



**Ngari & another v Join Ven Investment Limited & another (Civil Case E005 of 2021) [2024] KEHC 13633 (KLR) (31 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 13633 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL CASE E005 OF 2021  
MW MUIGAI, J  
OCTOBER 31, 2024**

**BETWEEN**

**MARY WAIRIMU NGARI ..... 1<sup>ST</sup> PLAINTIFF**

**RUTH RUGURU WAIRIMU ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JOIN VEN INVESTMENT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**KINGS DEVELOPERS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. By an amended Plaint filed on 16<sup>th</sup> August 2021, the Plaintiffs herein sued the Defendants in that on or about the year 2016, the 1<sup>st</sup> Defendant’s representative/Director, approached the 1<sup>st</sup> Plaintiff with information on an upcoming construction project consisting of 2 bedroomed apartments in Syokimau area on all that piece of property known as L.R. No. 12715/289, albeit that the project was off-plan in nature.
2. Since the Plaintiffs had, previously conducted other business with the 2<sup>nd</sup> Defendant (the 1<sup>st</sup> Defendant’s affiliate) there was some form of familiarity on the projects completed earlier as they were known to the management.
3. Upon visiting the site, viewing the showhouse and satisfied with the information provided as well as the familiarity of other projects as mentioned under clause 5 above, on or about 12<sup>th</sup> May 2016, the Plaintiffs and the 1<sup>st</sup> Defendant’s representative duly executed an offer for the purchase of 5, two bedroomed apartments, namely 5 -24, 7-13, 2-31 3-25 & 36, at the initial purchase price of Kshs.3,800,000/- per apartment.
4. In line with the agreement entered into by the parties, the Plaintiffs in showing their commitment, made the first payments amounting to Kshs.4,000,000/- on 27<sup>th</sup> May 2020.



5. The final payments were made on 2<sup>nd</sup> September 2016 to which the Plaintiffs paid a total of kshs.19,000,000/- for the purchase of the 5 apartments and official receipts for payment were issued by the 2<sup>nd</sup> defendants.
6. The Plaintiffs averred that the letter of offer issued by the 1<sup>st</sup> defendants coupled with payments made by the plaintiffs were credited to the 1<sup>st</sup> defendants and subsequently accepted by the 2<sup>nd</sup> defendants formed a contract. The 1<sup>st</sup> defendant without any justifiable cause of action breached the contract.

#### **STATEMENT OF DEFENCE DATED 19/05/2021**

7. That in seeking to make such an off-plan acquisition, the 1<sup>st</sup> Plaintiff was and knew that the project sought to be undertaken was;
  - a. Subject to the issuance of the Licenses from various regulatory bodies; and
  - b. Subject to any unforeseen objections by persons legally mandated to question the nature of the development
8. In the alternative and without prejudice to the foregoing the 1<sup>st</sup> Defendant avers that:-
  - i. In or about July 2015 it sought and obtained the relevant regulatory licenses and approvals to undertake the construction of 600 low-cost housing on all those properties known as Land Reference Numbers 12715/288 and 12715/289, Syokimau area, Machakos County.
  - ii. With the issuance of the licenses and the approvals, it was legitimately expected that any party with a concern about the proposed project would seek the intervention of the relevant regulator with a right of appeal should a decision be made not favourable to such a party or the 1<sup>st</sup> defendant as the Proponent.
  - iii. One such appeal against the issuance of an EIA License for the project was lodged in NET 182 of 2016, (Nelson Mutinda & Others –vs- Join Ven Investments Limited)
  - iv. The lodging of the appeal also provoked the issuance of an Stop Order by the National Environment Tribunal on 28<sup>th</sup> June, 2016, the effect of which was to stop the project until the determination of the Appeal; and
  - v. Proceedings in NET Number 182 of 2016 are still pending.

#### **REPLY TO DEFENCE**

9. Vide reply to defence dated 1<sup>st</sup> July 2022 and filed in court on 5<sup>th</sup> July, 2022 the plaintiff averred that
  - a. The 2<sup>nd</sup> defendants seemed to be propagating mere denials as the plaintiff had provided sufficient evidence to link the 2<sup>nd</sup> defendant to the transaction having been introduced to the 2<sup>nd</sup> defendant as an affiliate to the 1<sup>st</sup> defendant.
  - b. That the defendants being reputable estate developers had fiduciary duty to ensure that all the requisite licences were issued and that since the 1<sup>st</sup> defendant has admitted that no project kicked off, it would be prudent to refund the plaintiff's funds that had never been utilized.
  - c. That the plaintiffs have through their advocates written several letters enquiring about the progress or difficulties in performing the contract but none of the letters has been responded to.
  - d. The Plaintiff reiterated that the defence had no merit and that it be dismissed and judgement be enter in favour of the plaintiff as per the plaint.



## PRELIMINARY OBJECTION

10. Vide amended Notice of Motion dated and filed in court on 6<sup>th</sup> March, 2023 the Applicant, 2<sup>nd</sup> Defendant herein sought inter alia orders that:
  - a. The Honorable Court remove the name of the 2<sup>nd</sup> Defendant from these proceedings.
  - b. That the Honorable Court be pleased to dismiss the suit as against the 2<sup>nd</sup> Defendant.
  - c. That in the alternative this Honorable Court be pleased to transfer this suit to the Environment and Land Court, Machakos.
11. The Notice of Motion is supported by the affidavit dated and filed in court on 6<sup>th</sup> March, 2023, sworn by Sunita Patel. The deponent herein deposed inter alia that she is advised by her advocate record that the cause of action relates to the alleged transfer of an interest in an immovable property the determination of which is within the judicial powers of the Environment and Land Court.
12. This Court vide Ruling delivered on 24/7/2023 determined that Pre- dominant issue in the instant matter is refund of money had and received following the alleged breach of contract and not land per se as from the pleadings outlined, whereas land LR NO 12715/289 is where the Housing Construction Project is predicated upon, out of the 600 house/flat/apartment Project, the Plaintiffs base their claim on 5 specific Apartments 5 -24, 7-13, 2-31 3-25 & 36 and seek refund of monies amongst other prayers. The matter falls squarely within the High Court jurisdiction, pursuant to Article 165 (3) (a) of *the Constitution*.

## HEARING

13. PW1 Mary Wairimu Ngari testified was the 1<sup>st</sup> Plaintiff in the case and the 2<sup>nd</sup> Plaintiff was her daughter Ruth Ruguru Wairimu. She stated that she dealt with Kings Developers Ltd before and they were introduced her to Join Ven Investment Ltd in a project in a Housing Project in Syokimau. She filed an amended plaint on 18/8/2021. She was contacted by one 1<sup>st</sup> defendants representative director and was informed of the upcoming construction project consisting of 2 bedrooms apartments in Syokimau. She was given a letter of offer and she proceeded to execute the terms of payment. Letter of offer indicated that the project was to be through in 2018. She went to the site and got the letter of offer in 2016. She got 5 two bedroomed units at a price of Kshs 3,800,000 and her purpose was to target rental payments for her upkeep as she had retired.
14. It was her testimony that she was in touch severally with Kings Developers. They were in communication via email and phone until 2021 with one Abdulkadir Hassanali when she realized that they were not getting anywhere with the said project. PW1 decided to seek redress from Court. She has never bought any property from the 1<sup>st</sup> Defendant before. She had bought property from 2<sup>nd</sup> defendant. Prior in 2016. She was not aware of the said Stop Order by the National Environment Tribunal of 28/6/2016. She was offered units by King Developers Ltd at Ongata Rongai and she declined as they offered at their terms without redress and consideration of the money she paid and they held from 2016 to that time.
15. She stated that her claims are merited and the money received by the defendants in 2016 and her expectation from 2018 was justified as if the funds were in the bank. She requested the Court that she is granted the prayers as sought.
16. On cross examination by Ms Musau for the 1<sup>st</sup> defendant she stated that she was offered property as shown by the Copy of Letter of Offer of 12/5/2016 for sale 5 units – two bedroomed apartments



- 1<sup>st</sup> and 2<sup>nd</sup> floor-5-24,7-13, 2-31, 3-25 & 36. Purchase price was Kshs 3,800,000 for each of the Apartments. Bank Details where she paid the deposit was at Eco Bank to Join Ven Investments Limited. Completion date was 30/7/2018. She had obligation to conduct the requisite due diligence. She had dealt with Kings Developers Ltd before and it was the 1<sup>st</sup> time with Join Ven Investment Ltd. The Sale Agreement stipulated terms of payment, the last payment was to be on 2/9/2016 and thereafter the offer could have been rejected and as Purchaser she ought to have conducted due diligence.
17. On cross examination by Mr Luseno for the 2<sup>nd</sup> defendants she stated that the letter of offer of 12/5/2016- the purchasers were her and her daughter Ruth Ruguru. In 2016, she was an adult as she was born in 1989-27 years old and was working in a part time job and studying at Strathmore University. She did not know how much she was earning. Ruth did not pay purchase price. She paid the entire amount herself. She retired in 2013 April and had her residence. Ruth filed documents to authorize her to appear on her behalf before Court and she deposed so in the Replying Affidavit. She did not pay the defendant on the letter of offer.
  18. The Letter of Offer of 12/5/2016 there was/is only Jon Ven Investment Ltd as Vendor. Although she made deposit regarding the 5 Apartments to the Seller it was not paid as at the date stipulated in the letter of offer.
  19. Clause (ii) of the Agreement indicated that late payment shall make the offer lapse automatically lapse. This term was self-executing on the rights of the parties but also on receipt of the funds. PW1 did not formally write to the defendants for agreement for sale and or draft the lease. She wrote to Abdul Kadir and called him on Phone and through SMS. PW1 made payments to an account details on the letter of offer which details were Join Ventures Investment Ltd Eco Bank Ltd Plaza 2000 Account number 0030025009445901 she did not in her Agreement indicate that she agreed to be refunded.
  20. PW1 vide Email from Mr Abdulkadir Hassanali of 30/11/2020, at Paragraph 3 the issue of the Project being held up by NEMA County Government KURA and other Government bodies was raised.
  21. The Properties were purchased from 2<sup>nd</sup> Defendant were completed and delivered on time and it is not the same case here. PW1 stated that in her Witness statement she did not agree to a refund of monies paid to mitigate the loss. She was not given an opportunity to discuss on what would mitigate the loss. She did not have that statement on what she wants to mitigate. she was not given a chance, it was a take it or leave it scenario. She asked the Defendant to put the proposal in writing. The proposal was to give her two units in Hatheru- Lavington as the vendor was stuck in the 5 units in Syokimau. She did not invest in Hatheru. She had no relationship with Mr.Chris Kabugo advocate who was involved as her lawyer in Riara Road project and what she invested in she bought one unit. She was given possession That was before the Hatheru project.
  22. Subsequently, the Hatheru project came up and vendors advocate is Mr. Chris Kabugo and not her advocate. She has no idea what is better Riara or Hatheru as she had not consulted a Land Economist or Surveyor.
  23. The 1<sup>st</sup> defendant had not undertaken the project in Syokimau and refused to give her the units. She has been there and there was no building or development. She did not know of the project 1, 2, 3 and did not know of any other apartment. No show house as shown in the pictures but she found open space. She brought to court the pictures but there was a two bedroom show house.
  24. The CR12 of King Developers Ltd-4/8/2009 and shows 7 Directors. CR12 of Join Ven Investment Ltd 3/8/2009 (2 directors and 2 secretaries) she did not know the year she sued the 2 companies as she dealt with both Companies. The said Abdul is a director of Join Ven Investment Ltd.



25. Clause 8 the expected completion date of the development is on 30<sup>th</sup> July 2018.
26. On re-examination she stated that several years after 2018 they have not built any development on the site. The letter of offer of Join Ven Investment Ltd on the right side indicates King Developers Ltd. In terms of payment she paid and referred to the payment receipts. By the time she had the offer and signed the offer letter she took the view that the developer had obtained all the required approvals. She did not receive any letter formally written to her that there was a problem with NEMA approvals. She only got response after making phone calls. It was not her responsibility to get the approvals. She did not get any stop order/ correspondence from NEMA. Lavington was developed by King Developers not Join Ven investments Limited.
27. PW2 Bernard Lead stated that he was aware that the plaintiff filed a suit against the defendants. He produced his statement of 2/2/2024 as exhibit. The gist of the Statement is that Plaintiff had acquired several Units through /with 1<sup>st</sup> Defendant before. In this case, the construction was stopped vide National Environment Tribunal Number 182 of 2016 John Mutinda Mwanzia & others vs Join Ven Investment Limited still pending.
28. On cross examination he stated that he was an employee of the 2<sup>nd</sup> defendant though he had not brought any evidence to show he was an employee of the 2<sup>nd</sup> defendant. He was employed in May 2023. In the course of employment by the 1<sup>st</sup> defendant, he had not interacted with the 2<sup>nd</sup> defendant. He had not brought any evidence that the 1<sup>st</sup> plaintiff had bought the properties several units from the 1<sup>st</sup> defendant. He got the information from the Human Resource Office. He found and was not involved in the matter. The evidence of the 1<sup>st</sup> defendant obtaining necessary regulatory licences and approvals. He was aware that PW1 was given a letter of offer of 12/5/2016. He is not aware of any correspondence to show that the complainant was informed of the stop order. The same was communicated by the director to the Plaintiff. There are no correspondences. He is aware that the Plaintiff made payment on 28/8/2016 and paid 2/9/2016 after stop order. It was not by false pretence as by the letter of offer dated 12/5/2016. Stop order 28/6/2016 was indicated and they continued to receive the money as proceedings were ongoing and hoping the issue to be amicably resolved. They had no evidence of ongoing proceedings to resolve the matter.
29. On cross examination by Mr. Luseno for the 2<sup>nd</sup> defendant he stated that the stop order at page 12 concerned the 1<sup>st</sup> defendant and not the 2<sup>nd</sup> defendant. Clause ii of the deposit on the part of the vendor Join Ven Investment Ltd no obligation on King developers and no connection with the 2<sup>nd</sup> defendant.
30. On re examination he stated that letter of offer expected date of completion at clause 8 is of 30/7/2018.
31. The matter was canvassed vide written submissions.

## **WRITTEN SUBMISSIONS**

### **PLAINTIFFS SUBMISSIONS DATED 16/05/2023**

32. The Plaintiff filed submissions raising 3 issues for determination;
  - a. Whether the 2<sup>nd</sup> Defendant is a distinct and separate entity from the 1<sup>st</sup> Defendant/should be struck out as a party in this suit.
  - b. Whether these proceedings against the Defendants are an abuse of Court process/whether the 2<sup>nd</sup> Defendant's application is frivolous, vexatious and an abuse of Court process.



- c. Whether the cause of action alleges to the transfer of an interest in an immovable property, the determination of which is within the judicial powers of the ELC Court.
33. On whether the 2<sup>nd</sup> Defendant is a distinct and separate entity from the 1<sup>st</sup> Defendant/should be struck out as a party in this suit, it is submitted that the 2<sup>nd</sup> Defendant is well known to the 1<sup>st</sup> Defendant as was provided for as an affiliate to the Company when the offer for the purchase of the suit properties was presented to the Plaintiffs. Further Copies of the CR 12 Forms for both Defendants list of documents shows that one Taherali D. Hassanali is a Director in both companies and as such the affiliation cannot be denied.
34. Matching the two Directors in this case is a relevant feature that cannot be ignored as leaving out the 2<sup>nd</sup> Defendant would cause injustice on the party of the Plaintiffs as they would be put to task as the recipient of the funds. As per the information adduced the 2<sup>nd</sup> Defendant received funds on behalf of the 1<sup>st</sup> Defendant as evidenced from the receipts forming the Plaintiff's documents.
35. Reliance is made in the case of Kingori -v-Chege & 3 Others [2002]2KLR 243 as submitted by the 2<sup>nd</sup> Defendant shows there exists relief flowing from the 2<sup>nd</sup> Defendant as they received monies for the transactions as well as passed themselves as affiliates.
36. The Defendants filed a joint statement of Defence and confirmed that the Plaintiffs were offered units in other projects which offer was rejected by the Plaintiffs.
37. In striking out an application for striking out a Defendant reliance is made in the case Alumark Investments limited -vs- Tom Otieno Anyango & 4 others where the Court held that:
- “It is settled law that the Court’s power to strike out pleadings is to be exercised sparingly and cautiously because the court exercise the power without being fully informed on the merits of the case through discovery and oral evidence.”
38. On the issue of Whether these proceedings against the Defendants are an abuse of Court process/ whether the 2<sup>nd</sup> Defendant’s application is frivolous, vexatious and an abuse of Court process, the Plaintiffs have a strong prima facies case against the Defendants tactfully wishes to be excused from their responsibility with the home that the case against the 1<sup>st</sup> Defendant shall crumble.
39. On Whether the cause of action alleges to the transfer of an interest in an immovable property, the determination of which is within the judicial powers of the ELC Court, reliance is made in Civil Case No. 600 of 2015 – Quorum limited -v- Invesco Assurance ltd [2019] eKLR while quoting Nakana Trading Co. Ltd -vs- Coffee marketing Board 1990 – 1994 EA 448 where the Court noted that;
- “A breach occurs in a contract when one or both parties fail to fulfil the obligations imposed by the terms. Since the contract was in writing the Court’s duty was to look at it and determine whether it applies to the facts”
40. The jurisdiction of the ELC Court is limited by Article 162(2) and (3) of Kenya and Section 13 (2) of the ELC [Act No.19 of 2011](#). Article 162(2)(b) states that the ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land.

#### **1<sup>ST</sup> DEFENDANT’S SUBMISSIONS DATED 02/10/2024**

41. It is submitted that the issues for determination were whether the 1<sup>st</sup> defendant breached its contractual obligations to the plaintiff and whether the plaintiff is entitled to the reliefs sought.



42. It was submitted that in 2015, the 1<sup>st</sup> defendant sought and was granted regulatory licences and approvals to undertake construction of 600 low-costs housing on land references numbers 12715/288 and 12715/289 located in Syokimau area. The 1<sup>st</sup> defendant offered to sell to the plaintiffs on an offplan basis five (2 bedroomed) apartments.
43. Regrettably in 2016 an appeal was instituted before the National Environment Tribunal at Nairobi, being Tribunal Appeal Number 182 of 2016 objecting to the Environment Impact Assessment License issued to the 1<sup>st</sup> development by NEMA for the development.
44. Reliance was made to Section 58 of the *Environmental Management and Co-ordination Act* on the conducting a full Environmental Impact Assessment study prior to being issued with a license by NEMA.
45. They invited the court to draw a difference between a breach of contract and the frustration of a contract. The definitions were according to the Black law dictionary and Halsbury Law of England Volume 9, 4<sup>th</sup> Edition, Paragraph 450.
46. It is not in dispute that the 1<sup>st</sup> defendant was aware of the issues relating to the EIA Licence being a necessary document forming part of the basic licences required by the 1<sup>st</sup> defendant to commence and complete development and was legally impossible for the 1<sup>st</sup> defendant to proceed with the development.
47. The court was urged to make a finding that the 1<sup>st</sup> defendant did not breach its contractual obligation as set out in the letter of offer but was in fact barred from proceeding with the development following the stop order issued by the National Environment Tribunal.
48. On whether the plaintiffs are entitled to the relief sought, it was submitted that it is uncontroverted that the construction of the development has been frustrated by events not within the control of the 1<sup>st</sup> defendant. It would be unjust to condemn the 1<sup>st</sup> defendant to pay the plaintiff interest on the purchase price from the time the project was expected to have been completed, the said delay having been occasioned by the events out of its control
49. On General damages it was reiterated that the 1<sup>st</sup> defendant did not breach the terms of the letter but was infact barred from commencing the development following appeal form the tribunal and the stop order issued.
50. It is trite that general damages are not awardable for breach of contracts in addition to a claim for quantified damages as it would amount to duplication. Reliance was made to the case of Dharamshi vs Karsan (1974) EA 41 and Securicor Courier (K) Limited vs Benson David Onyango & Another).
51. On seeking kshs 4,000,000 being the estimated sum for loss of rental income, it was submitted that special damages must specifically pleaded and strictly proved before they can award. Reliance of Union bank of Nigeria PLC vs Alhaji Adams Ayabule & another (2011) and the case of David Bagine vs Martin Bundi.
52. The court was urged to find that the performance of the contract was frustrated by the appeal against the EIA License issued against the 1<sup>st</sup> defendant as regards the developments and subsequent stop order issued by NET and the claim be dismissed.



## **2<sup>ND</sup> DEFENDANTS SUBMISSIONS DATED 2/08/2024**

53. It is submitted on behalf of the 2<sup>nd</sup> Defendant that the issues for determination are whether there exists a contractual relationship between the plaintiffs and the 2<sup>nd</sup> defendant and whether the plaintiffs are entitled to reliefs sought against the 2<sup>nd</sup> defendants
54. It is the case of the 2<sup>nd</sup> Defendant that it is not in dispute that the plaintiff entered into a contract with the 1<sup>st</sup> defendant for the sale of five (5) two bed roomed apartments located on the first and second floor in the development known as Joinven investment Limited erected on all that property known as LR 12715/289.
55. The plaintiffs during cross examination admitted that at all times they were in contractual relationship with the 1<sup>st</sup> defendant and not 2<sup>nd</sup> defendant with the view of purchasing the apartments. No evidence has been adduced to creation of any contractual relationship between the plaintiffs and the 2<sup>nd</sup> defendant to the sale and purchase of apartments. The 2<sup>nd</sup> defendant was neither a party to the letter of offer nor did it accrue any rights or obligations under the letter of offer.
56. Reliance was placed on the case of Agricultural finance Corporation vs Lengetia Limited & Jack Mwangi [1985] eKLR and William Muthee Muthami vs Bank of Baroda (2014) e KLR.
57. They urged the court to find the plaintiffs cannot maintain the suit as against the 2<sup>nd</sup> defendants, there having been no contractual relationship between parties, as pertains the sale or purchase of the apartments
58. On whether the Plaintiffs are entitled to the prayers sought as against the 2<sup>nd</sup> defendants, the plaintiffs settled the purchase price in the letter of offer which was paid directly to the account of the 1<sup>st</sup> defendant and not 2<sup>nd</sup> defendant as is evidenced from the voucher receipts.
59. It was submitted the it was evident that the 2<sup>nd</sup> defendant was neither a party to the letter of offer nor did it receive the purchase price. Reliance was placed in the case of Mosi vs National Bank of Kenya Limited (2000).
60. The Court was urged to dismiss the suit as against the 2<sup>nd</sup> Defendant with costs.

## **ANALYSIS AND DETERMINATION.**

61. The Court considered the pleadings filed and the submissions of both parties.
62. The issues that arise for determination in this case are whether there was a breach of contractual relationship as between the parties and consequently if the plaintiffs are entitled to the reliefs as sought.
63. The amended Plaint filed on 16/08/2021 outlines the cause of action as the 1<sup>st</sup> Defendant's representative/Director, approached the 1st Plaintiff with information on an upcoming construction project consisting of 2 bedroomed apartments in Syokimau area on all that piece of property known as L.R. No. 12715/289, on or about 12th May 2016, the Plaintiffs and the 1st Defendant's representative duly executed an offer for the purchase of 5, two bedroomed apartments, namely 5 -24, 7-13, 2-31 3-25 & 36, at the initial purchase price of Kshs.3,800,000/- per apartment.

In line with the agreement entered into by the parties, the Plaintiffs in showing their commitment, made the first payments amounting to Kshs.4,000,000/- on 27th May 2020.

The final payments were made on 2nd September 2016 to which the Plaintiffs paid a total of Kshs.19,000,000/- for the purchase of the 5 apartments.



64. The Particulars of breach are that the projected completion date of 30<sup>th</sup> July 2018 the defendants were to hand over the 5 Apartments [ out of 600 flat/housing project] for consideration of Purchase price of Ksh 19,000,000/- [at Ksh 3,800,000/- for each of 5 Flat/Apartment /House].
65. The prayers sought are;
- a. An order to issue that 1<sup>st</sup> Defendant was in breach of the contractual obligations between parties
  - b. The Defendants be held jointly and severally liable for breach of contract
  - c. The Defendants to pay and reimburse the Plaintiffs, special damages Ksh 19,000,000/-
  - d. General damages as compensation of loss or rental income at Ksh 25,000/- which at the time of filing suit stood at Ksh 4,000,000/-
  - e. General damages for breach of contract
  - f. Interest of all above
  - g. Costs
  - h. Any other relief that the Honorable court may deem just and fit.
66. In the instant case, the pleadings disclose the cause of action as money had and received as alleged in the Plaint for purchase of 5 Apartments which it is alleged have not been handed over and hence the claim for refund of such monies as alleged Ksh 19,000,000/- among other claims.
67. The Defendants jointly put their Defense that in July 2015 that they sought and obtained the relevant regulatory licenses and approvals to undertake the construction of 600 low-cost housing on all those properties known as Land Reference Numbers 12715/288 and 12715/289, Syokimau area, Machakos County. An appeal against the issuance of an EIA License for the project was lodged in NET 182 of 2016, (Nelson Mutinda & Others –vs- Join Ven Investments Limited) Stop Order by the National Environment Tribunal.
68. The issue in the instant matter is refund of money had and received following the alleged breach of contract and the Plaintiffs base their claim on 5 specific Apartments 5 -24, 7-13, 2-31 3-25 & 36 and seek refund of monies amongst other prayers.
69. The burden of proof was on the Plaintiff to prove his case is in doubt. Section 107 (1), 109, 112 of the Evidence Act, Cap 80 Laws of Kenya provides that:
- 107 (1) Whoever desires any court to give judgment as to any legal right or liability dependant on the existence of facts which he asserts must prove that those facts exist.
  109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person.
  112. in civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving the fact is upon him.



70. The Court of Appeal held in *Anne Wambui Ndiritu –vs- Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 stated that:

“As a general proposition under Section 107 (1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is case upon any party the burden of proving any particular fact which he desires the court to believe in its existence which is captured in Sections 109 and 112 of the Act.

## CONTRACT

71. The Contract /Agreement /Letter of Offer of 12/5/2016 is on letter- heads JOIN VEN INVESTMENT LIMITED addressed to Mary Wairimu Ngari & Ruth Ruguru Wairimu.

The VENDOR- Join Ven Investments Limited

THE PURCHASERS- Wairimu Ngari & Ruth Ruguru Wairimu.

THE PROPERTY BEING OFFERED FOR SALE – 2 bedroom Apartments Numbers 5-24, 7-13, 2-31, 3-25 & 36 on LR 12715/289 Nairobi.

USE OF PROPERTY- residential

PURCHASE PRICE-Ksh 19million -5 Units @ Kshs 3.8 million each per Apartment excluding Legal Fees and Costs as hereinafter particularized.

TERMS & MODE OF PAYMENT- CASH

BANK DETAILS

AGREEMENT FOR SALE & LEASE

SCHEDULE OF COSTS

72. It is not in dispute that 1st Defendant’s representative/Director, approached the 1st Plaintiff with information on an upcoming construction project consisting of 2 bedroomed apartments in Syokimau area on all that piece of property known as L.R. No. 12715/289, on or about 12th May 2016, the Plaintiffs and the 1st Defendant’s representative duly executed an offer for the purchase of 5, two bedroomed apartments, namely 5 -24, 7-13, 2-31 3-25 & 36, at the initial purchase price of Kshs.3,800,000/- per apartment.

The Contract was duly executed by both Vendor and Purchaser. The contract terms were spelt out and each party to the contract was to execute its obligations and safeguard each party’s rights under the contract. The Contract fulfilled the essential elements of a valid contract. An offer was made vide the Letter of Offer and the said letter was accepted in its terms setting out the rights and obligations of each party. There was consideration in terms of payment. Therefore, upon execution/signing by both Vendor & Purchaser formed a binding contract. This Court can only enforce the terms of the contract.

73. The Court of Appeal in *Margaret Njeri Muiruri vs. Bank of Baroda (Kenya) Limited* (2014) eKLR stated:-

“It is not for the Court to rewrite a contract for the parties. As this Court held in *National Bank of Kenya Ltd vs Pipe Plastic Sankolit (K) Ltd*. Civil Appeal No. 95 of 1999 “a Court of law cannot rewrite a contract with regard to interest as the parties are bound by the terms of their contract.”



## **PAYMENT**

74. In line with the agreement entered into by the parties, the Plaintiffs in showing their commitment, made the first payments amounting to Kshs.4,000,000/- on 27th May 2020.
75. The final payments were made on 2nd September 2016 to which the Plaintiffs paid a total of kshs.19,000,000/- for the purchase of the 5 apartments. The issue here being whether the 1st defendant received money from the 1st plaintiff is not disputed. This is the primary issue of the dispute and having established that the issue of whether money was paid has not been disputed by both parties.
76. The Plaintiff annexed copies of Receipt Vouchers in the name of Joinven Investments Limited dated 24/8/2016 where a total of Ksh 6,000,000/- was paid through 3 instalments of Ksh 2,000,000/-, Receipt Voucher of 2/9/2016 Ksh 990,000/- was paid and Ksh 20,000/- On 27/7/2016 5 instalments of Ksh 1,000,000/- was paid totaling Ksh 5,000,000/- and 27/5/2016 5 instalments of Ksh 800,000/- that totaled Ksh 4,000,000/- The grand total of acknowledged payments to the Vendor by the Purchaser was Ksh 19,000,000/-

## **BREACH OF CONTRACT**

77. The next question is whether then there was breach of a contract.
- According to the letter of offer the expected date of completion of the development was 30<sup>th</sup> July 2018. In 2016, the 1<sup>st</sup> Defendant was issued with a stop order barring it from undertaking any further activities pertaining to the development pending the hearing and determination of the appeal filed before the NEMA Tribunal.
78. PW1 testified that even after payments by instalments of the Purchase price she kept contacting the Defendants on the completion handing over and occupation of the 5 Apartments as of the Completion date stipulated in the contract and she visited the site and found open space. The show house was shown in pictures but construction of the 5 Apartments among others had not commenced. There was breach of contract as per terms of the contract payments were made but the consideration of Apartments was not fulfilled.
79. On the other hand, the Defendants assert that Clause 11 of the Agreement stipulates Acts of Default by the Vendor and by the Purchaser. Of importance if the Purchaser failed to execute letter of Offer and pay deposit within the prescribed period the offer would automatically lapse. If the payment of deposit and instalments were not paid within the stipulated period the offer would automatically lapse. The Defendants posited that the Purchaser failed to comply with the contractual timelines in payments of instalments and therefore the offer automatically lapsed.
80. This Court finds that the installments were paid albeit not on time and received by the Vendor and acknowledged and Receipt Vouches issued. If the Offer Lapsed due to payments made by instalments past due date, why did the Defendants/vendors not decline to receive payment and not acknowledge? Why were the various instalments received and acknowledged and not refunded and stopped officially. Although, there was breach of terms of payment by Purchaser on due dates, the Defendants receipt of funds and acknowledgement by issuing Receipt Voucher compromised their right to terminate the contract, it remained valid.

## **LIABILITY**

81. 2<sup>nd</sup> Defendant contended that it had no contractual relationship with the Plaintiffs there was no privity of contract. The letter of offer was by the 1<sup>st</sup> Defendant and was executed by 1<sup>st</sup> Defendant. Therefore,



in the absence of contractual relationship between the plaintiffs and the 2nd defendant there is no cause of action and the Plaintiffs cannot obtain the reliefs sought against the 2nd defendants.

82. The documents lodged by the Plaintiff indicate as follows;
- a. Letter of Offer of 12/5/2016- although the Vendor is Join Ven Investment Limited- E-mail info@Kingsdevelopers.com & Kings Developers Limited (KDL) -An Affiliate of Kings Developers Limited.
  - b. The Receipt Vouchers- letter head is by JoinVen Limited but stamped Kings Developers Ltd and date of payment -24/8/2016
  - c. CR-12 -Kings Developers Limited as at 15/3/2021-Directors  
Taherali Dawoodhai Hassanali  
Moiz Shabbir Taherali Hassanali  
Yusuf Taherali Dawoodbhai Hassanali  
Allasgar Mohsin Mohamed Ali Bataniwala  
Zoher Taherali Dawoodbhai  
Abdulkadir Shabirhussein Hassanali  
Royal Importers Limited  
Registered Office- Enterprise Road Mombasa Road Building
  - d. CR-12 – Join Ven Investments Limited- Directors  
Okumu Odede  
Zoeb Ezzi  
Mercy Wambui Kamau  
Taherali D. Hassanali  
Registered Office- Enterprise Road Mombasa Road Building
83. The 2<sup>nd</sup> Defendant submitted that it is a limited liability company and is distinct and separate entity from its directors and/or shareholders.
84. In the case of Arun.C. Sharma v Ashana Raikundalia & 5 Others[2015] eKLR the Court held that; Separate Corporate Personality [13]. This is a very important subject in company law as I stated in Kolaba Enterprises Ltd vs. Shamsudin Hussein Varvani & Ano (2014) eKLR that:
- It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved.
85. In the case of Jiang Nan Xiang v Cok Fas-St Company Limited; Miscellaneous Application [2018] eKLR, the court stated that;
- “I find that the law on lifting the veil of incorporation is now settled. The circumstances under which a veil of incorporation would be lifted are inter alia where there is no real formal



legal separation between the Company and its shareholders' personal financial affairs and/or that the Company is just a sham or the Company's actions were wrongful or fraudulent, or if the shareholders and/or directors act recklessly in the management of the business of the Company and/or design a scheme, to perpetrate financial fraud, and/or if the Company's creditors suffer unjust cost, that is, they did business with the Company and they are left with unpaid bills or unpaid Court judgment. In all these circumstances, the Court will pierce the veil of incorporation and hold the shareholders and/or the directors personally liable.”

86. In the case of *Michael Kyambati vs Principal Magistrate Milimani Commercial Courts Nairobi & Anor* [2016] eKLR, the Court observed as follows in referring to *Peter O. Ngoge T/A OP Ngoge & Associates vs Ammu Investment Co Ltd* [2012] eKLR;

“The general law, however, is that a corporation is an artificial legal entity. Accordingly, it must of necessity act through agents. Usually the Board of Directors. A Company may in many ways be likened to a human body; it also has hands which hold tools and act in accordance with directions from the center. Some of the people in the Company are mere servants and agents.....[ and ] others are directors and managers who represent the directing mind and will of the company, control what it does.....ultimate responsibility rests with the directors.”

87. This Court finds that the 1<sup>st</sup> & 2<sup>nd</sup> Defendants are in law separate legal entities, however, from the documents outlined above they affiliates, the 1<sup>st</sup> Defendant is an affiliate of the 2<sup>nd</sup> Defendant. Thus in the legal documents the Defendants are indicated. Therefore, by virtue of having the executed Letter of Offer with the 1<sup>st</sup> Defendant Company through its Director(s) the 2<sup>nd</sup> Defendant is also on the said Document indicating 1<sup>st</sup> Defendant as its affiliate. Moreso, the Cr-12 confirms one of the Directors is in both Companies and both Companies share the same residential/physical address. For all practical purposes the Defendants are intertwined/interrelated one a holding Company and the other a subsidiary. Hence in this instant the corporate veil is lifted to have both Companies jointly and severally liable for the breach of the contract herein. The 1<sup>st</sup> Defendant entered into a binding contract with the Plaintiff and the 5 Apartments were not delivered nor funds received refunded to date. The formation of contract did not involve the Plaintiff.

## DAMAGES

88. A contract was the source of primary legal obligations upon each party to it to procure that whatever he had promised will be done was done. Leaving aside the comparatively rare cases in which the court was able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations gave rise to substituted or secondary obligations on the part of the party in default. Those secondary obligations of the contract breaker arose by implication of law.
89. To successfully claim damages for breach of contract, the plaintiff had to show that a contract was in existence, that the contract was breached by the defendant and that the plaintiff suffered damage (loss) as a result of the defendant's breach.
90. The Letter of offer indicated that the project was to be through in 2018. She went to the site and got the letter of offer in 2016. She got 5 two bedroomed units at a price of kshs 3,800,000 and her purpose was to target rental payments for her upkeep as she had retired.



91. It was her testimony that she was in touch severally with King developers. They were in communication via email and phone until 2021 when she realized that they were not getting anywhere with the said project and she decided to seek redress from Court.
92. The Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the plaintiff. In the instant case, the existence of the contract is not disputed. I have considered the evidence before me and the documents submitted. I am persuaded that the plaintiff has demonstrated that the defendants were in breach of the contract.
93. What remains is whether the plaintiff has proved the loss suffered and whether she is entitled to various heads of damages claimed. Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy.
94. The Plaintiff claim which was by and large a claim in damages was proved by showing the various payments made to the 1<sup>st</sup> defendant's account.
95. A case in point which shows the plaintiff's duty is *BID INSURANCE BROKERS LIMITED VS. BRITISH UNITED PROVIDENT FUND (2016)* eKLR thus:-

“In the case of *KENYA BREWERIES LIMITED KIAMBU vs. GENERAL TRANSPORT AGENCY LIMITED [2000]* eKLR, the court said –

“It is the duty of the Plaintiff to prove its claim for damages as pleaded. It is not enough simply to put before the court a great deal of material and expect the court to make a finding in his favour. It was said by Lord Goddard, CJ in *BONHAM CARTERS HYDE PARK HOTEL LIMITED [1948]* 64TR 177 –

The Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to write down particulars and, so to speak, throw them at the head of the court, saying, “this is what I have lost, I ask you to give me these damages.” They have to prove it.”

96. In this regard the Plaintiff proved the payments of Ksh. 19,000,000/.
97. The Plaintiff's claim for general damages suffered is not available in a claim for breach of contract; see the case *KENYA TOURIST DEVELOPMENT CORPORATION VS. SUNDOWNER LODGE LIMITED (2018)* eKLR thus:-

“With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: 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. And so it would be. See also *SECURICOR (K) vs. BENSON DAVID ONYANGO & ANOR [2008]* eKLR. 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.”

## **DISPOSITION**

1. For the reasons set out above, the following is the judgment of this Court:-
  - (a) Judgment is entered for the 1<sup>st</sup> Plaintiff against the Defendants jointly and severally for Kshs.19,000,000 with interest at Court rate from 20<sup>th</sup> April, 2021 until payment in full.
  - (b) The Plaintiff is awarded costs of the suit to be paid by the 1<sup>st</sup> & 2<sup>nd</sup> Defendants.

**JUDGMENT DELIVERED, SIGNED & DATED IN OPEN COURT ON 31/10/2024 IN MACHAKOS HIGH COURT (VIRTUAL/PHYSICAL CONFERENCE).**

**M.W. MUIGAI**

**JUDGE**

**In the presence of**

Mr. Thuo - For the Plaintiff

Ms Mwangi H/B Ms Musau for The Defendants

Geoffrey - Court Assistant

