



REPUBLIC OF KENYA



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**Kilonzo v Ndolo (Civil Appeal 127 of 2018)
[2023] KECA 1030 (KLR) (4 August 2023) (Judgment)**

Neutral citation: [2023] KECA 1030 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 127 OF 2018
DK MUSINGA, KI LAIBUTA & PM GACHOKA, JJA
AUGUST 4, 2023**

BETWEEN

MARTIN MBEKE KILONZO APPELLANT

AND

DANIEL MUTISO NDOLO RESPONDENT

(Being an appeal against the Judgment and Decree of the Environment and Land Court of Kenya at Nairobi (Mwangi Njoroge, J.) dated 16th May 2017 in ELC Case No. 408 of 2015)

JUDGMENT

1. Before this court is an appeal against the judgment and decree of the Environment and Land Court at Nairobi (Mwangi Njoroge, J) dated May 16, 2017 in ELC Case 408 of 2015.
2. The dispute between the parties herein revolves around a sale transaction in respect of the parcel of land known as LR No 209/17466 (hereinafter referred to as 'the suit property'). The appellant (as the vendor) offered for sale to the respondent (as the purchaser) the suit property and the improvements thereon. The terms and conditions of the sale transaction were captured in a sale agreement entered into by the parties on September 27, 2011. The agreed purchase price was Kshs 15,000,000/-. As per the provisions of clause 1.3 of the sale agreement, the respondent was required to pay to the appellant a deposit of Kshs 730,000/- and the balance upon successful transfer of title to the respondent.
3. The completion date for the transaction was within ninety (90) days from the date of the sale agreement, (October 21, 2011), or such earlier date as the parties thereto would agree. The transaction did not crystallize within the stipulated timeline, necessitating the filing of suit by the respondent before the trial court to wit, ELC Case No 408 of 2015 through a plaint dated April 24, 2015. The respondent alleged breach of contract on the part of the appellant, thereby frustrating completion of the sale transaction. The particulars of breach of contract cited against the appellant were, inter alia, failing to complete the transaction; failing to give completion documents; failing to sign a transfer



- to complete the transaction; and failing to pick the respondent's phone calls when enquiring about completion of the transaction.
4. The respondent prayed for judgment against the appellant for: Kshs 730,000/- plus interest at the rate of 18% per month from October 21, 2011 until payment in full; damages for breach of contract amounting to Kshs 1,500,000/- being 10% of the purchase price; Kshs 70,000/- being legal and valuation fees; and cost of the suit as well as interest.
 5. The appellant defended the suit, contending that the suit property had already changed ownership sometime in the year 2012, even before the filing of the suit by the respondent.
 6. It was the appellant's argument that the Kshs 730,000/- paid to him by the respondent was part payment of the requisite 10% deposit of the total purchase price; and that the sale agreement had a further condition of payment of a further Kshs 770,000/- within 10 days to bring the deposit amount to Kshs 1,500,000, being 10% of the purchase price.
 7. According to the appellant, it was an express term of the sale agreement that in the event the purchaser (the respondent) failed to complete the transaction, he would forfeit the deposit of 10%. The appellant contended that the respondent paid a deposit of Kshs 730,000/- only and was unable to top up the deposit amount of Kshs 770,000/- within 10 days. Consequently, the appellant decided to source for another buyer. The appellant argued that it was the respondent who had breached the contract.
 8. The appellant, save for praying that the suit be dismissed, stated that the respondent owed him a further Kshs 770,000/- being the balance of the 10% deposit, together with damages for wrongful and malicious prosecution, and stated that he reserved his right to pursue that at his time.
 9. At the hearing of the suit before the trial court, the respondent gave a detailed account of the negotiations which took place before entering into the sale agreement and the events which took place thereafter. He faulted the appellant for failing to complete the transaction as per the terms and conditions of the sale agreement. The appellant did not testify during the hearing.
 10. In its judgment dated May 16, 2017, the trial court identified three main issues for determination. The first issue was whether there was a binding agreement between the parties. The court returned a finding that the agreement dated September 27, 2011 fulfilled all the necessary basic formalities of a valid land sale agreement. In any case, the appellant did not contest the sale agreement. The second issue identified by the trial court for determination was whether payment of 10% purchase price was part of the terms of the sale agreement. The trial court held that it was not. The court cited the provisions of special condition No 1.3 of the sale agreement which provided, inter alia, that: 'The purchaser shall pay a purchase deposit of Kshs 730,000/- to the vendor and the vendor shall acknowledge receipt of the said deposit in writing. The balance of the sale price will be paid upon successful transfer of title.' There was no evidence adduced by the appellant that there were any further monies to be paid by the respondent within a time frame of 10 days as alleged by the appellant in his statement of defence. The third issue for determination was: who breached the terms of the sale agreement? The trial court held that it was the appellant who was in breach.
 11. The learned judge also addressed his mind to the respondent's prayer for damages for breach of contract amounting to Kshs 1,500,000/-. According to the learned judge, the respondent had not demonstrated how he was automatically entitled to damages for breach of contract amounting to Kshs 1,500,000/= being 10% of the purchase price, whereas the 10% clause was not part of the sale agreement, and secondly, for the reason that clause 1.3 of the agreement stipulated that the deposit would be refundable if the transaction aborted. Although the respondent had not demonstrated that he was entitled to damages in the sum of Kshs 1,500,000/=, the learned judge was of the view that the appellant had



- breached the agreement without any just cause, which occasioned loss and damage to the respondent. The respondent was therefore entitled to general damages for breach of contract, which the learned judge assessed at Kshs 400,000/=.
12. On the interest payable, the trial court cited the provisions of section 26(1) of the *Civil Procedure Act* which provides for interest to be awarded on decrees at such a rate as the court deems reasonable. However, the learned judge noted that the trial court had unfettered discretion in as far as the issue of interest was concerned. The learned judge took the view that the respondent had been denied by the appellant the opportunity to invest the money paid to him as deposit, and it was, therefore, in the words of the learned judge, not whimsical or capricious to award interest at the rate of 18% per month.
 13. In the end, the trial court entered judgment in favour of the respondent as follows:
 - a. 'Kshs 730,000/- being refund of the deposit paid in respect of the sale transaction with interest at 18% per month from December 27, 2011 till payment in full;
 - b. General damages of Kshs 400,000/- for breach of contract;
 - c. Special damages of Kshs 70,000/- being legal and valuation fees with interest accruing thereon at the rate of 18% per month till payment in full;
 - d. Interest on general damages at 18% per month until payment in full;
 - e. Costs of the suit with interest accruing thereon at court rates.'
 14. The appellant was dissatisfied with the decision of the trial court and preferred this appeal. The appellant argues that the learned judge erred in law and in fact for, inter alia, finding that the respondent was entitled to Kshs 730,000/- with interest of 18% per month from December 27, 2011; finding that the respondent was entitled to Kshs 400,000/- as general damages for breach of contract plus interest of 18% per month until payment in full; finding that the respondent was entitled to special damages of Kshs 70,000/- being legal and valuation fees with interest of 18% per month until payment in full; failing to consider the general rule that special damages must be specifically proved with respect to the award of Kshs 70,000/- as special damages; finding that the respondent was entitled to the exorbitant interest rate of 18% per month until payment in full; awarding the respondent 18% per month interest when the said rate was not provided for in the sale agreement; awarding the respondent further interest at court rates in addition to the 18% per month interest awarded; and for failing to consider conventional awards in cases of a similar nature.
 15. At the hearing of this appeal, learned counsel Mr. Okore appeared on behalf of the appellant. There was no appearance on behalf of the respondent despite service of a hearing notice by the Court. Highlighting the appellant's written submissions, counsel submitted that the trial court erred by awarding the general damages for breach of contract whereas the remedy for breach of contract under the agreement dated September 27, 2011 were rescission and the refund of the deposit paid by the purchaser. The general damages, therefore, had no anchorage under the said agreement, and were excessive and completely unwarranted.
 16. On the issue of the Kshs 70,000/= awarded to the respondent as legal and valuation fees, it was submitted that this claim was not specifically pleaded and/or proved as required in law and, therefore, the trial court had no basis whatsoever in allowing the same.
 17. In respect of the 18% monthly interest rate awarded by the trial court against the deposit of Kshs 730,000/=, the general damages of Kshs 400,000/= and the special damages of Kshs 70,000/=, learned counsel submitted that this was not provided for in the sale agreement, neither did the respondent provide justification for the rate of 18% per month. It was contended that the monthly rate of 18%



- applied by the trial court was not only oppressive but also whimsical, capricious, and exorbitant, and ought to be set aside. Counsel relied on, inter alia, the decisions in *Danson Muriuki Kihara vs Amos Kuthua Gatungo [2012] eKLR*; *Anjeline Akinyi Otieno vs Malaba Malakisi Farmers Co-op. Union Ltd [1998] eKLR*; and *Abok James Odera T/A A J Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR*, where the court set aside interest rates awarded by the trial court for being manifestly harsh, unconscionable, oppressive and so exorbitant that no reasonable court could conscientiously countenance them. It was submitted that the trial court ought to have awarded interest rate at the prevailing court rates, which according to counsel stood at 12% per annum.
18. On his part, the respondent has filed written submissions, which are dated October 19, 2018. The written submissions are, in our respectful view, a reiteration of the respondent's case as put forth before the trial court. The submissions are set out in a rather general manner. The respondent has also not cited any case law in support of his arguments. The respondent urges this Court to find that the trial court did not err in its findings and on the final awards it made in his favour.
19. We have considered this appeal, the submissions and the authorities cited, as well as the law. This appeal, in our view, turns principally on the following three issues:
- i. whether the respondent was entitled to any damages for breach of contract;
 - ii. whether the respondent's claim for special damages was specifically pleaded and proved; and
 - iii. whether the interest rate of 18% per month applied by the trial court on the deposit amount, the general damages and the special damages was tenable.
20. This being a first appeal, it is by way of a retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence afresh and draw its own conclusions on it. The court should however bear in mind that it did not see the witnesses as they testified and give due allowance for that. See *Selle vs Associated Motor Boat Co Ltd & Others [1968] EA 123*.
21. In *Makube vs Nyamiro [1983] eKLR*, this Court stated thus:
- ' A court on appeal will not normally interfere with the finding of fact by a trial court unless it is based on no evidence, or on a misapprehension of the evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching his conclusion.'
22. It is a longstanding principle of law that parties to a contract are bound by the terms and conditions thereof, and that it is not the business of the courts to rewrite such contracts. This Court in *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & another [2001] eKLR* held thus: -
- ' A court of law cannot rewrite 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.'
23. Similarly, in *Pius Kimaiyo Langat vs Co-operative Bank of Kenya Limited [2017] eKLR*, this Court held thus:
- ' We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved ... The primary task of the court is to construe the contract and any terms implied in it.'
24. The contents of the sale agreement were not denied by any of the parties. Pursuant to the provisions of Clause 6(5), the agreement was to supersede the letter of offer and any other agreements entered



into before its execution. In essence, the sale agreement represented the full understanding and the intentions of the parties. The completion period for the transaction was ninety (90 days) from the date of the agreement. In the event of any default on the part of the vendor, Special Condition No 1.3 stipulated as follows:

'...If for any cause whatsoever the Sale Agreement is not executed to completion, the Vendor will refund to the Purchaser the said deposit within a period of Thirty (30) days from the date of such realization.'

25. It is our view that to give full effect to the intention of the parties, the provisions of Special Condition No 1.3 must be considered alongside the provisions of Clause 4 which provides for remedies in case of breach of contract. It reads as follows:

'Notwithstanding any other remedies available to the parties herein, if for any cause whatsoever the transaction shall not be completed on the Completion Date as provided as a result of any breach of either of the parties, the party not in breach, being ready, able and willing to complete shall be entitled to serve notice in writing upon the other party to complete the sale of the property within Fourteen (14) days from the date of service of such notice. If the party in breach shall fail to complete before expiry of the said notice period, then the other party not in breach shall be entitled at its sole discretion either to: -

- a. Extend the time for completion;
- b. Immediately rescind this Agreement.'

26. The appellant does not appear to challenge the finding of the trial court that he was the one who breached the terms of the sale agreement. What the appellant is contesting are the awards made by the trial court upon making this finding and the interest rate applied on the awards. It is a fact that the respondent had paid a deposit of Kshs 730,000/- to the appellant pursuant to the provisions of Special Condition No.

1. 3 of the agreement. The appellant acknowledged receipt of this deposit vide his letter dated October 21, 2011. The appellant's contention that the respondent was supposed to deposit a further sum of Kshs 770,000/- within a period of 10 days to bring the total deposit amount to Kshs 1,500,000/- (equivalent of 10% of the purchase price) was not an agreed term in the sale agreement. The allegation made by the appellant was also not supported by way of evidence at the hearing of the suit. The learned judge was therefore correct in holding that there were no further monies to be paid by the respondent as deposit within a time frame of 10 days as alleged by the appellant. By invocation of the provisions of Special Condition No 1.3 of the sale agreement, the respondent was entitled to a refund of the deposit of Kshs 730,000/- The learned judge therefore did not err in his finding.

27. It is the award of damages for breach of contract which evidently rumbled the appellant. Although the respondent had pleaded for an award of Kshs 1,500,000/= under this head, the learned judge, in exercise of his discretion, awarded him Kshs 400,000/=. Was the respondent entitled to damages for breach of contract? This Court has addressed itself on the issue of award of general damages for breach of contract in a plethora of decisions. In *Kenya Tourist Development Corporation vs Sundowner Lodge Limited [2018] eKLR*, this 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 JA 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. To award it anything else would be to engage in sympathetic sentimentalism as opposed to proof- based judicial determination.”

See also *Securicor Courier (K) Ltd v Benson David Onyango & another* [2008] eKLR.

28. It is therefore trite law that general damages are not awardable for breach of contract or breach of contractual obligations. A contract for performance of specific duties or obligations, if breached, would lead to compensation for the specific loss suffered because of the breach, but not general damages. The trial court’s finding that courts have the discretion to assess general damages for breach of contract in accordance with the special circumstances of each case does not accord with the law. Upon breach of the agreement, the remedies available to the respondent were, pursuant to the provisions of Clause 4, extension of the completion period or rescission on the agreement all together. The agreement did not provide for the award of general damages for breach of terms and conditions thereof. The trial court, in our view, applied wrong principles, and misapprehended the evidence, thus fell into error in awarding general damages to the respondent. This award must, therefore, be set aside in entirety, which we hereby do.
29. The trial court also awarded the respondent special damages of Kshs.70,000/- being legal and valuation fees with interest accruing thereon at the rate of 18% per month till payment in full. It is trite law that special damages must be pleaded and proved before they can be awarded by the Court. This Court in *Hahn vs Amrik Singh [1985] eKLR* held that:

’ Special damages must not only be specifically claimed (pleaded) but also strictly proved for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.’
30. The respondent pleaded for the award of Kshs 70,000/- being legal and valuation fees with interest accruing thereon at the rate of 18% per month till payment in full. The proceedings of the trial court do not reflect any adduction of evidence by the respondent in support of this claim. The legal burden of proof lay upon the respondent to prove that he incurred this cost. Without production of evidence, the allegation by the respondent that he incurred Kshs 70,000/- as legal and valuation fees remained just that, a mere and an unsubstantiated allegation. The trial court, save for stating that the respondent was entitled to special damages in the amount stated did not give any basis for the award. The trial court erred by awarding this amount without any proof. We therefore set it aside.
31. Turning to the issue of the 18% per month interest rate awarded by the trial court on the deposit from December 27, 2011 till payment in full; the general damages and special damages till payment in full, it is our view that the same was exorbitant and capricious. Although the learned judge cited



the provisions of section 26 of the Civil Procedure Act which guides the court in awarding interest, the learned judge relied on the court's unfettered discretion and awarded the 18% monthly rate pleaded by the respondent. The interest rate contemplated under the Civil Procedure Act is, for starters, on a per annum basis. The learned judge however applied the interest rate on a monthly basis.

32. The interest rate of 18% per month was not agreed upon by parties in the sale agreement. We have perused the plaint and the trial court proceedings. We have no hesitation in agreeing with the appellant that the respondent did not provide any justification for the 18% monthly interest rate appearing in his pleadings. In the absence of such justification, the trial court ought to have applied the existing court interest rates at the time. It is also our view that there was no foundation for the justification provided by the learned judge that the respondent was denied the opportunity to invest the deposit paid to the appellant and hence the entitlement to the interest rate of 18% per month. This was not a fact pleaded by the respondent in his plaint.
33. In *Abok James Odera T/A AJ Odera & Associates vs. John Patrick Machira T/A Machira & Co Advocates* (supra) this Court held thus:

'...we make no hesitation in finding that the learned trial Judge made an error in awarding interest as prayed in the plaint at the rates of 25% from March 4, 1996 when the same had neither been provided for in the said agreement or justification made for its claim by the respondent both in the plaint filed, affidavit in support of the application for summary Judgment and or oral highlights in court at the time of the respondents request for the said summary Judgment.

We appreciate that section 26 (1) of the Civil Procedure Act Cap 21 Laws of Kenya tended to give the learned trial judge a wide discretion with regard to the award of interest. It reads:
- Where and in so far as a decree is for the payment of money, the court may in the decree order interest at such rates as the court deems reasonable to be paid on the principal such adjudged from the date of the suit to the date of decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit....'

The above discretion notwithstanding it is now trite that the exercise of the judicial discretion donated by section 26(1) above is not absolute. It has to be exercised judiciously, not with caprice or whim but with reason. Herein the learned trial Judge gave no reason as to why he awarded interest at the rate of 25% from the pre-claim period.

In the absence of both the respondent and the learned trial judge having shown the basis and justification for an award of interest at the rate of 25% from the pre-claim period, in the wake of the silence on the rate of interest applicable in the agreement of March 4, 1996, we find this rate of interest was granted in error and should not be allowed to stand. Failure to intervene on our part would offend the principle of justice and fairness as it is enshrined in the overriding objective principle.'

34. The interest rate applied by the learned judge was, in our view, manifestly harsh, unconscionable, oppressive, and exorbitant. We accordingly set aside the interest rate awarded by the trial court on the Kshs 730,000/- deposit and award interest thereon at court rates from October 27, 2011 till payment in full.
35. The upshot is that this appeal partially succeeds. We accordingly set aside the award by the trial court on general damages for breach of contract as well as the award on special damages. We also set aside the monthly interest rate of 18% per month on the deposit amount of Kshs 730,000/= and substitute



therefor an award of interest at the prevailing court rates from October 27, 2011 till payment in full.
The appellant shall have costs of this appeal.

Dated and Delivered at Nairobi this 4th day of August, 2023.

D. K. MUSINGA, (P).

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JUDGE OF APPEAL DR. K. I. LAIBUTA

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

