



Kirwera v Bando Projects (K) Ltd & 2 others (Environment & Land Case 126 of 2021) [2024] KEELC 6103 (KLR) (26 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6103 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 126 OF 2021
NA MATHEKA, J
SEPTEMBER 26, 2024**

BETWEEN

MARGARET WOTHAYA KIRWERA PLAINTIFF

AND

BANDO PROJECTS (K) LTD 1ST DEFENDANT

MOMBASA COUNTY LAND REGISTRAR 2ND DEFENDANT

HFC LIMITED 3RD DEFENDANT

JUDGMENT

1. The claim is that the Plaintiff was to purchase from the 1st Defendant Apartment Number Al First Floor on Subdivision Number 17466 (Original Number 1 169/2) Section 1 Mainland North (Apartment, 47) for a valuable consideration of Kshs. 13,500,000.00. That the Plaintiff has since performed all her contractual duties. On its part, however, the 1st Defendant has defaulted in performing its contractual obligations by; Failing to register a partial discharge of charge entered in favour of the 2nd Respondent over Apartment Al; Pegging execution of the sub-lease upon payment of a colossal jumbled up figure of Kshs. 1, 288,219.50 bereft of contractual and/or statutory basis; Failing to provide the Plaintiff with copies of the insurance policy taken out over Apartment Al; and Failing to provide the Plaintiff with vacant possession of Apartment Al; Failing to execute the sub-lease of Apartment Al in favour of the Plaintiff. The Plaintiff's claim against the Defendants, to which she prays for judgment against, is for:
 - a. The 1st Defendant to forthwith give the Plaintiff vacant possession of the property on Apartment Number Al First Floor on Subdivision Number 17466 (Original Number 1 1 69/2) Section 1 Mainland North;
 - b. The 1st & 2nd Defendants, or any persons acting on their behalf, be prevented from interfering with and/or acting in any manner whatsoever which interferes with the Plaintiff's peaceable



and quiet possession and enjoyment of the property on Apartment Number Al First Floor on Subdivision Number 17466 (Original Number 1 169/2) Section 1 Mainland North during the leasehold term;

- c. The 1st & 2nd Defendants to forthwith execute and/or caused to be registered a discharge of charge on the property known as Apartment Number Al First Floor on Subdivision Number 17466 (Original Number 1 1 69/2) Section 1 Mainland North in the prescribed form, which failing the Deputy Registrar, Environment & Land Court of Kenya, Mombasa shall sign one on behalf of the 1st & 2nd Defendants and under the authority of this Court;
 - d. The 1st Defendant to execute the sub-lease in respect of the property known as Apartment Number Al First Floor on Subdivision Number 17466 (Original Number 1 1 69/2) Section 1 Mainland North to the Applicant, which failing the Deputy Registrar, Environment & Land Court of Kenya, Mombasa shall execute the same on behalf of the 1st Defendant together with any such document(s) the 1st Defendant ought to execute for all intended purposes;
 - e. Upon fulfilment of the foregoing, the 3rd Defendant to dispense the production of all title documents regarding the Apartment Number Al First Floor on Subdivision Number 17466 (Original Number 1 1 69/2) Section 1 Mainland North and any other document in the hands of the 1st & 2nd Respondents, and issue a Certificate of Lease thereof to the Plaintiff;
 - f. Pending compliance of the forgoing prayers (a) - (e) above, the 1st Defendant he compelled to pay, on the Plaintiff's account, all due service charges, less the contractual initial 3 months' deposit of service charge at Kshs. 48,300.00 to the corporation managing the apartment block on Subdivision Number 17466 (Original Number 1 1 69/2) Section 1 Mainland North on the Plaintiff's account
2. The 1st Defendant states that there was a written agreement dated 9th May 2016 where the Plaintiff and the 1st Defendant agreed to the purchase of Apartment Number Al by the Plaintiff at a consideration of Kshs 13,500,000. That the said purchase price was to be paid in 3 installments with interest penalties accruing against the plaintiff for late and delay in payments of the purchase price. The 1st Defendant avers that completion date was set to be on the 31st December 2016. The 1st Defendant avers that there was no apportionment of cost for land rent and rates and or set figures for any amount to be paid for registration fees for the sublease and partial discharge, disbursements and professional legal fees and the same was subject to assessment by the responsible entities handling the transaction. That the 1st Defendant avers that it was a material term of the contract with the Plaintiff, that the Plaintiff shall only be entitled to vacant possession of the apartment no Al upon payment of the full purchase price all other outgoing including interest, legal fees incidentals, disbursement none of which the Plaintiff had complied with at the time of filing this suit. The events leading to registration of the sub-lease are pegged on compliance with the contractual terms by the Plaintiff who has since failed to comply with the contractual terms by; Failure to settle the purchase price before completion date and after extension of the completion date. Instigating and or precipitating delay in completion of the transaction. Refusing to pay the agreed service despite the 1st Defendant continue maintenance of the apartment and retain the same in tenantable state. Refusing and delaying in settling of contractual dues such as legal fees, Registration fees, stamp duty.
3. The 1st Defendant reckons that the completion of the contract is pegged solely on the Plaintiff settling the current accrued contractual dues that the Plaintiff has refused/ denied/ neglected to settle as particularized below;
- a. County Government Rent= Kshs 6,219/ =



- b. Insurance Rent 2year Deposit 9.00 sq.ft =Kshs. 75,800/ =
 - c. Annual Residential service charge year 2017=Kshs 193,200
 - d. Revised Annual Residential service charge 2018-Kshs 248,400/ =
 - e. Current/ 2019 Annual service charge payable = Kshs 75,900/ =
 - f. 2019 to 2022 Annual Service charge =Kshs. 227,700/ =
4. The 1st Defendant prays for the dismissal of the Plaintiffs claim with costs. In the alternative the Plaintiff be compelled to comply with all the contractual terms as indicated in paragraph 7 and 10 of the Defense and or any other conditions precedent and attendant to precipitate completion of the agreement.
 5. This court has considered the evidence and the submissions therein. The firm of Anne Wamithi & Company Advocates jointly with the firm of Waithera Ngugi & Company Advocates held a fixed term deposit account number 5379033401-0 at HFC Limited with Kshs 4,173,041.78. On 9th August 2019 Anne Wamithi, counsel for the plaintiff, wrote to HFC Limited proposing the registration of a partial discharge of charge for charge registered against Title No. CR 57545 Plot No. MN/I/17466 and registration of a sublease in favour of Margaret Wothoya Kirwera. The 2nd defendant wrote back on 21st August 2019 accepting the proposal to execute the partial discharge over Apartment No. A1 and registration of sublease upon receipt of Kshs 4,160,000/= to account number 7500000010 account name Bando Projects (K) Limited. Further on 2nd September 2019, Anne Wamithi of Anne Wamithi & Company Advocates and Lucy W. Ngugi of Waithera Ngugi & Company Advocates wrote to the bank instructing them to release Kshs 4,160,000/= held in the fixed deposit account number 5379033201 jointly registered in their firm's names into account number 7500000010.
 6. On 6th September 2019, the bank wrote an email to Anne Wamithi informing her that the correct account number for depositing the balance was 7210000010 and not 7500000010 and inquired if the bank would proceed with the transaction. Anne Wamithi responded to Maureen Ndeti of HFC Limited by recalling the letter dated 2nd September 2019 which instructed the bank to make the transfer of funds and indicated that new instructions could not be issued by email and that Lucy W. Ngugi of Waithera Ngugi & Company Advocates had to endorse the said instructions with her signature. On the same day, Anne Wamithi sent new instructions to the bank to pay, however, the letter did not have the signature of Lucy W. Ngugi of Waithera Ngugi & Company Advocates.
 7. The evidence before the court shows that upon agreeing to partially discharge the charge over the title of the suit property, the bank communicated to the plaintiff's advocate on the account to deposit the balance of the purchase price. In its letter dated 21st August 2019, the bank indicated the account number as 7500000010 and the account name Bando Projects (K) Limited. However, on 6th September 2019, through an email, the bank communicated to the plaintiff's counsel that the correct account number was 7210000010 and not 7500000010. The bank then asked for confirmation from the plaintiff's counsel whether they could proceed with the payment. There is no evidence that the plaintiff's counsel authorized the bank to proceed with the payment. Instead, the evidence before the court demonstrated that the plaintiff's counsel recalled the instructions in her responding email dated 6th September 2019. It is clear to the court that the plaintiff clearly communicated to the bank to await fresh instructions to pay, which would bear the signatures of both counsels holding the fixed account. The letter dated 6th September 2019 that sought to issue fresh instructions to the bank to pay did not bear the signature of Lucy W. Ngugi of Waithera Ngugi & Company Advocates, who was one of the two account holders of the fixed deposit.



8. The plaintiff in her testimony insisted that the bank was instructed to pay the balance of the purchase price, however, no evidence has been tendered before this court confirming the same. There is no evidence of joint instructions from Anne Wamithi of Anne Wamithi & Company Advocates and Lucy W. Ngugi of Waithera Ngugi & Company Advocates to the bank to pay Kshs 4,160,000/=. The agreement was for the bank to execute the partial discharge over Apartment No. A1, release the original title for registration of the partial discharge and lease on condition that the plaintiff would advance the balance of the purchase price. The plaintiff has not led evidence to prove that the condition was met, instructions to pay were recalled and the fresh instructions were not properly issued as they lacked the endorsement of one of the account holders. In the absence of proof of payment of the balance price, the court cannot compel the bank to execute the partial discharge of the charge or register the lease. The plaintiff has not demonstrated that her lawyer paid the balance price to the bank, she cannot therefore be granted the prayer of registration of the lease or partial discharge of the charge.
9. I conclude by finding that the Kshs 4,160,000/= claimed to have been paid by the plaintiff has not been supported by any payment receipt. I find that the Plaintiff needs to regularize the instructions to enable to complete the payment. The condition set by the bank for the partial discharge of the charge and subsequent registration of the lease was never met. The purchase price remains outstanding and as such I find that the plaintiff has failed to prove her case on the balance of probabilities and is on this premise I find the plaint dated 29th June 2021 unmerited and I dismiss it. On the issue of costs, 1st Defendant and 3rd defendants had entered a consent compromising the case among them. The 2nd defendant is holding the said balance of the purchase price albeit in a different fixed deposit bank account hence each party will bear its own costs of this suit.
10. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF SEPTEMBER 2024.

N.A. MATHEKA

JUDGE

