



Kimathi & 5 others v Teleposta Pension Scheme Registered Trustees (Environment & Land Case 150 of 2008) [2023] KEELC 17474 (KLR) (11 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17474 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 150 OF 2008**

**LN MBUGUA, J
MAY 11, 2023**

BETWEEN

**ANNE K. KIMATHI 1ST PLAINTIFF
SUSAN MWALUDA 2ND PLAINTIFF
EMMY CHEPKEMOI BUNEI 3RD PLAINTIFF
HELLEN MWANYONGE WESUTA 4TH PLAINTIFF
MARY JEPKOECH CHEPYATOR 5TH PLAINTIFF
CAROLINE MUMBI NJENGA 6TH PLAINTIFF**

AND

TELEPOSTA PENSION SCHEME REGISTERED TRUSTEES DEFENDANT

JUDGMENT

1. This file consists of 6 consolidated matters namely: ELC 150 of 2008 Ann Kimathi versus Telposta Pension Scheme Registered Trustees, 151 of 2008 Susan Mwalunda versus Telposta Pension Scheme Registered Trustees, 152 of 2008 Emmy Chepkemoi Bunei versus Telposta Pension Scheme Registered Trustees, 153 of 2008 Hellen Wesutsa Manyonge versus Telposta Pension Scheme Registered Trustees, 154 of 2008 Mary Jepkoech Chepyator versus Telposta Pension Scheme Registered Trustees and 529 of 2009 Caroline Mumbi Njega Mumbi versus Telposta Pension Scheme Registered Trustees. All the suits were filed on 7.4.2008 except case no. 529 of 2009 which was filed on 16.10.2009. The file ELC 150 of 2008 is the lead suit.
2. All the plaintiffs were former employees of Telkom Kenya Limited while the defendant is a pension scheme whose primary contributors were: Telkom Kenya Limited, Postal Corporation and CCK.



3. The defendant owned houses which were on property known as Nairobi block 34/160. There was an arrangement between the plaintiffs and the defendant whereby, the defendant was to sell the housing units to the employees of Telkom Kenya Limited including the plaintiffs.
4. The agreements appear not to have been honored prompting the plaintiffs to file various suits against the defendant. In case no. 150 of 2008, the claimant – Ann Kimathi was buying house unit no. 19 vide a sale agreement dated 15th November 2004. In case no. 151 of 2008, the claimant Susan Mwaluda was buying house unit no. 7 vide an agreement dated 16th March 2005; for case no. 152 of 2008, the claimant Emmy Chepkemai was buying house unit no 35 vide a sale agreement dated 26.11. 2005; for case no 153 of 2008, the claimant Hellen Wesutsa was buying house unit no. 37 vide a sale agreement dated 26th November 2005; for case no 154 of 2008, the claimant Mary Jepkoech Chepyator was buying house no. 9 vide an agreement dated 15.11.2004, while in case no 529 of 2009, the claimant Caroline Mumbi Njega was buying house no. 8 vide a sale agreement dated 17th may 2006.
5. In their pleadings, the plaintiffs seek the following orders;
 - a) An injunction does issue restraining the Defendant/Respondent by itself, its servants, agents, assigns or otherwise howsoever from offering for sale, selling, transferring alienating or in any way disposing of the suit properties situate in Parklands, Nairobi to a person other than the Applicants and from evicting or dispossessing the Applicants herein therefrom.
 - b. A mandatory Injunction does issue compelling the Defendant to release to the Plaintiffs title to the suit properties situate in Parklands, Nairobi, under an appropriate professional undertaking from the Plaintiffs’ Advocates.
 - b. An order of specific performance does issue compelling the Defendant to perform its obligations under the suit Sale Agreements and to sell, transfer and issue title to all the suit properties situate in Parklands, Nairobi to the Plaintiffs.
 - b. Costs and interests.”
6. The defendant filed various statements of defenses in respect of all the 6 suits.
7. For the better part of the lifespan of these suits (until year 2021), litigation generally was anchored on the prosecution of various applications. On 29th September 2010, Judge Sitati (now retired) delivered a ruling whereby she dismissed the application for injunction lodged by the plaintiff made in case no. 153 of 2008. That ruling was to apply in the other files. On 9th September 2011, another ruling was delivered by Judge H.M. Okwengu (as she then was) where she declined to review the orders of Judge Sitati. An appeal was thereafter lodged against the ruling of Judge Okwengu in the Court of Appeal case no. 254 of 2011. Apparently the case is still active. Still another ruling was delivered on 4.5.2012 where Judge R. Ougo dismissed the application dated 16.11.2011 (filed by the plaintiff in case No. 150 of 2008) on the basis that it was an application for injunction of which that issue had previously been dealt with and the matter was at the Court of Appeal.
8. Eventually the matter took off on 25th of January 2021 with two witnesses testifying on the side of the plaintiffs and two witnesses testifying on the side of the defendant.

Case management

9. On 28th September 2017 the court gave pretrial directions re-designating the parties in the consolidated suits as follows:
 1. Ann Kimathi -1st plaintiff



2. Susan Mwalunda -2nd plaintiff
 3. Emmy Chepkemoi -3rd plaintiff
 4. Hellen Wesutsa -4th plaintiff
 5. Mary Chepchoech Chepyator- 5th plaintiff
 6. Caroline Mumbi Njenga- 6th plaintiff
10. On the aforementioned date, each plaintiff was directed to file and serve a bound paginated Trial Bundle with index containing pleadings, witness statements and documentary evidence within 30 days. Not only was there none compliance with the timelines given, but even when the aforementioned Trial Bundles were filed, the plaintiffs carried out the tasks haphazardly.
 11. It is noted that by then, the 1st and 4th plaintiffs were being represented by one firm of advocates. Their trial bundle dated 24th February 2019 does not contain their pleadings while their witness statements have been filed as stand alone documents. For the 2nd, 3rd, 5th and 6th plaintiffs, they were being represented by another firm of advocates. Their trial bundle filed in court on 21.2.2019 and which they were relying upon contains the documents pleadings and witness statements of 2nd, 5th and 6th plaintiffs only. It is noted that the pleadings of the said plaintiffs do not bear case numbers!. The documents of the 3rd plaintiff (Emmy Bunei) were filed in a separate bundle on 25th February 2019 of which the plaint is missing from the said bundle.
 12. Despite the aforementioned shortcomings the court has endeavored to trace the missing documents particularly the pleadings from the various files.
 13. On 25th January 2021 the parties entered into a consent in terms of the prosecution of the case in the following manner:
 1. . Ann Kimathi (1st plaintiff) and Mary Chepkoech Chepyator (5th plaintiff) shall testify and produce documents on behalf of all the other plaintiffs.
 2. The Defendant will call one witness whose testimony will apply to all the consolidated causes.”
 14. The defendants made an application dated 12th march 2021 seeking to reopen the case to call another witness which application was allowed vide a ruling delivered on 4th October 2021.

Joinder

15. A perusal of the proceedings of 17.6.2015 reveals that an application dated 31.3.2015 filed by the 3rd Plaintiff Emmy Bunei (case no. 152 of 2008) was marked as withdrawn. The said application was seeking orders to consolidate the current suits with HCCC. NO. 290 OF 2011. Though the said High Court case file is not amongst the files in this suit, I have stumbled upon a plaint indicating that in HCCC 290 OF 2011, parties are Emmy Bunei vs. Christine Wangari Munga and David Mwaura in which the plaintiff (Emmy) was challenging the demand for rent by the defendants.
16. The same plaintiff (Emmy) was to file another application dated 30th may 2017 seeking orders that: Christine Wangari Munga And David Mwaura be joined as 2nd and 3rd defendants in the current suit(s), that the two defendants be ordered to file their defense to the plaintiff's claim, and that the sum of kshs. 1,500,000 held at chase bank in the joint names of M/S Mitei and associates advocates and Michael Daudi and associates advocates should not be withdrawn till the determination of the suit.



17. On 27th January 2020 the aforementioned application was allowed in terms of prayer no. 1 and 2 (joinder and the filing of defence by the new defendants). There is no evidence to indicate that the said prayers were effectuated, in that the 2 new parties were never served with the aforementioned orders of joinder and filing of defences. There is also no evidence to indicate that the said parties were served with the pleadings in case no. 152 of 2008. In terms of the provisions of Order 5 of the Civil Procedure Rules, I find that the evidence to invite the new defendants to defend themselves in this suit is missing.
18. It is not lost to this court that the parties entered into the consent of 25th January 2021 where all the parties were mute on the status of the purported new defendants.
19. Further I find that the plaint filed by Emmy Bunei in case no. 152 of 2008 does not contain any claim against the two new parties. There is no evidence to indicate that the said plaint was ever amended. In light of the foregoing analysis, I find that any claim against the purported two new parties cannot stand, the same is hereby Dismissed.

Evidence

20. The case of the plaintiffs was advanced by the 1st and the 5th plaintiffs. PW1 Anne Karimi Kimathi testified and adopted her witness statement dated 25th February 2019 as her evidence. In addition, she also adopted the witness statements of the 4th plaintiff (Hellen Manyonge Wesutsa) dated 25th February 2019 and that of Alfayo Keya dated 24.2.2019 as their evidence. In addition, PW1 produced the documents in their bundle filed on 25th February 2019 as Exhibits 1 - 10.
21. In her recorded statement pw1 identifies herself as a former employee of Telkom and that by virtual of her employment, she is a member of Telposta Pension Scheme Registered Trustees. She contends that the plaintiffs were occupying the houses situated in parcel block 34/160 in Parklands Nairobi as tenants of the defendant, of which she had moved into her house in 1999.
22. That by a letter dated 19 March 2002, the defendant informed them of their intention to sell the houses to the tenants. On 14th May 2002, their employer Telkom Kenya Limited wrote to all occupants of the suit premises indicating that they were negotiating with the defendant to sell the suit premises to the occupants of the various units. The purchase price was set at 1.5 million of which the tenants were to pay 50% thereof and the balance was to be spread within a period of 15 months.
23. The agreement did not materialize as Telkom Kenya Limited, the employer of the plaintiffs pulled out of the arrangement, and also embarked on retrenching the employees without their knowledge.
24. Thereafter, the defendant entered into other agreements with the plaintiffs in which the houses in question were being sold at a price of kshs. 1.8 million. The terms of the agreement were that 10% deposit being ksh. 180, 000 was to be paid on execution while the balance thereof of ksh 1,620 000 was to be paid on completion. Pw1 paid the deposit but she was unable to get financing for the balance. She then joined and started saving with Kenya union of saving and credit corporation limited (KUSCCO), where she was promised a loan to finance the balance. The defendant however declined to release the title document or to cooperate with KUSCCO and went on to frustrate PW1's efforts to complete the transactions.
25. Pw1 contends that to date, the defendant has never shown any willingness to be bound by the contract agreement for sale.
26. She further states that although the completion date in the agreement was indicated as 90 days, the defendant never indicated its readiness for completion in the 90th day. What more, the defendant



- continued to receive balances of the purchase price from her fellow colleagues of which 25 sales out of 32 were completed.
27. Pw1 added that to date, she has been paying rent beyond the completion date, of which she had paid approximately ksh. 2,125,000 as at February 2019. The defendant still holds her deposit paid on 24th November 2004.
 28. The contents of the statements of Hellen Manyonge are similar to those of pw1, save that her unit is no. 37 and her agreement was made on 26th November 2005. She also contends that she paid a sum of kshs. 200,000 as a deposit, and that by February 2019, she had paid a proximately ksh 1,975,000.
 29. Further, the contents of the statement of Alfayo Keya are again more or less similar to the statements of Ann Kimathi and Hellen Manyonge. The points of departure are that Alfayo is not a plaintiff, he is a former employee of Telkom Kenya Limited, that he entered into an agreement with the defendant on or about 31st December 2004 which agreement was similar to that of the other employees of Telkom Kenya Limited. He contends that he is one of those people who did not pay the purchase price within 90 days as stipulated in the agreement. Nevertheless, he paid the balance in installments with the last batch being paid on March 2007 for ksh. 600,0000 and the housing unit was transferred to him.
 30. The case of the 2nd, 3rd, 5th and 6th plaintiff was advanced by Jepkoech Chepyator (5th plaintiff). She adopted her witness statement dated 5th February 2019 as their evidence. She also produced the 17 documents in their bundle as their exhibits. Further, Pw2 adopted the witness statements of her colleagues namely: Susan Mwaluda (2nd plaintiff), Emmy Bunei (3rd plaintiff) and Caroline Mumbi Njega (6th plaintiff) as their evidence.
 31. She avers that she was renting unit no. 9 from the defendant and this is the house she also agreed to buy vide her agreement dated 7th October 2005. Again the evidence is more or less similar to that of PW1. She however added that the defendant discriminated them by accepting payments from persons who are not employees of Telkom Kenya and Postal Corporation of Kenya. Further, on 16th November 2016, the defendant through one of his agents caused her household goods to be auctioned to satisfy the alleged rent arrears.
 32. The contents of the statement of Susan Mwaluda (2nd plaintiff) is again similar to that of PW2. She was buying unit no. 7 and her sale agreement is dated 15th March 2005. She avers that the auction of her household property occurred on 6th November 2011.
 33. The contents of the witness statement of one Caroline Mumbi Njenga (6th plaintiff) is again similar to that of pw2. She was buying unit no. 8 as per the agreement of 17 may 2006. Equally her household property were auctioned on 6th December 2011.
 34. For Emmy Chepkemoi Bunei, the contents of her statement indicate that she was to buy house no. 35 and she paid the defendant a deposit of ksh. 430,000. She resided in the same house from 1995 until July 2022 when she was evicted on the basis that the house was paid for by Christine and Mwaura. She contends that the defendants acted in a discriminatory manner by allowing some of the employees to purchase the properties beyond the time given, yet they were not evicted.
 35. Dw1 is peter Kipyegon Rotich who identified himself as the trustee secretary/administrator of the defendant. He adopted his 6 witness statements filed on 31st October 2019 as his evidence in all the consolidated 6 files. He also produced the 14 documents in their bundle as exhibits. He contends that indeed the board of trustees did make a decision to sell the suit properties, of which the board agreed with Telkom Kenya Limited that willing scheme members who were tenants were to get first priorities in purchasing the houses. Vide the various sale agreements the defendant offered to sell the houses at



the sum of kshs. 1.8 million of which 10 % of the purchase price was to be paid upon execution of the agreement. The balance thereof was to be paid to the vendor upon completion of which the date of completion was pegged at 90 days.

36. That in fragrant breach of the agreements, the plaintiffs did not pay the purchase price within 90 days prompting the defendants to issue notices to the plaintiffs. Still there was no compliance with the said notices, thus the defendant was entitled to sell the suit premises to third parties.
37. Dw1 further states that the purported undertaking given by KUSCCO's advocates to finance the plaintiffs with the balance of the purchase price was issued almost 2 years after the expiry of the completion period without any explanation and was therefore unacceptable.
38. Dw2 Esther Onsembe testified that she is an advocate of the High Court of Kenya. She adopted her witness statement dated 8th March 2021 as her evidence. She avers that between year 2004 and 2007 she worked in the firm of Kale Maina & company advocates who acted on behalf of the defendant and the plaintiffs in the same transaction of the suit premises. That the said firm of advocates is the one which prepared the various sale agreements which provided that completion was to be 90 days.
39. Dw2 avers that the plaintiffs did not fully comply with the terms of the various sale agreements and were subsequently issued with completion notices which she availed as exhibits. She contends that the plaintiffs personally collected the notices from the aforementioned firm of the advocates.
40. Dw2 also contends that unit no. 35 which had been offered to Emmy Chepkemoi Bunei (3rd plaintiff) has since been transferred to a 3rd party that is Christine Wangari Munga and the title to that effect has been issued.

Submissions

41. The submissions of the 1st and 4th plaintiffs are dated 13th February 2023 where they raise the following two issues;
 1. Whether the plaintiffs are entitled to an order of specific performance.
 2. Whether the defendants indicated readiness to complete the transaction.
42. On the issue of specific performance, it was submitted that the 1st and 4th plaintiffs had entered into sale agreements with the defendant vide the agreement dated 15th November 2004 and 26th November 2005. That the said agreements were in writing and were duly executed by the parties. Thus the two agreements were valid contracts which were capable of being enforced by the parties. To this end, the cases of Bernard Nganga Ndirangu versus Samuel Wainaina Tiras [2019] eKLR and Nelson Kivuvani versus Yuda Komora & Another Nairobi HCCC NO. 956 of 1991 were relied upon.
43. It was further submitted that none of the parties to the contract had cited any defect, illegality or mistake in the said contract that could have crippled or invalidated the same. These plaintiffs further argue that they have always occupied and paid rent upon their respective housing units, thus the same have sentimental value to them hence they cannot be compensated by any other remedy except an order of specific performance.
44. On the issue of completion date it was argued that the defendant has not availed any evidence to show that they furnished the plaintiffs with the completion documents when they were requested, and they have not shown proof of service of the completion notice to the plaintiffs. To this end, these plaintiffs refute the claim that they were ever served with the completion notices mentioned by Dw2, Esther Onsembe dated 20th and 21st January 2006. On this point reference was made to the cases of Olive



Mweya Wachira and David Duhui Wahome (as administrators of John Wahome Wachira – deceased) versus Amboseli Court Limited [2021] eKLR.

45. Finally, the plaintiffs contend that their 10% deposit given to the defendant was never refunded back. They also contend that they were discriminated upon by the defendant thus they deserve the orders sought.
46. The submissions of 2nd, 3rd, 5th and 6th plaintiffs are dated 15th November 2022. They dwell on the issue of completion, arguing that they were never issued with completion documents as claimed by the defendant, yet at all material times they had complied with the terms of the agreement by paying the 10% deposit and securing a financier to pay the balance of the purchase price. To this end, the case of Olive Mweya Wachira and David Nduhui Wahome (supra) was cited. The plaintiffs are also demanding for costs in tandem with the case of Cecilia Karuru Ngayu versus Barclays Bank of Kenya and another [2016] eKLR.
47. The submissions of the defendant are dated 22nd February 2023 where they have framed the following issues for determination;
 - a. Whether there was a breach of the term of the sale agreements by either party.
 - b. Whether the plaintiffs are entitled to the orders sought and who should bear the cost of the suit.
48. On the issue of breach, it was submitted that the plaintiffs breached the terms of the sale agreements as they never completed the sale, since the balance of the purchase price was not paid within the stipulated 90 days. It was further submitted that the other undertakings issued by KUSCCO to the plaintiffs came two years from the date of the agreements. To this end, the defendants argue that the court cannot rewrite contracts for the parties and has relied on the cases of Rufale –vs- Umon Manufacturing Co. (Ramsboltom) (1918) L.R IKB 592, Scrutton L.J., and Attorney General of Belize et al –vs- Belize Telecom Ltd & Another (2009), IWL R 1980.
49. The defendants aver that they issued completion notices in accordance with the law society of Kenya conditions of sale whose notices were availed by DW2; pointing out that the advocate for the plaintiff admitted that the said notices were served. On this point, reference was made to the cases of Christopher Kurutyon Lonyala & 27 others; Ekitalo Ekal Lodio & 12 others (Interested Parties) vs- Cabinet Secretary Ministry of Lands and Settlement & 10 others and David George Bell & another – vs- Ashutosh Bhasin [2009] eKLR.
50. On whether the plaintiffs are entitled to the prayers sought, it was submitted that prayer A is spent while prayer B & C (specific performance or mandatory injunction) are remedies which are equitable in nature and the plaintiffs have come to court with unclean hands. It was submitted that the plaintiffs failed to pay the full purchase price, hence the defendant was entitled to repudiate the agreement. In any event the agreements were executed almost 20 years ago and a lot has happened since then. The defendant therefore urges the court to strike out the claims with costs.
51. The defendant has also relied on the cases of Ole Meikoki –vs- Ole Sirere [1981] KLR 593, Kubal Properties Development Limited –vs- Maloo & Others [1990-1994] E.A, and Amina Abdulkadir Hawa – Vs- Rabinder Nath Anand & another [2012] eKLR.

Determination

52. It is common ground that the plaintiffs were employees of Telkom Kenya Limited, of which they became members of the defendant. Further, there is no dispute that the defendant had offered for sale the house units situated on the suit premises to the plaintiffs and their colleagues. To this end, the



parties had entered into various sale agreements, but the suit properties were not transferred to them. It follows that there was a breach of the sale agreements.

53. I find that the issues falling for determination are;
1. Who breached the agreements.
 2. What relieves are available to the plaintiffs.
54. It is apparent that all the sale agreements between the plaintiffs and the defendants are more or less similar. The purchase price for each house unit was Ksh. 1,800 000 of which a purchaser was required to pay a deposit of Ksh.10 % thereof. The balance of the purchase price was to be paid on completion, which was pegged at 90 days. On or before the completion date, the vendor was to release the completion documents to the advocates for the purchaser.
55. It has been held over and over again that courts cannot re-write contracts for parties, and cannot deviate from the intention of the parties to a contract. The sacred duty of the court is to enforce and/or legitimize what the parties have agreed between themselves as was held in *National Bank of Kenya Ltd V Pipeplastic Samkolit (K) Ltd and Another* (2002) Ea 503. The Court of Appeal in the case of *Five Forty Aviation Limited v Erwan Lanoe* [2019] eKLR cited in the case of *Pius Kimaiyo Langat versus Co-operative Bank of Kenya Ltd* [2017] eKLR stated that;
- “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.”
56. The Court of Appeal in the case of *Mwangi v Kiiru* [1987] eKLR made reference to Lord Diplock in the case of *Photo Production v Securicor Ltd* (1980) AC 827 at page 848 in which it was stated that:
- “...Every failure to perform a primary obligation is a breach of contract...”
57. None of the plaintiffs paid the balance of the purchase price within the stipulated time in the agreement. The plaintiffs contend that in further compliance with the agreement, and in order to get the balance of sh.1 620 000, they acquired a financier known as Kenya Union of Savings & Credit Cooperative Limited (KUSCCO), but the defendant refused to release the completion documents, thereby frustrating the contract.
58. A perusal of the various sale agreements reveals that there was no provision on how the purchasers were to get finances to enable them purchase the housing units. Indeed Pw2 confirmed during cross examination that the Sale Agreements did not contain a provision for financing by KUSCCO. The letters of offer of sh. 1 620 000 authored by KUSCCO were addressed to the plaintiffs and there is no indication that the defendant accepted the terms set out there in. In that regard, the engagement between the plaintiffs and KUSCCO was between the two parties, of which the defendant had no obligation to comply with the same. In any event, it is worthy to note that the offers made by KUSCCO came in year 2007, by then two or so years had lapsed from the time the various agreements were made in years 2004-5.
59. It is noted in the various agreements that that the parties (vendor and purchaser) were having joint advocate for the transaction. The plaintiffs cannot therefore advance an argument that the completion documents had not been availed by the defendant.



60. I find that there was no evidence of Coercion, Fraud or Undue influence, in the sale agreements, rather, it is the plaintiffs who failed to make good the consideration amounting to Sh.1 620 000 as per the contract. In that regard, the breach was occasioned by the plaintiffs.

61. An issue has been raised as to whether the defendant had the mandate to sell the properties to third parties. In the case of Brook Villas Estate Limited v Duncan Macharia Gatu & 16 others [2018] eKLR, the court stated that;

“Where a contract is breached, the innocent party has among other rights, a right of rescission”.

62. Thus in the suit at hand, the defendant had every right to call off the agreements. It is noted that the defendant is a pension scheme where the contributing members were Telkom, Postal Corporation and CCK. Such a scheme is meant to cushion the members in their sunset years (after retirement) in terms of financial support. In that regard, the scheme had a right to sell properties to 3rd parties.

63. Further, the fact that one Alfayo Keya apparently paid his balance of the purchase price after the completion date does not in any way vary the contract between the plaintiffs and the defendant. It is perhaps a moral issue if indeed the defendant was accepting monies from some of the purchasers while rejecting others, but the said issue cannot be elevated to a legal obligation. After all, it is noted that any arrangement done by the defendant with any of the buyers after the completion period amounted to a separate individual transaction.

64. What relief is available to the plaintiffs?. Other than injunctive orders, the other claim made by the plaintiffs is that of “specific performance”. In the case of Solomon Ndegwa Kuria v Peter Nditu Gitau [2019] Eklr, the court cited the case of Reliable Electrical Engineers Ltd.....Vs.....Mantrac Kenya Limited (2006) eKLR, where it was stated that;

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles. The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract....”.

65. In the suit at hand, the contract is no longer effective due to none compliance on the part of the plaintiffs. The said plaintiffs are therefore not entitled to an order of specific performance.

66. The plaintiffs had however paid deposits for their house units. The same were not refunded. But again, there is no evidence that the plaintiffs ever made a demand for the same. Even in their pleadings, the plaintiffs have not requested for the refund. Noting that the case is rather old and that any subsequent suits may be caught up by the statute of limitation, and in order to bring some semblance of finality, this court proceeds to give the following orders;

1. All the six suits filed by the plaintiffs are hereby dismissed.
2. The defendant is directed to refund back the deposits paid by the plaintiffs.
3. Each party is to bear their own costs of the suits.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA



JUDGE

In the presence of:-

Arori for 2nd, 3rd, 5th and 6th Plaintiffs

M/s Muthama holding brief for Mr. Munene for 1st & 4th Plaintiffs

Mr. Maina holding brief for Mr. Oketch for Defendant

Court assistant: Eddel

