



**Husseini Builders Limited v Oceanic Towers Limited (Environment & Land  
Case 110 of 2018) [2024] KEELC 4676 (KLR) (11 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4676 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 110 OF 2018**

**NA MATHEKA, J**

**JUNE 11, 2024**

**BETWEEN**

**HUSSEINI BUILDERS LIMITED ..... PLAINTIFF**

**AND**

**OCEANIC TOWERS LIMITED ..... DEFENDANT**

**JUDGMENT**

1. The plaintiff avers that they entered into an Agreement for Sale with the defendant dated the 6<sup>th</sup> of October 2015 for an apartment on L.R Number Mombasa/Block XXV1/1063 known as Apartment Number 703 for an agreed amount of Kshs 22 million. That the defendant is in breach of the sale agreement by taking the whole purchase price from the plaintiff while knowing that they are unable to deliver; Failing to handover the apartment to the plaintiff in spite finishing the project; Failing to handover the completion documents to the plaintiff. As a result of the defendants action the plaintiff has suffered loss and damages and continues to do so. The plaintiff prays for judgment be entered against the defendant for specific performance in terms of handing of the Apartment known Apartment Number 703, 7<sup>th</sup> Floor on L.R Mombasa/Block XXV1/1063 among other orders.
2. The defendant admits that it entered into an Agreement for Sale dated 6<sup>th</sup> October 2015 for Apartment No. 703 situate on the building built on the land comprised in Title Number Mombasa/Block XXVI/1063. That it was a term of the Agreement for Sale that the defendant shall complete the development by the Completion Date as provided for in the Agreement for Sale. The defendant avers that apart from the Agreement for Sale of Apartment No. 703 as afore stated the defendant had also entered into an Agreement with the plaintiff for carrying out of certain Aluminium/Glazing works on the suit property which Agreement was made in 2015 and is evidenced in writing in various communications exchanged between the parties as well as pursuant to the oral agreements reached between the parties' respective directors. A dispute has arisen between the parties hereto relating to this agreement for the Aluminium/Glazing works given the plaintiff's failure to complete the contracted



works and its abandonment of the site which is being referred to litigation in a separate cause given that this Honourable Court has no jurisdiction to hear and determine this.

3. It was a specific term of the Agreement for Sale afore stated that the defendant is not only entitled to extension of time for concluding the development works and the completion date is correspondingly extended but also that the defendant (and the plaintiff in this case given it was the contracted party) was required within five months of completion clear the suit property of all building material and debris which the plaintiff failed to do as it abandoned the site. The defendant avers that the plaintiff cannot seek to take advantage of its own breaches and wrongs. In any event, the defendant avers that the plaintiff has been the cause and/or substantially contributed to the defendant's inability to discharge its obligation to deliver an Apartment devoid of defects under the Agreement for sale which was as a result of the plaintiff's own breaches and failures to discharge its obligations under the Agreement for the Aluminium/Glazing works. The defendant prays that the plaintiff's claim be dismissed with costs.
4. I have considered the pleadings and evidence tendered in court. The defendants did not provide any oral evidence in this matter and the issues for determination are as follows;
  1. Whether the sale of the suit property was valid?
  2. What prayers can be granted?

### **1. Whether the Sale of the Suit Property was Valid?**

5. PW1 the plaintiff testified that by an Agreement for Sale dated the 6<sup>th</sup> of October 2015 he bought an apartment on L.R Number Mombasa/Block XXV1/1063 known as Apartment Number 703 from the Defendant for an agreed amount of Kenya Shillings Twenty Two Million. The contract read in part as follows;
  - 1.8 "the purchase price" means the sum of Kenya Shillings Twenty Two Million (Kshs. 22,000,000/=) exclusive of VAT and any other taxes (which applicable shall be paid by the purchaser at the appropriate time).
  2. Completion
    - 2.1 The vendor should forthwith in substantial and workman like manner complete the construction of Development in accordance with the proposed specifications(short particulars of specifications of the premises are set out(for purpose of only)in Schedule A and the floor plan and the floor plan of the premises is marked A attached hereto) and details which has been produced to the purchaser by the Vendor and which the purchaser shall be deemed to have full knowledge subject to any minor amendments or variations to the said plans and specifications as the vendor may deem fit(not affecting the floor size of the accommodation of the premises).
6. That the plaintiff herein and pursuant to clause 3.2 of the agreement and on various dates did pay the defendant the total purchase price of Kshs. Shillings Twenty-Two Million (Kshs. 22,000,000/=). Thereafter the plaintiff demanded from the defendant that it hands over the apartment for the purpose of occupation since 2016 and recuperation of its investment when the apartments were finished and ready for occupation which the defendant has failed refused and/or neglected to do.
7. The Law of Contract Act clearly stipulates the requirements for a valid instrument to convey an interest in land. Section 3 (3) of the Law of Contract Act (Cap 23 of the Laws of Kenya) stipulates that;

“No suit shall be brought upon a contract for the disposition of an interest in land unless—



- a. the contract upon which the suit is founded—
    - i. is in writing;
    - ii. is signed by all the parties thereto; and
  - b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:”
8. In Harris JA in *Garvey v Richards* [2011] JMCA 16 the court in considering the essential components of a contract reflected the following principles:
- “It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable an essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.”
9. The Supreme Court of United Kingdom in *RTS Flexible Systems Ltd v Moikerei Alois Muller GMBH & Co K. G.* [2010] UKSC 14 states that;
- “The general principles are not in doubt, whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon them, by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precaution to a concluded and legally binding agreement.”
10. PW1 entered into an agreement with the defendant for the purchase of Apartment No. 703 situate on the building built on the land comprised in Title Number Mombasa/Block XXVI/1063 on the 6<sup>th</sup> October 2015. The same was produced in evidence as PEx1. I have perused the said agreement and find that this contract was properly executed by the Directors of the plaintiffs and the defendant at the material time and is valid and binding. It is also not disputed that the defendant has paid the full purchase price. The defendant avers that apart from the Agreement for Sale of Apartment No. 703 which is not disputed, the defendant had also entered into an Agreement with the plaintiff for carrying out of certain Aluminium/Glazing works on the suit property which Agreement was made in 2015 and is evidenced in writing in various communications exchanged between the parties as well as pursuant to the oral agreements reached between the parties' respective directors. A dispute has arisen between the parties hereto relating to this agreement. No evidence has been adduced by the defendant of this other agreement. Indeed, there is no evidence that the sale agreement dated 6<sup>th</sup> October 2015 was subject to the other agreement if at all and what the consequences of a breach of the second agreement which has not been established would be. I find that defence has not been proved and I dismiss it.



## 2. What Prayers can be Granted

11. The plaintiffs sought specific performance of the sale agreement dated 6<sup>th</sup> October 2015. In *[Thrift Homes Ltd vs. Kenya Investment Ltd](#)* 2015 eKLR, the court stated that;

“specific performance like any other equitable remedy is discretionary and will be granted on well settled principles. The jurisdiction of specific performance is based on the existence of a valid enforceable contract and will not be ordered if the contract suffers from some defects or mistake or illegality. Even where a contract is valid and enforceable, specific performance will not be ordered where there is an adequate alternative remedy. The court then posed the question as to whether the Plaintiff who was seeking specific performance in that case had shown that he was ready and able to complete the transaction”.

12. The Court has carefully perused the sale agreement produced as Exhibit 1 by the plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the *[Contract Act](#)*. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. I find that the sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. In the case of *Nelson Kivuvani v Yuda Komora & Another*, Nairobi HCCC No. 956 of 1991, the Court held that;

“the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract.”

13. On whether or not the defendant breached the agreement for sale, *[Black's Law Dictionary](#)*, 9<sup>th</sup> Edition, Page 213, defines a breach of Contract as;

“a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”

14. In the case of *Shah v Guilders International Bank Ltd* [2003] KLR the Court in considering the terms of the parties contract stated;

“The parties executed the same willingly and they are therefore bound by it.”

15. And in the case of *[National Bank of Kenya Ltd v Pipeplastic Samkolit \(K\) Ltd & Another](#)*, Civil Appeal No.95 of 1999 [2001] KLR 112 [2002] EA 503, the Court held that;

“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”.

16. In the instant case the agreement is clear that the purchase price was Kshs. 22 million. The defendant was paid in full and a summary of payments produced as PEx 3. I am satisfied that the defendant (and he does not dispute this) did receive the full purchase price and they failed to transfer the property to the plaintiff hence the defendant is in breach of the agreement.



17. I find that the payment of the purchase price was completed way back in 2016 and the plaintiff is entitled to specific performance. The issue of general damages and mesne profits was not proved and the same will not be awarded. It is the finding of this court that there is a breach of contract on the part of the defendant in this case. I find that the plaintiffs have proved their case on a balance of probabilities and I grant the following orders;

1. A declaration that the plaintiff is entitled to specific performance of the sale agreement dated 6<sup>th</sup> October 2015 in respect to Apartment known Apartment Number 703 on L.R Mombasa/Block XXV1/1063
2. An order directing the defendant to release to the plaintiff, all transfer documents alongside the relevant title documents to the Apartment known Apartment Number 703 on L.R Mombasa/Block XXV1/1063 within the next 60 days from the date of this judgement.
3. In default an order directing the Deputy Registrar of this court to sign all the relevant documents for the purposes of obtaining the relevant consents required to transfer Apartment Number 703 on L.R Mombasa/Block XXV1/11063 and also sign all the relevant transfer forms of the said apartment.
4. Costs of the suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 11<sup>TH</sup> DAY OF JUNE 2024.**

**N.A. MATHEKA**

**JUDGE**

