



Shisanya & another v National Olympic Committee of Kenya & 3 others; Tysons Limited (Interested Party) (Environment & Land Case E245 of 2022) [2023] KEELC 19939 (KLR) (21 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19939 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E245 OF 2022**

**JO MBOYA, J
SEPTEMBER 21, 2023**

BETWEEN

BETHWELL IGOBWA SHISANYA 1ST PLAINTIFF

MARIE CLARA CHAO LAGO 2ND PLAINTIFF

AND

THE NATIONAL OLYMPIC COMMITTEE OF KENYA 1ST DEFENDANT

THE FUND ADMINISTRATOR, SPORTS, ART AND SOCIAL DEVELOPMENT FUND 2ND DEFENDANT

PAUL K TERGAT, FRANCIS MUTUKU & ELIUD KARIUKI (SUED AS THE TRUSTEES OF THE NATIONAL OLYMPIC COMMITTEE – KENYA) 3RD DEFENDANT

THE HON ATTORNEY GENERAL 4TH DEFENDANT

AND

TYSONS LIMITED INTERESTED PARTY

JUDGMENT

Introduction and Background

1. The Plaintiffs’ herein entered into a contract for purchase of office spaces within the premises otherwise known as L.R No 209/12386 (Grant No. 64613), (hereinafter referred to as the Suit Property); with the 1st Defendant herein, who was the lawful and registered proprietor of the named property.
2. Pursuant to and arising from the entry into the Sale Agreement, the Plaintiffs’ paid to and in favor of the 1st Defendant an initial deposit of Kes.2, 000, 000/= Only, on the 21st December 2012; and



thereafter paid a further some of Kes.2, 612, 000/= only, which sum was paid on the 22nd March 2013. However, despite making the deposits alluded to, the sale agreement entered into between the Plaintiff on one hand; and the 1st Defendant on the other hand, aborted for various reasons, which are well within the knowledge of the Parties.

3. Nevertheless, despite the collapse of the Sale agreement and the consequential contract, the Plaintiffs' herein were never refunded the deposits that were paid to and in favour of the First Defendant; and in any event, which were duly received and acknowledged by the 1st Defendant.
4. Arising from the failure, neglect and or otherwise refusal to make the refund in favor of the Plaintiffs; the Plaintiffs' herein were constrained to and thereafter filed the instant suit and in respect of which same have sought for various reliefs.
5. For good measure, the reliefs sought at the foot of the Plaint dated the 21st June 2022, are as hereunder;
 - i. The refund of the sum of Kenya shillings Four million six Hundred and Twelve Thousand only (KSHS. 4,612,000/-) Only.
 - ii. Interest on (i) above at Court's rate from 12th December, 2012 till payment in full;
 - iii. Damages for breach of contract;
 - iv. Costs of this suit; and
 - v. Any other relief this Honourable court may deem fit to grant.
6. Upon being served with Plaint and Summons to enter appearance, the 1st and 2nd Defendants entered appearance and filed a Statement of Defense dated the 2nd August 2022; and wherein same contested and or disputed the claims by and on behalf of the Plaintiffs'. In particular, the 1st and 2nd Defendants denied that same were guilty of breach of contract and indicated that the Plaintiffs' shall be invited to strict proof.
7. On the other hand, the 3rd and 4th Defendants' also entered appearance and filed a Statement of Defense dated the 23rd August 2022; and in respect of which same similarly disputed/contested the claims by and on behalf of the Plaintiffs.
8. Moving forward, the pleadings in respect of the instant matter closed and the suit was subjected to the requisite Pre-trial directions, whereupon the advocates for the respective Parties confirmed the filing and exchange of the requisite trial documents, inter-alia the List and Bundle of documents and the relevant Witness Statements.
9. Subsequently and arising from the foregoing, the subject suit was confirmed ready for hearing and same was thereafter fixed for hearing; whereupon the Plaintiffs' called two (2) Witnesses; whereas the Defendants' also called two (2) witness, in support of the Defense case.

Evidence By The Parties:

a. Plaintiffs' Case:

10. The Plaintiffs' case is premised and/or anchored on the Evidence of two (2) Witnesses, namely, Bethwel Igubwa Sisanya and Marrie Clara Chao Lago, who testified as PW1 and PW2, respectively.
11. It was the testimony of PW1 that same is the 1st Plaintiff in respect of the instant matter, whereas the 2nd Plaintiff is his spouse. Furthermore, the witness added that both the 2nd Plaintiff and himself had been looking for office space to purchase as part of their Family Investments.



12. Besides, the Witness testified that in the course of time, the 2nd Plaintiff and himself got to know of the premises known as Olympic Plaza, situate within Upper Hill Area, Nairobi and wherein there were available office spaces for sale. In this regard, the witness averred that the 2nd Plaintiff and himself thereafter approached the 1st Defendant herein through their designated Estate Agents, namely, Tyson Limited, with a view to purchasing/acquiring office space within the suit property.
13. Additionally, the witness testified that arising from the engagement between the 2nd Plaintiff and himself, on one hand; and Tyson limited on the other hand, the 2nd Plaintiff and himself were issued with Letters of offer which contained the terms of the offer and which Letter(s) of offer, the witness confirmed were duly accepted by the 2nd Plaintiff and himself and thereafter same proceeded to and executed the Letters of offer.
14. It was the further testimony of the witness that upon the execution of the Letters of offer, the 2nd Plaintiff and himself remitted to and in favor of the 1st Defendant an initial sum of Kes.2, 000, 000/= only and thereafter paid a further sum of Kes.2, 612, 000/= only; which monies were duly received and acknowledged by the 1st Defendant herein. For good measure, the witness averred that the 1st Defendant indeed proceeded to and issued receipts confirming that the monies/ payments were duly paid.
15. It was the further testimony of the witness that the total payments amounting to Kes.4, 612, 000/= only, which were paid to and in favor of the 1st Defendant represented the requisite stakeholders sum, which was designated to be 20% of the purchase price in terms of Clause 6 of the Letters of offer, issued on behalf of the 1st Defendant.
16. Other than the foregoing, the witness averred that the 1st Defendant herein through her nominated advocate, namely, M/s Mutuli & Associates Advocates, thereafter generated and forwarded to the advocate for the 2nd Plaintiff and himself a Draft Sale Agreement, which the 1st Defendant's advocates required the Plaintiffs' advocates to comment on and or otherwise approve, for purposes of preparation of the final agreement for sale.
17. In addition, the witness averred that their advocate indeed examined the Agreement for sale and thereafter returned same to the 1st Defendant's advocate for purposes of preparation of the final agreement for sale. In any event, the witness added that the final agreement for sale was duly crafted and thereafter same was returned to the Plaintiffs' advocate for purposes of execution by the 2nd Plaintiff and the witness, respectively.
18. Furthermore, it was the testimony of the witness that after the execution of the agreement for sale, same was returned to the 1st Defendant's advocate for necessary execution by and on behalf of the 1st Defendant, prior to and before a counterpart copy could be returned to the Plaintiffs' advocate.
19. Nevertheless, the witness averred that despite the fact that the sale agreement was returned to the 1st Defendant's advocate for necessary execution and engrossment, the 1st Defendant herein failed and/or neglected to return a duly signed and/or executed copy of the sale agreement to the Plaintiffs' advocates.
20. On the other hand, the witness testified that after following up for a duly executed copy of the sale agreement, the 2nd Plaintiff and himself established that the 1st Defendant was in the process of transferring and/or disposing of the suit property to and in favor of the 3rd Defendant herein. In this regard, the witness averred that the Plaintiffs' advocates indeed procured and obtained a Letter dated the 14th August 2020; and in respect of which the 1st Defendant intimated that the suit property was in the process of being acquired by and on behalf of the 3rd Defendant.



21. It was the further testimony of the witness that upon establishing the fact that the suit property was in the process of being transferred to and registered in the name of the 3rd Defendant, same wrote a demand letter to the 1st Defendant to refund the deposit of the purchase price which had hitherto been paid to and in favor of the 1st Defendant.
22. Be that as it may, it was the evidence of the witness that the 1st Defendant responded to the demand notice and intimated that the suit property was being transferred to and in favor of the 3rd Defendant and that the 3rd Defendant was going to be responsible to inter-alia, settle all the liabilities due, owing and arising from the suit property.
23. Furthermore, the witness averred that the 1st Defendant also intimated to same that the claim on behalf of the 2nd Plaintiff and the witness should be followed up with the 3rd Defendant, albeit through the offices of M/s Rachier & Amollo Advocates LLP, who were acting for the 3rd Defendant in the sale transaction pertaining to and or respecting the suit property.
24. Premised on the foregoing, the witness testified that the 2nd Plaintiff and himself thereafter liaised with the offices of M/s Rachier & Amollo Advocates LLP, who were acting for the 3rd Defendant and sought to be addressed on the question of refund of the deposit that had hitherto been paid by the 2nd Plaintiff and the witness.
25. Further and in any event, the witness added that the firm of M/s Rachier & Amollo Advocates thereafter responded to their Letter and sought to procure from the 2nd Plaintiff and himself, documentation in proof/verification of the claim for refund.
26. Additionally, the witness further testified that arising from the request from the firm of M/s Rachier and Amollo Advocates LLP, the 2nd Plaintiff and himself forwarded copies of the receipts, denoting payments which had been made towards the purchase of the office spaces within the suit property.
27. Notwithstanding the foregoing, the witness averred that despite forwarding copies of the receipts to the firm of M/s Rachier & Amollo Advocates LLP, for purposes of verification, neither the said Lawfirm nor the First Defendant reverted to him and the 2nd Plaintiff as pertains to question of and/ or status of the refund.
28. As a result of the failure to procure and obtain any response from the firm of M/s Rachier and Amollo LLP, the 3rd Defendant nor the 1st Defendant herein; the Witness averred that the second Plaintiff and himself were therefore constrained to file, commence and or mount the instant suit, seeking for refund of the deposit that had been paid to and which was duly acknowledged by the 1st Defendant.
29. Moreover, the witness intimated to the court that same had recorded and filed a witness statement, which detailed the events pertaining to and concerning the sale transaction, the subject of the matter beforehand. In this regard, the witness alluded to the witness statement dated the 21st June 2022; and thereafter sought to adopt and rely on the entirety of the named witness statement.
30. Consequently and at the instance of the Witness, the contents of the witness statement dated the 21st June 2022, (parts of which have been reproduced hereinbefore), were thereafter adopted and constituted as the Evidence- in chief of the witness.
31. Additionally, the witness referred to the List and Bundle of Documents dated the 21st June 2023; and thereafter sought to rely on same. Notably and in this regard, the documents at the foot of the List dated the 21st June 2022; were thereafter admitted and constituted as Plaintiffs Exhibits 1 to 24, respectively.



32. Furthermore, the witness also referred to the Plaint dated the 21st June 2022; and sought for the reliefs/ remedies which have been by enumerated at the foot thereof.
33. On cross examination by counsel for the 1st and 2nd Defendants, the witness herein reiterated and adopted the contents of the Witness statement dated the 21st June 2022. In addition, the witness averred that the 2nd Plaintiff and himself have followed up the issue of refund of the deposit that was paid to and in favor of the 1st Defendant in terms of various correspondence(s), which have not been adduced.
34. It was the further testimony of the witness that the various documents, which have been filed by and on behalf of the 1st and 2nd Defendants, include a Letter from the Ministry of Sports and which was addressed to the 1st Defendant herein, pertaining to and concerning the issue of the Sale of the Nock Plaza, namely, the Suit Property herein.
35. Whilst still under cross examination, the witness testified that the Letter dated the 22nd October 2020; from the 1st and 2nd Defendants was also in respect of the sale of the suit property and that the said letter alluded to the various liabilities attaching to the suit property.
36. Furthermore, the witness averred that despite the exchange of correspondence between the 1st and 2nd Defendants on one hand and the 3rd Defendant on the other hand, the refund due to the 2nd Plaintiff and himself has never been made. In any event, the witness added that same has also become aware of a sale agreement which was entered into between the 1st Defendant and the 3rd Defendant pertaining to and concerning the suit property. In this regard, the witness referred to the sale agreement dated the 1st September 2020; and which forms part of the Bundle of documents filed by the 1st and 2nd Defendants.
37. Besides and in any event, the witness averred that the claim by and on behalf of the 2nd Plaintiff and himself relates to refund of the deposit that was paid and duly acknowledged by the First Defendant herein.
38. On cross examination by Learned Counsel for the 3rd and 4th Defendants, the witness reiterated that neither the 2nd Plaintiff nor himself have been refunded the deposit(s) which were paid towards and for purposes of acquisition of office space in the suit property.
39. On re-examination, the witness averred that the agreement for sale filed by and on behalf of the 1st and 2nd Defendants is dated the 1st September 2020, whereas a similar agreement for Sale filed by the 3rd Defendant; is dated the 9th September 2020.
40. Be that as it may, the witness reiterates that the dispute before the Honourable court relates to refund of the sum of Kes.4, 612, 000/= only, which was paid to the 1st Defendant.
41. The Second witness who testified on behalf of the Plaintiff was Marie Clara Chao Igobwa. For good measure, the witness confirmed that she is the 2nd Plaintiff herein and besides, same testified as PW2.
42. Further and in addition, the witness averred that same is conversant and familiar with the 1st Plaintiff, whom same identified as her Husband. Additionally, the witness stated that same has recorded a witness statement dated the 21st June 2022; and sought to adopt and rely on the contents of the named witness statement.
43. Significantly and at the instance of the witness, the witness statement dated the 21st June 2022, was thereafter adopted and admitted as her Evidence in chief.
44. Additionally, the witness also referred to the List and Bundle of Documents dated the 21st June 2022; which had hitherto been produced as Plaintiffs Exhibits P1 to p24, respectively.



45. On cross examination by Learned counsel for the 1st and 2nd Defendants, the witness herein confirmed that the names contained and alluded to in the Plaint are her names, save that she has since adopted and added the maiden name of her husband.
46. On the other hand, the witness reiterated that the contents of the witness statement, which same has adopted reflect the correct position pertaining to the transaction that were entered into between the First Plaintiff and herself, on one hand; and the 1st Defendant on the other hand.
47. On cross examination by Learned counsel for the 3rd and 4th Defendants, the witness herein confirmed that the deposit which was paid to and in favor of the 1st Defendant were made vide two installments, wherein the first installment was paid in December 2012, whilst the second installment was paid in early 2013.
48. Nevertheless, the witness averred that the payments in question were duly acknowledged and receipted by the 1st Defendant herein. Furthermore, the Witness added that the receipts, which were issued by the First Defendant have been produced and tendered before the Honourable Court, as Exhibits.
49. With the foregoing testimony, the Plaintiffs' case was duly closed.

b. 1st And 2nd Defendants' Case:

50. The 1st and 2nd Defendants' case is anchored on the Evidence of one witness, namely, Francis Mutuku, who testified as DW1. It was the evidence of the witness that same is the currently the Secretary General of the National Olympic Committee of Kenya (NOCK). Further, the witness averred that same is conversant/ familiar with the issues and facts pertaining to the subject matter and in particular, the transaction that was hitherto entered into between the 1st Defendant and the Plaintiffs; and thereafter the transaction between the 1st Defendant and the 3rd Defendant, as pertains the suit property.
51. On the other hand, the witness averred that in respect of the subject matter, same has recorded and filed a witness statement dated the 20th February 2023, detailing the facts underpinning the dispute beforehand. Consequently and in this regard, the witness sought to adopt and rely on the witness statement in question.
52. For coherence, the witness statement dated the 20th February 2023; was thereafter adopted as the Evidence in chief of the witness.
53. Furthermore, the witness also intimated that the 1st and 2nd Defendants herein have also filed before the court a List and Bundle of documents dated the 30th November 2022; containing a total of seven documents. In this respect, the witness implored the court to admit the named documents as Exhibits on behalf of the 1st and 2nd Defendants, respectively.
54. Instructively and there being no objection to the documents presented by and on behalf of the 1st and 2nd Defendants, same were duly admitted as Exhibits D1 to D7, respectively.
55. Additionally, the witness testified that the claims which have been raised by and on behalf of the Plaintiffs herein were brought to the attention of the 3rd and 4th Defendants in the year 2017. In any event, the witness added that the 1st Defendant subsequently entered into a sale agreement with the 3rd Defendant, pertaining to and in respect of the suit property and wherein the 3rd Defendant undertook to bear/settle all the liabilities attaching to and arising from the suit property.
56. Further and in addition, the witness alluded to the sale agreement dated the 1st September 2020; and intimated that pursuant to the terms of the said agreement, the 3rd Defendant herein undertook to



take care of the liabilities due to and in favor of the Plaintiffs. For good measure, the witness alluded to clause 3.1 of the sale agreement in question.

57. On cross examination by Learned counsel for the 3rd and 4th Defendants, the witness alluded to a previous document, which was termed as Nock Plaza Historical Overview and which document was shared with the 3rd Defendant. In addition, the witness averred that the named document, which provides the historical background touching on the Nock Plaza, disclosed all the liabilities attaching to the suit property, including, the identities of the persons who paid monies on account of Nock Plaza.
58. Whilst under further cross examination, the witness averred that the 1st Defendant had various discussions with the 3rd Defendant concerning and pertaining to the repayments of various debts and monies to persons who had bought spaces within Nock Plaza.
59. On cross examination by Learned counsel for the Plaintiff, the witness confirmed that indeed the Plaintiffs herein bought office space within Nock Plaza, but the sale collapsed and/or aborted.
60. On the other hand, the witness averred that the sale agreement which has been produced before the Honourable court relates to the transaction between the 1st Defendant and the 3rd Defendant.
61. Additionally, the witness averred that same indeed wrote a letter dated the 14th August 2020; and which was addressed to the firm of M/s Kipkenda & Co Advocates and wherein the 1st Defendant admitted the debt to and in favor of the Plaintiffs herein. In any event, the witness reiterated that the Plaintiffs' are owed the monies that same paid at the foot of the purchase of office space within Nock Plaza.
62. With the foregoing testimony, the 1st and 2nd Defendants' case was duly closed.

c. 3rd And 4th Defendants' Case:

63. The 3rd and 4th Defendants' case gravitates and revolves around the Evidence of one witness. For good measure, the witness herein is one known as John Mark Nyaga Wamugu, who testified as DW2.
64. It was the testimony of the witness that same is currently the Fund Administrator; and also the Acting Chief Executive Officer of the 3rd Defendant.
65. Furthermore, the witness averred that same is conversant and familiar with the facts underpinning the subject dispute. In any event, the witness added that as pertains to the subject dispute he (witness) recorded a witness statement dated the 17th January 2023; and in this regard, same sought to adopt and rely on the witness statement.
66. Pertinently and at the request of the witness, the witness statement dated 17th January 2023; was admitted and constituted as the Evidence in chief of the witness.
67. Other than the foregoing, the witness also alluded to a List and Bundle of documents dated the 27th January 2023, containing a total of 17 documents. In this respect, the witness sought to adopt and produce the various documents as Exhibits before the Honourable court.
68. In the absence of any objection on behalf of the adverse Parties, the documents at the foot of the List and Bundle of documents dated the 17th January 2023, were duly produced and marked as Defense Exhibits Numbers 8 to 25, respectively.
69. Other than the foregoing, the witness also alluded to the Statement of Defense dated the 23rd August 2022; and also sought to adopt the contents thereof.



70. On cross examination by counsel for the 1st and 2nd Defendants, the witness herein indicated that paragraph 5 of his witness statement confirms that the 1st and 2nd Defendants had made full and material disclosures pertaining to the liabilities in question. In addition, the witness added that the 3rd Defendant herein has made various payments relating to the liabilities which were attaching to the suit property.
71. Whilst under further cross examination, the witness averred that the 3rd Defendant imagined that same had paid all the debts and Liabilities due and payable by and on behalf of the 1st Defendant.
72. Furthermore, upon being referred to the letter contained at page one of the 1st and 2nd Defendants' bundle, namely, the letter dated the 18th March 2019; the witness confirmed that the letter in question emanated from the Chief Executive Officer of the 3rd Defendant. Besides, the witness acknowledged that the Letter in question was addressed to the Ministry of Sports, Culture and Heritage.
73. Furthermore, it was the testimony of the witness that the Letter dated the 18th March 2019; was also authorizing the 3rd Defendant to avail the requisite funds for purposes of payment of all the pending debts and Liabilities that were incurred by Nock Plaza as pertains to the suit property.
74. On the other hand, the witness averred that the 1st and 2nd Defendants shared the overview relating to the dispute pertaining to the suit property. In addition, the witness also averred that the Government indeed stopped the intended auction of the suit property.
75. Upon being referred to clause 3.1 of the sale agreement, the witness confirmed that the vendor (the 3rd Defendant herein) undertook to settle all the claims and liabilities arising from the suit property. Notably and in particular, the witness added that same re-affirms that the terms of the sale agreement are binding on the 3rd Defendant.
76. On cross examination by Learned counsel for the Plaintiffs, the witness averred that the 1st Defendant and the 3rd Defendant entered into a sale agreement pertaining to and concerning the suit property. Further, the witness added that the 3rd Defendant's advocate in respect of the sale transaction was M/ s Rachier & Amollo Advocates LLP.
77. Whilst under further cross examination and upon being referred to the Letter at page 12 of the Plaintiffs Bundle of documents, the witness confirmed that the Debt in favor of the Plaintiffs is truly and indeed due. In any event, the witness added that the named Letter confirms that the 3rd Defendant was keen to settle/ liquidate the debt due to the Plaintiffs.
78. Finally, upon being referred to Exhibit P13 (c); the witness confirmed that the claim beforehand was duly forwarded to the 3rd Defendant.
79. With the foregoing testimony, the 3rd and 4th Defendants' case was duly closed.

Submissions by the Parties::

a. Plaintiffs' Submissions:

80. The Plaintiffs' filed written submissions dated the 10th July 2023; and in respect of which same have raised, highlighted and canvassed two (2) salient issues for consideration by the Honourable court.
81. Firstly, Learned counsel for the Plaintiffs' has submitted that the Plaintiffs' herein have made out a case to show and establish that indeed the Plaintiffs' entered into a lawful sale agreement with the



- 1st Defendant pertaining to and concerning the sale/purchase of office space within Nock Plaza or otherwise the suit property.
82. Furthermore, it was the submissions of Learned counsel for the Plaintiffs' that the sale agreement did not materialize and thereafter the 1st Defendant admitted and acknowledged the debt due to and in favor of the Plaintiffs'.
83. On the other hand, Learned counsel for the Plaintiffs' has further submitted that subsequently, the suit property, wherein the office spaces hitherto sold to the Plaintiffs was situated, was sold to and in favor of the 3rd Defendant herein, who ultimately agreed to bear and/or shoulder all the liabilities attaching to and arising from the suit property. In this respect, Learned counsel cited and referred to Clause 3.1 of the Sale Agreement dated the 1st September 2020; and which was produced on behalf of the 1st and 2nd Defendants.
84. Additionally, it was the submissions by Learned counsel for the Plaintiffs' that the 3rd Defendant herein having unequivocally undertaken to foot and or shoulder all the liabilities attaching to and or arising from the suit property, same are now bound by the terms of the sale agreement to refund the monies owed to and payable in favor of the Plaintiffs.
85. Essentially, Learned counsel for the Plaintiffs' has thus contended that the Plaintiffs' have placed before the Honorable court cogent and credible evidence to warrant a finding that the Defendants' are jointly and severally liable to pay the refund in favor of the Defendants.
86. In support of the foregoing submissions, Learned counsel for the Plaintiffs' has cited and relied on inter-alia the case of Muriungi Kanoru Jeremiah versus Stephen Ungu Mwarambua (2015)eKLR, Swalleh C Kariuki & Another versus Violet Owisi Okuyu (2021)eKLR, Nyamunyu versus Nyagah (1983)KLR and Ayub Ndungu versus Marion Waithera Gicheru (2006)eKLR, respectively.
87. Secondly, Learned counsel for the Plaintiffs' has submitted that the Plaintiffs herein are entitled to indemnity on account of Interests due and payable on the deposit that was remitted to and paid in favor of the 1st Defendant.
88. In addition, learned counsel has submitted that the payment of the interests is premised and or predicated on the fact that the Defendants herein and in particular, the 1st, 2nd, 3rd and 4th Defendants have breached the terms of the contracts; and thus the necessity to order and/or direct payment of interests.
89. As pertains to payment of Interests, Learned counsel has cited and relied on various decisions inter-alia Kimakia Cooperative Society versus Green Hotel (1988)KLR, Consolata Anyango Ouma versus South Nyanza Sugar Co Ltd (2015)eKLR, Gami Properties Ltd versus National Social Security Fund Board of Trustees & 2 Others (2018)eKLR, Housing Company of East Africa Ltd versus Board of Trustees National Social Security Fund (2018)eKLR and Millicent Perpetua Atieno Wandiga & Another versus John Chege (2013)eKLR, respectively.
90. Premised on the foregoing submissions, Learned counsel for the Plaintiffs' has therefore implored the Honourable court to find and hold that the Plaintiffs' herein have established and proved their case on a balance of probabilities. Consequently and in this regard, Learned Counsel for the Plaintiffs' craves that the Court be pleased to grant the reliefs sought at the foot of the Plaint dated 21st day of June, 2022.

b. 1st And 2nd Defendants' Submissions:

91. The 1st and 2nd Defendants herein filed written submission dated the 26th July 2023; and same have highlighted, and canvassed four (4) salient issues for determination by the Honourable court.



92. First and foremost, Learned counsel for the 1st and 2nd Defendants has submitted that indeed the Plaintiffs' herein bought Office space within Nock Plaza, which hitherto belonged and was registered in favor of the 1st Defendant.
93. Furthermore, Learned counsel submitted that the Plaintiffs' herein thereafter paid and or remitted deposits on account of the purchase of the Office spaces within Nock Plaza and which deposits were duly received and acknowledged.
94. Nevertheless, Learned counsel has added that the suit property was thereafter taken over and ultimately transferred to and in favor of the 3rd Defendant herein, who upon the take-over was obligated to bear/settle all the liabilities arising from and/or attaching to the suit property.
95. Secondly, Learned counsel for the 1st and 2nd Defendants has submitted that the debt and or liabilities due and payable to the Plaintiffs' ought to be borne solely by the 3rd Defendant, insofar as same undertook unequivocally to settle all liabilities arising from the suit property, inter-alia the debt payable to the Plaintiffs herein.
96. Thirdly, Learned counsel has further submitted that the Plaintiffs' herein are however not entitled to payment of Damages for breach of contract, either as claimed or at all. In any event, Learned counsel has added that damages for breach of contract are ascertainable and quantifiable and thus ought to be specifically pleaded by the Plaintiffs, which is not the case.
97. In respect of the submission that no General damages are payable on account of breach of contract, Learned counsel has submitted cited inter-alia the decisions in the case of Dharamshi versus Karsan (1974)EA 41; Postal Corporation of Kenya versus Geral Kamondo Njuka T/a Geka General Supplies (2021)eKLR, Kenya Industrial Estate Ltd versus Lee Enterprises Ltd (2009)eKLR, Kenya Breweries Ltd versus Natex Distributors Ltd (2004)eKLR and Standard Chartered Ltd versus Intercom Services Ltd & Others (2004)eKLR, respectively.
98. Finally, Learned counsel has submitted that the Plaintiffs' herein are not entitled to payment of Interests on the deposits paid insofar as the deposits in question were made and/or paid at the foot of a Sale agreement, which did not contain any Clause pertaining to and/ or concerning the payment of interests.
99. Furthermore, Learned counsel has contended that insofar as there was no incidence pertaining to interests that was envisaged and/or provided for under the sale agreement, no award of Interests ought to be made.
100. Additionally, Learned counsel has submitted that Parties are bound by the terms of contract entered into and therefore an award of Interests would be tantamount to the Honorable court re-writing the agreement which was entered into and/or executed between the Plaintiff on one hand; and the 1st Defendant, on the other hand.
101. In support of the submissions that a court of law cannot re-write the terms of an agreement entered into the Parties, Learned counsel for the 1st and 2nd Defendants has cited and relied on the decision in the case of National Bank of Kenya Ltd versus Pipeplastic Samkolit (K) Ltd & Another (2001)eKLR.
102. Finally and in respect of the question of costs, Learned counsel has submitted that the costs attendant to and in respect of the subject matter ought to be borne by the 3rd Defendant and not otherwise.



c. 3rd and 4th Defendants' SubmissionS:

103. The 3rd and 4th Defendants filed an undated written submissions which raised, highlighted and amplified four (4) issues for due consideration by the Honourable court. Firstly, Learned counsel for the 3rd and 4th Defendants has submitted that indeed there was a valid and lawful contract that was entered into and executed between the Plaintiffs' on one hand; and the 1st Defendant on the other hand.
104. Furthermore, Learned counsel has contended that the contract in question complied with and adhered to the provision of Section 3(3) of the [Law of Contract Act](#), Chapters 23 Laws of Kenya.
105. Secondly, Learned counsel has submitted that the contract which was entered into was between the Plaintiffs' on one hand and the 1st Defendant on the other hand, was lawful and thus binding on the respective Parties. In this respect, counsel has submitted that the contract in question therefore created an obligation as between the named Parties thereto and not otherwise.
106. Additionally, Learned counsel has submitted that the default to refund the monies payable to the Plaintiffs herein was by the 1st Defendant and hence it is the 1st Defendant herein who is obligated to make the refund in question and not otherwise.
107. Thirdly, Learned counsel for the 3rd and 4th Defendants has submitted that there was no contract between the Plaintiffs' herein and the 3rd Defendant; and hence the 3rd Defendant is not obligated to make any refund and or payments to and in favor of the Plaintiffs, either as claimed or otherwise.
108. Further and in any event, Learned counsel for the 3rd and 4th Defendants has invoked and amplified the Doctrine of privity of contract and thereafter contended that there was no privity of contract between the Plaintiffs and the 3rd and 4th Defendants, whatsoever, to warrant a claim by the Plaintiffs herein from the 3rd and 4th Defendants.
109. In this respect, Learned counsel for the 3rd and 4th Defendants has cited and relied on the decision in the case of Agricultural Finance Corporation versus Lengetia Ltd & Another (1985)eKLR, to amplify the relevance and significance of the Doctrine of privity of contract.
110. Fourthly, Learned counsel has submitted that the Plaintiffs' herein are not entitled to General damages on account of breach of contract, either as claimed or otherwise. In any event, Learned counsel has pointed out that damages for breach of contract are special in nature and thus ought to be pleaded, particularized and thereafter proved.
111. To this end, counsel has invited the court to take cognizance of the decision in the case of Kimakia Cooperative Society versus Green Hotel (1988)KLR 41, wherein the position pertaining to whether General damages could be awarded for breach of contracts was addressed.
112. Finally, Learned counsel for the 3rd and 4th Defendants has submitted that the Plaintiffs herein are not entitled to payment of Interests either in the manner claimed or at all, insofar as the sale agreement which was entered into between the Plaintiffs on one hand and the 1st Defendant on the other hand, did not envision payment of interest or at all.
113. In addition, Learned counsel has contended that Parties are bound by the terms of the contract entered into and executed and that in any event, it is not the business of the court to re-write the terms of the contract for and on behalf of the Parties.
114. To this end, Learned counsel has cited and highlighted the ratio decidendi in the case of National Bank of Kenya Ltd versus Pipeplastic Samcolite (K) Ltd (2001)eKLR and Pius Kimaiyo Langat versus Cooperative Bank Ltd (2017)eKLR.



115. Consequently and as a result of the foregoing submissions, counsel for the 3rd and 4th Defendants has therefore invited the court to find and hold that the Plaintiffs herein have not proved their case as against the 3rd and 4th Defendants and hence same ought to be dismissed.

Issues For Determination

116. Having reviewed and considered the pleadings filed by the Parties herein and upon taking into account the Evidence tendered (both oral and documentary) and upon appraising the written submissions filed on behalf of the respective Parties, the following issues do arise and are thus worthy of determination;
- i. Whether the Plaintiffs herein paid the sum of Kes.4, 612, 000/= only on account of purchase of office space within Nock Plaza and if so; whether the money in question has since been refunded.
 - ii. Who between the 1st, 2nd and 3rd Defendants are liable to make the refund due to and in favor of the Plaintiffs or better still; what is the legal import and tenor of the sale agreement entered into between the 1st and 3rd Defendants and how does it impact on the Plaintiffs' claim.
 - iii. Whether the Plaintiffs' are entitled to General damages for breach of contract.
 - iv. Whether the Plaintiffs' are entitled to Interests and if so; the duration of computation.

Analysis And Determination

Issue Number 1

Whether the Plaintiffs herein paid the sum of Kes.4, 612, 000/= only on account of purchase of office space within Nock Plaza and if so; whether the money in question has since been refunded.

117. The Plaintiffs herein, namely PW1 and PW2, respectively, tendered evidence pertaining to execution of letters of offers which related to and concerned the sale/purchase of office spaces within Nock Plaza, situate on the suit property. For good measure, the Letter of offer which was alluded to by the Plaintiffs herein was tendered and produced before the court as Exhibit P1.
118. Furthermore, it was also the evidence of the Plaintiffs and which evidence was not controverted that subsequent to the execution of the Letter of offer, namely Exhibit P1, same paid to and in favor of the 1st Defendant a total of Kes.4, 612, 000/= only, constituting the 20% of the purchase price of the named office spaces, which were being bought by the Plaintiffs. In this respect, the Plaintiffs' also tendered evidence in proof of the payments.
119. Other than the foregoing, it is also important to underscore that the fact of payment of the deposit by and on behalf of the Plaintiffs herein was also acknowledged by the 1st Defendant in terms of the Letters dated the 14th August 2020 and 3rd November 2020; which were produced as Exhibits P5 and P6, respectively.
120. At any rate, it is also not lost on the court that upon receipt of the payments which were made by the Plaintiffs herein, the 1st Defendant herein duly generated and issued receipts in acknowledgment of the said monies and which receipts were tendered in evidence as Exhibits P7 and P8, respectively.
121. From the foregoing testimony, which is vindicated vide the named Exhibits, there is no gainsaying that the 1st Defendant duly received and acknowledged payments of the sum of Kes.4, 612, 000/= only.



122. Other than the fact that the said monies were duly received and acknowledged by the 1st Defendant, it is also common ground that the sale in question, relating to the office space, which was being acquired by the Plaintiffs' did not materialize.
123. Simply put, the sale transaction collapsed and/or aborted on the basis of a plethora of reasons, which were documented by the 1st Defendant in terms of Exhibit D7 which was christened as Nock Plaza – a Historical Overview.
124. Arising from the fact that the sale transaction between the Plaintiffs and the 1st Defendant did not materialize, it was thereafter incumbent upon the 1st Defendant to refund the deposit of the purchase price that had been paid by and on behalf of the Plaintiffs. In this respect, it is important to underscore that upon issuance of demand notice to the 1st Defendant, same indeed conceded that the Plaintiffs were entitled to refund of the deposit paid save that the 1st Defendant sought for more time within which to facilitate the refund, insofar as the Government of Kenya was in the process of taking over the suit property and assuming the liabilities attendant thereto.
125. Without belaboring the point, it is common knowledge that the deposit on account of purchase price which were paid by the Plaintiffs' herein remained due and owing; and have never been refunded to and in favor of the Plaintiffs.
126. To underscore, the fact that the said monies have never been refunded, it is imperative to take cognizance of the certain aspects of the evidence tendered by DW1, whilst under cross examination by Learned counsel for the Plaintiffs.
127. For good measure, DW1 stated as hereunder;

“I wish to confirm that I wrote the letter dated the 14th August 2020 to the firm of M/s Kipkenda & Co Advocates; and we did admit the debt to and in favor of the Plaintiffs. I do confirm that the Plaintiffs are owed the money that the same paid at the foot of the purchase”.
128. From the foregoing testimony, it is crystal clear that the deposit which was paid by and on behalf of the Plaintiffs herein and which is duly acknowledged; remains due, owing and payable to date.
129. In the premises, my answer to issue Number one is two-fold. Firstly, the debt in question is not in dispute and in any event, has not been disputed by either the 1st or the 3rd Defendants.
130. Secondly and for good measure, the debt in question has never been refunded and hence same remains due, owing and outstanding to date.

Issue Number 2:

Who between the 1st, and 3rd Defendant are liable to make the refund due to and in favor of the Plaintiffs or better still; what is the legal import and tenor of the sale agreement entered into between the 1st and 3rd Defendants and how does it impact on the Plaintiffs claim.

131. Even though the 1st Defendant had entered into a sale agreement with the Plaintiffs and wherein same had intended to sell to and in favor of the Plaintiffs' office spaces within Nock Plaza, the intended sale aborted and/ or collapsed.
132. Furthermore, there is no dispute that arising from various issues and factors that bedeviled the construction and completion of Nock Plaza, several creditors and in particular M/s Sidian bank Ltd,



sought to sell Nock Plaza vide public auction with a view to recovering the debt which was then due and owing unto her.

133. Nevertheless, it is also not in dispute that arising from the threat and imminent sale of Nock Plaza, the 1st Defendant herein approached the Ministry of Sports, Culture and Heritage, with a view to intervening and to salvage the suit property. In this regard, the Ministry of Sport, Culture and Heritage through the 3rd Defendant ultimately intervened and thereby averted the sale of the suit property by and at the instance of M/s Sidian Bank Ltd.
134. Furthermore, the suit property was thereafter taken over by the 3rd Defendant on the basis of a sale agreement entered into and executed between the 1st Defendant and the 3rd Defendant herein. In this respect, the 1st Defendant tendered and produced before the Honourable court the sale agreement dated the 1st September 2020, whereas the 3rd Defendant produced a similar agreement, but which was curiously dated the 9th September 2020.
135. Barring the variance in the dates pertaining to when the sale agreement was entered into and or executed, however it is not in dispute that a sale agreement was indeed entered into between the First Defendant and the Third Defendant herein, over and in respect of the Suit Property.
136. In this regard clauses 1.1 (d) and 3.1 and 3.2 of the said Agreement are paramount and thus bears critical relevance; and particularly, as far as the resolution of this Dispute is concerned.
137. Consequently and in the premises, the said clauses are reproduced as hereunder;
 - “ 1.1 purchase price;
 - (d) Means the sum totals and all liabilities and debts attached to the property net of all of banks charges.
 - 3.1 The purchaser shall own or before the completion date pay the purchase price in clear funds (net of all bank charges) to various parties with established liquidated claims over the property.
 - 3.2 The vendor shall on notification of settlement of all claims and liabilities relating to the property, or on receipt of a suitable professional undertaking to have the same settled, forward to the purchasers’ advocates the following documents (the completion documents)”.
138. My understanding of the cited clauses of the sale agreement which was duly entered into between the 1st Defendant and the 3rd Defendant; drives me to the conclusion that the 3rd Defendant; who was the vendor undertook unequivocally to pay, settle and/or liquidate all claims and liabilities relating to and concerning the suit property.
139. Instructively, the liabilities herein and which were being acceded to by the 3rd Defendant included claims inter-alia; refund of the purchase price/deposit on account of purchase price which the Plaintiffs’ herein had paid.
140. Other than the clear and explicit terms of the sale agreement, which must be read in line with the Provisions of Section 97 and 98 of the *Evidence Act*, Chapter 80, Laws of Kenya; it is also important to take cognizance of paragraph 5 of the witness statement of DW2.



141. For good measure, same stated as hereunder;

“That at the time of signing of the agreement, the fund administrator, sport, arts and social development fund relied on and understood that information on financial liability provided by national Olympic committee of Kenya was material full disclosure over the said property hence the payments made and the final agreement”

142. Additionally, it is also imperative to detour and take cognizance of the evidence tendered before the court by DW2, who was the Representative of the 3rd Defendant.

143. Whilst under cross examination by Learned counsel for the 1st and 2nd Defendants, same stated as hereunder;

“I confirm the contents of paragraph 5 of my witness statement and further add that the 1st and 2nd Defendants had made full and material disclosures. I also wish to confirm that the 3rd Defendant made various payment. I wish to state that we imagined that we had paid all the debt due and payable by Nock Plaza..... Referred to the sale agreement and the witness confirms that the vendor (3rd Defendant) shall settle all claims and liabilities arising from the suit property. I do confirm the terms of the sale agreement are binding on the 3rd Defendant”

144. Besides, the witness also made further admissions as hereunder;

“I do confirm that the asset was taken by the 3rd Defendant. I also do confirm that the 3rd Defendant also took the liabilities”

145. Additionally, it is also important to take note of the responses by the witness (DW2) whilst under cross examination by Learned counsel for the Plaintiff.

146. For coherence, same stated as follows;

“Referred to the letter at page 12 of the Plaintiffs bundle of documents and the witness confirms that the letter in question the debt due to the Plaintiffs. The letter also confirms that the 3rd Defendant was keen to settle/sought out the debt due to the Plaintiffs’

147. Finally, it is also instructive to take cognizance of yet another startling, nay, admission by DW2 whilst under cross examination by Learned counsel for the Plaintiffs. In this respect, same states as hereunder;

“referred to exhibit P13(c) and the witness confirms that the claim beforehand was duly forwarded to the 3rd Defendant herein”.

148. Arising from the totality of the evidence tendered by and on behalf of the 3rd Defendant, there cannot be any further debate, or discourse as to who between the 1st and 3rd Defendant, was liable to make the refund in favor of the Plaintiffs herein.

149. Clearly and to my mind, the 3rd Defendant took over the suit property and undertook to settle, liquidate and/or pay all liabilities attaching to and arising from the said property. For coherence, the Third Defendant herein understood the import and tenor of the Sale Agreement and in particular, the extent of the obligations thereunder.



150. Invariably, one of the said liabilities which the 3rd Defendant undertook to liquidate was the refund of the Deposits in question.
151. Before venturing to address and deal the Doctrine of privity of contract and its relevance if at all to the subject matter; it is important to point out that the sale agreement which was entered into between the 1st Defendant and the 3rd Defendant respectively, contained explicit, clear and unequivocal terms, which both Parties understood would effect the Rights/ liabilities of third parties including the Plaintiffs herein.
152. Furthermore, having entered into the named sale agreement, whose terms were as clear and white as snow sitting atop mount Kenya; the 3rd Defendant herein cannot now be heard to renege from the terms of the said agreement. Simply put, same is bound by the terms therein.
153. To this end, it is instructive to adopt and reiterate the dictum of the Court of Appeal in the case of National Bank of Kenya Ltd versus Pipeplastic Samkolit Kenya ltd & Another (2001)eKLR, where the Court of Appeal underscored the binding effect of the terms of a contract, entered into freely and voluntarily by the concerned Parties.
154. For coherence, the court stated thus;

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. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

155. In any event, whilst interpreting an agreement/contract which has been reduced into writing, like the one which was entered into between the 1st and 3rd Defendants and whose import was to settle all liabilities due from and attaching to the suit property; the court is only called upon to read the agreement within the four corners thereof.
156. Simply put, the court is called upon to apply what is better known as the Four-Square Rule; which binds the court to the four corners of the impugned documents under consideration, unless there is any ambiguity or ambivalence in the terms thereof.
157. In amplification of the foregoing legal position, it suffices to highlight the ratio decidendi captured in the case of the Speaker of the County Assembly - Kisii County & 2 others versus James Omariba Nyaoga [2015] eKLR, where the court stated and observed as hereunder;

The 1st appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the [Evidence Act](#), Chapter 80 Laws of Kenya, which attempt we must reject. . This is not the first time we are doing so. In the case of John Onyancha Zurwe v Oreti Atinda alias Olethi Atinda [Kisumu Civil Appeal No. 217 of 2003] (UR), we cited, with approval, Halisbury's Laws of England 4th Edition vol. 12, on interpretation of deeds and non Testamentary Instruments paragraph,1478 as follows:-

" Extrinsic evidence generally excluded:

Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions ,drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the trms of the document.



Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."

158. With the foregoing in mind, I must pause to now answer the significant aspect of issue number two. For the avoidance of doubt, it is my humble albeit considered position that the person who is obligated and mandated to refund the claims by the Plaintiffs herein is none other than the 3rd Defendant.
159. Having made the foregoing determination, I must still venture forward and address the implication of the Doctrine of privity of contract which submitted by Learned counsel for the 3rd Defendant and who in particular, contended that the 3rd Defendant was not privy to the contract between the Plaintiffs' on one hand; and the 1st Defendant on the other hand; and hence cannot be called upon to pay the monies in question.
160. Whereas the 3rd Defendant was indeed not privy nor party to the sale agreement which was hitherto entered into between the Plaintiffs on one hand and the 1st Defendant on the other hand and would therefore not be bound, however, the 3rd Defendant throw herself into the mix on the basis of the sale agreement dated the 1st September 2020 (or read 9th September 2020).
161. Furthermore, it is imperative to observe that the Doctrine of privity of contract is subject to known limitations, which have been duly taken cognizance of and applied by courts within the Republic of Kenya.
162. In this respect, it is appropriate to cite and invoke the holding in the case Savings & Loan (K) Limited versus Kanyenje Karangaita Gakombe & another [2015] eKLR, where the court observed ad stated as hereunder;

"Over time some exceptions to the doctrine of privity of contract have been recognized and accepted. Among these exceptions is where a contract between two parties is accompanied by a collateral contract between one of them and a third party relating to the same subject matter. Thus in *Shanklin Pier V Detel Products LTD* [1951] 2 KB 854, for example, the plaintiff owned a pier, which it wished to be repainted. After the defendant represented to the plaintiff that some particular paint was fit for purpose, the plaintiff directed its contractor to use that paint. The contractor purchased the paint from the defendant, which proved unfit for purpose. Upon a suit by the plaintiff against the defendant, the court found for the plaintiff notwithstanding the fact that there was no privity of contract between the plaintiff and the defendant, as far as the contract for the sale of the paint was concerned.

While the proposition that a contract cannot impose liabilities on a non-party has been widely embraced and accepted as rational and well founded, the proposition that a contract cannot confer a benefit other than to a party to it has not been readily accepted and has in fact been the been subject of much criticism. In *Darlington Borough Council V Wiltshire Northern LTD* [1995] 1 WLR 68 Lord Steyn eloquently demonstrated the flaw in the proposition in the following terms:

"The case for recognizing a contract for the benefit of a third party is simple and straightforward. The autonomy of the will of the parties should be respected. The law of contract should give effect to the reasonable expectations of contracting parties. Principle certainly requires that a burden should not be imposed on a third party without his consent. But there is no doctrinal, logical or policy reason why the law should deny effectiveness to a contract for the benefit of a third party



where that is the expressed intention of the parties. Moreover, often the parties, and particularly third parties, organize their affairs on the faith of the contract. They rely on the contract. It is therefore unjust to deny effectiveness to such a contract.”

Some jurisdictions have, accordingly and in a bid to introduce reforms and ameliorate the harshness of the rule, resorted to legislative intervention. The best examples are the United Kingdom and Singapore where the Contracts (Rights of Third Parties) Act, 1999 and the Contract (Rights of Third Parties) Act, 2001 have respectively been enacted.”

163. From the ratio decidendi in the decision supra, which decision indeed took into account the earlier decision in the case of Agricultural Finance Corporation Versus Lengetia LTD & Another (1985); which was cited by counsel for the 3rd Defendant, it is apparent that where the contracting parties confer legitimate interests and expectation on a Third party, such Third Party becomes entitled to enforce the ensuing interests conferred or denoted by the contract.
164. In my humble view, the sale agreement between the 1st and 3rd Defendants herein created an avenue wherein the 3rd Defendant undertook to settle all liabilities arising from and attendant to the suit property; and thus in the event of default any creditor, the Plaintiffs not excepted, with proven claims are obligated to pursue the 3rd Defendant.
165. Consequently and in this regard, I am of the view that the Doctrine of privity of contract, which has been vouched by the 3rd Defendant is distinguished and in any event, distinguishable as pertains to the subject matter.

Issue Number 3

Whether the Plaintiffs are entitled to General damages for breach of contract.

166. In the body of the Plaintiffs' herein have sought for various reliefs, inter-alia, a claim for payment of General damages for breach of contract.
167. Nevertheless, even though the Plaintiff herein prayed for recompense on the basis of General damages for breach of contract, it is not lost on the court that in the course of their submissions, the Plaintiffs herein did not canvass and/or ventilate this limb of the claim.
168. Perhaps and in my view, Learned counsel for the Plaintiffs came to terms with the crystal-clear position that no General damages can be awardable for and in respect of breach of contract. Clearly, it is common knowledge that any damages arising out of breach of contract are ordinarily ascertainable, quantifiable and thus claimable as special/liquidated damages; which must no doubt be particularly pleaded and specifically proved.
169. In this respect, it is refreshing to recall the ratio decidendi in the case of Dharamsi Vs Karsan (1974) EA 41 where, 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.



170. Similarly, the legal and jurisprudential position pertaining to award of General damages in cases of breach of contract, was highlighted and indeed elaborated upon in the case of Securicor Courier (K) Ltd. vs. Benson David Onyango & another 2008 e KLR where the court stated:-

“As for award of Kshs.25,000/= as general damages for breach of contract, this court has repeatedly held that general damages are not awardable for breach of contract.”

171. Recently, the now established, trite and hackneyed position, which prohibits an award of general damages in cases of breach of contract was underscored by the Court of Appeal in the case of Kenya Tourist Development Corporation versus Sundowner Lodge Limited [2018] eKLR, where the court stated 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.

Beyond the non-recoverability of general damages for breach of contract, a proper consideration of the nature of the respondent’s claim ought to have led to the same conclusion that only such proven loss could be compensated by way of damages.

172. What more must be said. For good measure, the legal position is well beaten and hence no award of general damages of breach of contract would be due and payable at all. Consequently and in the premises, this court would not have been obligated to make any such award.

Issue Number 4

Whether the Plaintiffs are entitled to interests and if so the duration of computation.

173. Similarly, the Plaintiffs’ herein have also sought to be paid interests at court rates in respect of the refund, which was paid to and in favor of the 1st Defendant herein. Instructively, the Plaintiffs have sought for payment of interests with effect from the 12th December 2012.
174. Be that as it may, it is important to recall that the Plaintiffs’ herein conceded that the deposit on account of the purchase of the office spaces at Nock Plaza, were indeed made vide two installments.



Instructively, it was conceded that the 1st instalment was paid in December 2012; whereas the second installment was paid in early 2013.

175. From the foregoing, it is difficult to understand the foundation and/or legal basis upon which the claim for interests can be sought for from the 12th December 2012.
176. Secondly, the Letter of offer which was executed by the Plaintiffs herein provided and indicated that the office space, which was being bought by the Plaintiffs was to be ready in two years from the date of the execution of the letter of offer. See clause 12 of the letter of offer which was produced as exhibit P1.
177. Consequently and in my view, though the Plaintiffs herein are entitled to lay a claim for Interests, which would indeed provide indemnity, nay, atonement for the diminished value of the money, same cannot be reckoned from the year 2012.
178. To the contrary, I hold the opinion that the requisite period for computation of the interests would be upon lapse of the two-year duration, within which the 1st Defendant had anticipated to conclude/complete Nock Plaza; and to hand over vacant possession to inter-alia the Plaintiffs herein.
179. Consequently and in my view, interests would be only be chargeable with effect from the year 2015, taking into account the import and tenor of clause 12 of the Letter of offer.
180. In respect of the holding that the Plaintiffs' herein are entitled to an award of interests, it is important to adopt the holding in the case of Highway Furniture Mart Limited versus Permanent Secretary Office of The President & another [2006] eKLR, where the court stated as hereunder;

“The justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant. In *Later v Mbiyu* [1965] EA 592, the forerunner of this Court said at page 593 paragraph E:

“In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest”.

(See also the Uganda case of *Lwanga v Centenary Rural Development Bank* [1999] 1 EA 175).

181. Without belaboring the point, the basis upon which interests is granted, is well articulated and succinctly espoused in the afore-cited Decision. In this respect, I am greatly indebted to the quote, reproduced hereinbefore.
182. Finally, I do not agree with the submissions by learned counsel for the 1st and 3rd Defendants that an award of interests, to and in favor of the Plaintiffs herein, would amount to re-writing the contract or otherwise. In this respect, the citation and reliance on the case of *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & Another* (2001)eKLR, was misconceived.

Final Disposition

183. Arising from the conversation, whose details are contained in the preceding paragraphs, it is evident, nay, apparent, that the Plaintiffs' herein have been able to establish and/or prove their claims; essentially as against the 3rd Defendant, who on the basis of the sale agreement dated the 1st September 2020 (9th



September 2020), undertook to settle and/or liquidate all claims and liabilities attendant to and arising from the suit property.

184. On the contrary, the Plaintiffs' herein did not demonstrate why the Honorable Attorney General was impleaded and/or sued in respect of this matter, taking into account that the 3rd Defendant is a body corporate by dint of the provisions of the *Sports Act*, 2013. In this respect, it is my finding that the suit as against the 4TH Defendant herein, does not disclose any reasonable cause of action.
185. Save for the observation contained in the preceding paragraph, I come to the conclusion that the Plaintiffs' claim is meritorious and in this regard, I enter Judgment in favor of the Plaintiffs as hereunder;
- i. The Plaintiffs shall be refunded the sum of Kes.4, 612, 000/= only by the 3rd Defendant herein.
 - ii. The refund in terms of clause (i) hereof shall attract Interests at court rates (14%) w.e.f January 2015 to date of payment in full.
 - iii. The Plaintiffs' claim against the 1st and 2nd Defendants is dismissed.
 - iv. The Plaintiffs claim against the 4th Defendant is dismissed.
 - v. The Plaintiff be and is hereby awarded costs of the suit to be borne by the 3rd Defendant; and same to be agreed upon and in default to be taxed in the usual manner.
 - vi. The claim for General damages for breach of contract is dismissed.
 - vii. For good measure, any other relief not expressly granted is declined.

186. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF SEPTEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Mr. Samora Marshel for the Plaintiffs

Ms. Faith Njuguna, Litigation Counsel for the 3rd and 4th Defendants.

N/A for the 1ST and 2ND Defendants

