
3. The Counsel for the defendant Mr Kimanzi submitted that the duty of this court is to interpret contracts and let parties resolve their dispute as per the agreements they entered into. Further that the court should be guided by the principle of express intention. Mr Kimanzi submitted that the court should be guided by the conditions of the Agreement of 13/07/2018. That the defendant was willing to refund the money since the suit property was not constructed. He submitted that he will rely on the case of Fedelity Commercial Bank Ltd vs Kenya Graunch Vehicle Ltd 2017 Eklr. He submitted that a document's meaning should be derived from the document itself and stated the court should be guided by special conditions at page 6 and clause 1 of the agreement dated 13/07/2018.



4. On his part Mr Mburu, Counsel for the plaintiff submitted that the special conditions as set out as per the agreement dated 13/07/2018 show that the plaintiff is entitled to interest. That the contract contemplated a completion date within 90 days and that is why the plaintiff prays for interest from 12/10/2018 which was the completion date. He submitted that though the defendant submitted that the contract contemplated a delay he had not availed any proof of this delay and that all there is, is a demand note from the plaintiff seeking a refund.
5. That on 6/03/2023 the plaintiff requested for a completion note but none was offered. The amount of money continued to be held by the defendants in contravention of the agreement so there is sufficient reason for the plaintiff to be paid interest. That in fact, the defendant had sufficient time to have refunded the money and paid interest prior to the institution of the suit but they kept holding onto the money. He referred the court to the case of *Jane Wanjiku Wambu vs Antony Kigamba Hato & 3 Others* 2018 Eklr.
6. He submitted that there was a deprivation of use of the money paid to the defendant and of the property that had been purchased. Therefore, the plaintiff had to come to court to seek redress for recovery of his funds. We ask court to exercise its discretion as prayed for under Section 26 of the *Civil Procedure Act*.
7. The ruling date was reserved.

#### **Determination**

8. Issue for determination is whether the defendant should be condemned to pay interest from 12/10/2018.
9. I have read the terms of the Agreement dated 13/07/2018 and I have not come across any provision for payment of interest. The Special Conditions clause 6.1 provided as follows; “In the event that completion of the Property is delayed for any reasons beyond the Completion date, this Agreement shall continue in force until actual completion can take place and the Vendor shall not be liable for any loss or damage suffered to the Purchaser as a result of such delay”. It was the terms of the sale agreement that in the event of any delay the agreement shall continue in force until actual completion take place. In the circumstances in the suit the parties have recorded a Consent which the Court has adopted as the Judgment of the Court. In it they agreed to have the defendant refund the plaintiff purchase price and the cost of the suit. According to the *Black’s Law Dictionary* 2<sup>nd</sup> Edition, breach of contract is defined as:

“A legal cause of action in which a binding agreement or bargained-for exchange is not honoured by one or more of the parties to the contract by non-performance or interference with the other party’s performance”.
10. The defendant and the plaintiff entered into a sale agreement for purchase of a suit property whose purchase price was Ksh. 6,500,000 and it was to be paid for in instalments of Kshs. 2,000,000 upon the signing of the Agreement and the balance of Kshs. 4,500,000 was to be paid on or before 31/07/2019. The suit property was to be handed over upon completion by the developers but this never happened.



11. The plaintiff fulfilled his part of the contract and thus the reason why the defendant has consented to refund him the purchase price. In the *National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & Another* (2001) e K.L.R, the Court of Appeal stated:

“A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge”.

12. On his part Shah J.A. in the case of *Fine Bank Limited Vs Spares & Industries Limited* (Civil Appeal No. 51 of 2000) (unreported) stated as follows:

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no party of equity’s function to allow a party to escape from a bad bargain”.

13. Further, the Court of Appeal in the case of *Margaret Njeri Muiruri Vs Bank of Baroda (Kenya) Limited* (2014) eKLR, on the issue of unconscionable contract stated thus:

“Nevertheless, Courts have never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to the procedure abuse during formation of the contract, or due to contract terms that are unreasonably favourable to one party and would preclude meaningful choice for the other party. An unconscionable contract is one that is extremely unfair. Substantive unconscionable is that which results from actual contract terms that are unduly harsh, commercially unreasonable, and grossly unfair given the existing circumstances of the case.

14. This means that a Court of law will not interfere with a contract entered into between two consenting parties and the interest agreed upon unless the same is illegal, unconscionable or fraudulent. From the instant suit there is no claim from the plaintiff of there being an unconscionable contract.

15. Parties’ having agreed on the terms, Court is bound by their intent and enforce the same as was the case in the Court of appeal sitting in Eldoret in *Andrew Kiprop Ronoh v Vitalis Sunguti Ligare & Another* [2018] eKLR case where the Court of appeal awarded interest on breach where parties had made provisions for penalty in case of default and the trial Court had failed to grant the same. In the instant case however, there is no such provision in the contract.

16. The Plaintiff prays for interest on the sum to be refunded, Court has the discretion to grant as provided for by section 26 of the *Civil Procedure Act* which provides,

- “26. Where and in so far as a decree is for the payment of money, the Court may,
- (1) in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit.
  - (2) Where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date



of payment or other earlier date, the Court shall be deemed to have ordered interest at 6 per cent per annum.

17. The purpose of interest in many cases in liquidated claims is normally to compensate the party to whom wrongful action was meted on the benefits on the monies he has been deprived of. In this case the Plaintiff did make payment to the Defendant, there has been no refund of the money since the cancellation expiry of completion date which is 12/10/2019 and the Defendant made no attempt to demonstrate intention to refund, for the economic interest of the Plaintiff it would be fair to award interest.
18. This being the case and Consent Judgment having been entered in favour of the Plaintiff against the Defendant I will order as follows:
  - a. Interest on the Consented Sum of Ksh. 3, 975,000 at Court's rate until payment in full from the date of this ruling.
  - b. File is now closed.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF MARCH 2024.**

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**MOGENI J**

**JUDGE**

In the virtual presence of: -

Mr Kimanzi for the Defendant

None appearance for the Plaintiff

Ms. Caroline Sagina: Court Assistant

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**MOGENI J**

**JUDGE**

