



Wayaffe v Toner Holdings Limited & another (Environment & Land Case E112 of 2022) [2023] KEELC 21753 (KLR) (16 October 2023) (Judgment)

Neutral citation: [2023] KEELC 21753 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E112 OF 2022**

**JO MBOYA, J
OCTOBER 16, 2023**

BETWEEN

ALEXANDRE WAYAFFE PLAINTIFF

AND

TONER HOLDINGS LIMITED 1ST DEFENDANT

CORRINE MARIE MADELEINE GENEVIEVE 2ND DEFENDANT

JUDGMENT

Introduction and Background

1. On or about the 16th day of January, 2013; the 1st Defendant herein issued to and in favour of the Plaintiff a Letter of offer pertaining to and in respect of an Apartment namely, Apartment Number 2, Level 4; Block A and DSQ Number 11, Basement; situate on LR No. 209/12981; and which Letter of offer was thereafter executed by the Plaintiff.
2. Furthermore, upon the execution of the Letter of offer, [details on terms of the preceding paragraph], the Plaintiff returned same to the 1st Defendant.
3. Other than the foregoing, there is no gainsaying that the Plaintiff also made several payments to and in favour of the 1st Defendant towards and on account of the Purchase price towards the suit apartment. However, despite a substantial amount of money begin made to and in favour of the 1st Defendant, the suit Apartment was ultimately neither transferred to nor registered in the name of the Plaintiff.
4. Arising from the failure to transfer and register the suit Apartment to and in favour of the Plaintiff; the Plaintiff has since filed and commenced the instant suit wherein same has sought for various/ a plethora of reliefs, inter-alia;-



- a. A declaration be and is hereby made that the registration of the suit property in the name of the 2nd Defendant was fraudulent, unlawful and in breach of the agreement for sale between the Plaintiff and the 1st Defendant.
 - b. An order be and is hereby made directed to the 1st Defendant to refund the sum of money it received from the Plaintiff in the sum of Kenya Shillings Twenty One Million Six Hundred and Ninety Two Thousand One hundred and Sixty (21,692, 1 60.00) only being payment towards the settlement of the purchase price pursuant to the subject agreement for sale.
 - c. A declaration be and is hereby made that the Plaintiff lost a business opportunity and profit he would have made which profit he lost due to the fraudulent and unlawful transfer of the suit property to the 2nd Defendant by the 1st Defendant.
 - d. An award of special damages for loss of business opportunity and profit be and is hereby awarded to the Plaintiff in the sum of Kenya Shillings Four Million Eleven Thousand and Two Hundred (Kshs. 4,011,200).
 - e. Interest at court rates on (b) and (e) above from the date of judgment until payment in full.
 - f. Costs of this suit.
 - g. Any other reliefs that the Honorable Court shall deem fit and just to grant.
5. Upon being served with the Plaint and the Summons to Enter Appearance, the 1st Defendant duly entered appearance and thereafter filed a Statement of Defence. However, the 2nd Defendant herein neither entered appearance nor filed a Statement of Defence.
 6. Be that as it may, the matter herein subsequently went through the requisite pre-trial directions, and thereafter, the same was fixed/ listed for hearing.

Evidence by the Parties ::

Plaintiff's Case:

7. The Plaintiff's case revolves around the Evidence of one witness, namely, Alexander Wayaffe, who testified as PW1.
8. According to the witness, the 1st Defendant herein issued to and in his favour a Letter of offer relating to Apartment Number 2, Level 4; Block A and DSQ Number 11, Basement of LR No. 209/12981 (hereinafter referred to as the "suit property").
9. It was the further testimony of the witness that upon issuance of the Letter of allotment, same proceeded to and executed the same. Further, and in addition, the witness also averred that upon execution of the Letter of offer, the same was duly returned to the 1st Defendant.
10. Additionally, the witness averred that same thereafter made various payments to and on account of the 1st Defendant and which payments were duly received and acknowledged by the 1st Defendant. In any event, the witness added that same paid a total of Kshs.21,692,160.00 Only, to the 1st Defendant.
11. It was the further testimony of the witness that sometimes on or about the 18th day of August 2015, he [witness] nominated one, Corine, Marie, Madeleine Picolo, namely, the 2nd Defendant as a nominee for purposes of the transfer of the suit Apartment albeit on behalf of the witness.



12. Notwithstanding the foregoing, the witness added that latter on that is , on or about the 6th February, 2017 and the 23rd March 2017, respectively, the witness wrote to and informed the 1st Defendant of the revocation of nomination of the 2nd Defendant and henceforth, the witness intimated to the 1st Defendant that he [witness] would wish to have the Apartment transferred to and registered in his (witness) name;
13. Furthermore, the witness added the fact of the revocation of the nomination of the 2nd Defendant was also relayed to the 1st Defendant transaction Advocate vide letter dated the 23rd March 2017; which Letter was written by the Plaintiff's (witness) advocates, namely, the firm of M/s Mohamed Madhani & Company Advocates.
14. Be that as it may, the witness added that despite the revocation of the nomination of the 2nd Defendant, which was duly communicated to the 1st Defendant herein vide various email correspondences, the 1st Defendant proceeded to and caused the suit Apartment to be transferred to and be registered in the name of the 2nd Defendant and thereby breached the terms of the Agreement of Sale.
15. At any rate, the witness added that the transfer and registration of the suit Apartment to and in favour of the 2nd Defendant was carried out and effected on the 27th June 2019; long after the nomination of the 2nd Defendant had been revoked and the revocation communicated to the 1st Defendant herein.
16. It was the further testimony of the witness that the 2nd Defendant herein did not have any contract with the 1st Defendant and hence there was no way that the 1st Defendant herein could deal and/or effect a transaction and registration of the suit apartment to the 2nd Defendant long after the revocation of the nomination of the 2nd Defendant had been revoked and duly communicated to the 1st Defendant.
17. On the other hand, the witness also testified that owing to the transfer and registration of the suit apartment in favour of the 2nd Defendant; the 1st Defendant herein denied and deprived the Plaintiff of his contractual right to conclude the payment of the purchase price and by extension, the transfer of the suit property/apartment into him [witness].
18. Besides, the witness also averred that the transfer and registration of the suit Apartment in favour of 2nd Defendant in the absence of any agreement of sale between the 1st and 2nd Defendants was informed by fraud and illegality.
19. Finally, the witness testified that same also informed and alerted the 1st Defendant of his [witness] desire to sell and/or dispose of the suit Apartment and further that the [witness], had over contracted an Estate agent to search for and procure a prospective buyer of the suit Apartment.
20. Furthermore, the witness added that the Estate Agent had even intimated that same had gotten a prospective buyer who was ready to purchase the suit Apartment at costs of Kshs.35,000.00 only; which amount the witness contends to have lost as a result of the actions and/or omissions of the 1st Defendant herein.
21. Other than the foregoing, the witness alluded to the witness statement dated the 14th February, 2022; and impressed upon the Honourable court to adopt and constitute the same as the further Evidence-in- chief of the witness.
22. For the sake of completeness, the Witness statement was duly admitted and constituted as the further evidence in chief of the witnesses.



23. Additionally, the witness also alluded to the List and Bundle of documents dated the 14th February 2022; containing a total of seventeen (17) documents and implored the court to adopt the same as Exhibits.
24. Suffice to point out that the Documents at the foot at the List dated the 14/02/2022 were thereafter adopted and admitted as Plaintiff's Exhibits P1-17, respectively.
25. Further and in addition, the witness also allude to the List and Bundle of documents dated the 19th October 2022 and containing a total of seven (7) documents. For good measure, the documents under reference were thereafter admitted as Plaintiff's Exhibits P18-25, respectively.
26. Finally, the Plaintiff alluded to the List and Bundle of Documents dated the 31/01/2023; containing one (1) document and thereafter the same was admitted as Plaintiff's Exhibit 26.
27. On cross-examination by Learned Counsel for the First Defendant, the witness herein stated that the Letter of offer was executed by himself and the 1st Defendant. Further, the witness added that the 2nd Defendant was not a party to the Letter of offer or even the sale agreement over and in respect of the suit Apartment.
28. Besides, the witness also admitted that the Letter of offer had timelines and that the (witness) paid four (4) instalments, which monies were duly acknowledged by the 1st Defendant. Furthermore, it was the testimony of the witness that he later on nominated the 2nd Defendant to take possession of the suit Apartment and forwarded the letter of nomination via email to the 1st Defendant herein.
29. On further cross-examination, the witness testified that the nomination of the 2nd Defendant was later on revoked by himself and he [Witness], informed the 1st Defendant of the revocation of the nomination of the 2nd Defendant.
30. Whilst under further cross-examination, the witness herein stated that same was aware of a meeting that was convened and scheduled for purposes of sorting out the dispute pertaining to the nomination of the 2nd Defendant, but he [the witness] added that he declined to attend the said meeting because according to him (witness) the nomination of the 2nd Defendant had been revoked and the revocation was duly communicated to the 1st Defendant long before the transfer and registration of the suit Apartment in favour of the 2nd Defendant on the 20th June 2019.

a. 1st Defendant's Case:

31. The 1st Defendant's case similarly, revolves and gravitates around the Evidence of one witness, namely; Joseph Schardzcmán alias "Blackman", who testified as DW1.
32. It was the testimony of the witness that same is one of the Directors of the 1st Defendant herein and hence same is conversant with the facts of the case.
33. Furthermore, the witness herein averred that the 1st Defendant generated and issued a Letter of offer to and in favour of the Plaintiff, pertaining to and concerning an Apartment, namely, Apartment Number 2, Level 4; Block A and DSQ Number 11, Basement on LR No. 209/12981 otherwise referred to as the "suit property".
34. It was the further testimony of the witness that upon the issuance of the Letter of offer, the same was duly executed by the Plaintiff and thereafter returned to the 1st Defendant.
35. Additionally, the witness herein averred that the Plaintiff also made various payments on account of the suit Apartment amounting to approximately Kshs.21,000,000.00 only.



Nevertheless, the witness averred sometimes in the year 2015, the Plaintiff herein nominated the 2nd Defendant to be the one to take possession of the suit Apartment and thereafter the 1st Defendant started to deal with the 2nd Defendant herein. In any event, the witness added that it was the 2nd Defendant who paid the balance of the purchase price and thereafter, the suit Apartment was transferred to and registered in favour of the 2nd Defendant.

37. Furthermore, the witness alluded to his witness statement dated the 5th October 2022 and thereafter sought to adopt and rely on the same. In this regard, the witness statement of the witness was adopted and duly admitted as the Evidence in chief of the witness.
38. On the other hand, the witness also alluded to the List and Bundle of documents dated the 4th October 2022; and thereafter sought to adopt and rely on the same as Exhibits on the part of the 1st Defendant.
39. In the absence of any objection to the documents, the same were duly admitted and adopted as Defendants Exhibits D1-12, respectively.
40. Additionally the witness also alluded to the Further List and Bundle of documents dated the 5th October 2022; containing five (5) documents and thereafter sought to adopt and rely on the same. For coherence, the documents at the foot of the List were admitted and adopted as Exhibits D13-17 respectively.
41. Having produced the various documents, [details in terms of the various List of documents]; the witness thereafter invited the Honourable court to adopt the contents of the Statement of Defense dated the 16/09/2022 and to find and hold that the Plaintiff's suit was devoid of merits.
42. On cross-examination by Learned Counsel for the Plaintiff, the witness confirmed that the Letter of offer was issued to the Plaintiff herein. Furthermore, the witness also averred that it is the Plaintiff who executed the Letter of offer as pertains to the suit property/Apartment.
43. On the other hand, the witness averred that the total purchase price was contained and alluded to on the face of the Letter of offer.
44. Additionally, the witness also stated that the Sale agreement was also drafted and the same was duly executed by the Parties, namely, the Plaintiff and the 1st Defendant. However, while under further cross-examination, the witness changed tune and thereafter averred that the 1st Defendant did not execute the sale agreement. For coherence, the witness added that the Sale Agreement was never signed/executed by a representative of the 1st Defendant herein.
45. As pertains to the amount of money that was paid by the Plaintiff; the witness herein stated that same paid a total of Kshs.23,460,692.00 only. However, the witness soon retracted the testimony and averred that the Plaintiff paid a total of Kshs.21,000,000.00 only, towards and on account of the purchase price of the suit Apartment.
46. Further and in addition, the witness also averred that the Plaintiff nominated the 2nd Defendant to receive the Apartment and the nomination was received by the 1st Defendant.
47. Nevertheless, the witness added that the Plaintiff herein thereafter communicated the revocation of the nomination, but the witness added that the revocation was disputed by the 2nd Defendant.
48. It was the further testimony of the witness that after the revocation was disputed by the 2nd Defendant, a meeting was scheduled, but the Plaintiff declined to attend the meeting in question.



49. Nevertheless, the witness confirmed and admitted that the revocation of the nomination of the 2nd Defendant was duly communicated to and was received by the 1st Defendant herein.
50. Asked why the 1st Defendant transferred the suit Apartment to the 2nd Defendant, the witness averred that the Plaintiff had already assigned his rights and interests over the suit Apartment to the 2nd Defendant and hence the Plaintiff had no further right to and in respect of the suit Apartment.
51. It was the further evidence of the witness that though the Plaintiff had also indicated his interest to sell the suit property to a third party, but however, the witness reiterated that by the time the Plaintiff intimated his intention to sell the suit Apartment to a third party, the Plaintiff was already divested of rights and interests over the suit Apartment after the nomination of the 2nd Defendant to be the one to take possession of the Apartment.
52. Additionally, it was the further testimony of the witness that the transfer of the suit property/ Apartment to the 2nd Defendant was done on the instructions of the Plaintiff herein.
53. Finally, the witness averred that the lease in favour of the 2nd Defendant was registered long after the 1st Defendant had received the communication from the Plaintiff as pertains to the revocation of the nomination of the 2nd Defendant.
54. With the foregoing testimony, the 1st Defendant's case was duly closed.

b. The 2nd Defendant's Case:

55. The 2nd Defendant's herein neither entered appearance nor filed a Statement of Defence.
56. Furthermore, the 2nd Defendant neither attended court nor participated in the proceedings before the court herein. Simply put, the case against the 2nd Defendant proceeded on the basis of Formal proof.

Parties' Submissions:

57. Following the conclusion of the case on behalf of the 1st Defendant herein; the Advocate for the respective Parties sought for time to file and exchange written submissions.
58. Consequently and in this regard, the Honourable court granted to the Parties an opportunity to file and exchange written submissions. Furthermore, it is important to observe and underscore that the Advocates duly complied and filed their written submissions which are on record.

Issues for Determination:

59. Having reviewed and analyzed the Pleadings filed by and on behalf of the Parties; and upon evaluation of the evidence tendered (both oral and documentary), and finally upon consideration of the written submissions filed on behalf of the Parties, the following issues do emerge and are thus worthy of determination;-
 - a. Whether there existed an Agreement of between the Plaintiff and the 1st Defendant, and if so; whether the same was breached.
 - b. Whether the Transfer and ultimate registration of the Suit Apartment in favour of the 2nd Defendant was fraudulent and illegal.
 - c. Whether the Plaintiff is entitled to the reliefs sought or otherwise.



Analysis and Determination

Issue Number 1 Whether there existed an agreement of between the Plaintiff and the 1st Defendant and if so, whether the same was breached.

60. It is not in dispute that the 1st Defendant herein generated and issued a Letter of Offer to and in favour of the Plaintiff over and in respect of Apartment Number 2, Level 4; Block A and DSQ Number 11, Basement; situate on LR No. 209/12981 otherwise referred to as the [suit property herein].
61. Furthermore, upon receipt of the Letter of Offer, the Plaintiff herein proceeded to and executed the same and thereby signaled his acceptance of the terms of the Letter of offer.
62. Other than the letter of offer, which was generated by the 1st Defendant and ultimately signed by the Plaintiff; the 1st Defendant herein through her transactional Advocate also crafted and forwarded the Sale Agreement to the Plaintiff's Advocates, which sale Agreement was thereafter executed by the Plaintiff. For good measure, the Sale Agreement which was duly executed by and effected on behalf of the Plaintiff was produced as an Exhibit before the Honourable court.
63. Nevertheless, despite the fact that the Sale Agreement was remitted to the 1st Defendant through her transaction Advocates; the said Agreement was never executed by the 1st Defendant or at all. Further and in any event, though DW1 initially admitted, that same [1st Defendant], executed the Sale Agreement, the admission was quickly retracted and the witness confirmed that the 1st Defendant did not execute the Sale Agreement.
64. However, despite the fact that the 1st Defendant did not execute the Sale Agreement, is not lost on the Honourable court that the 1st Defendant herein through her transaction Advocate kept intimating to the Plaintiff that the Agreement had been executed.
65. Furthermore, the 1st Defendant through her transaction Advocate also kept demanding from the Plaintiff various documents, inter-alia, copy of the Pin Certificate; Passport size Photographs and also the Legal fees towards and in respect of the transaction. [see the letter, from the 1st Defendant's transaction advocate dated 4th April 2013 and 20th November 2013, respectively].
66. Additionally, it is also important to state and observe that the 1st Defendant herein also received and acknowledge receipt of the sum of Kshs.21,692,160.00 only towards and on account of the purchase price of the suit Apartment.
67. Granted that the 1st Defendant did not execute the Sale Agreement which was generated by her own Advocates, but the point is that the 1st Defendant received and acknowledged receipt of the various payments from the Plaintiff and retained the same. Besides, the 1st Defendant did not rescind the contract or at all; either on account of lack of execution of the Sale Agreement by herself or otherwise.
68. Consequently and in this regard, it is my finding and holding that there was in existence a valid and lawful agreement for sale of Apartment Number 2, Level 4; Block A and DSQ Number 11, Basement on LR No. 209/12981, namely, the Suit Property.
69. Having found that there was in existence a valid sale agreement between the Plaintiff and the 1st Defendant; it is therefore obvious and evident that the contention by the 1st Defendant that there was no sale agreement is erroneous, misleading and factually incorrect.



70. Further and at any rate, the fact that the 1st Defendant generated the Sale Agreement, which was thereafter forwarded to the Plaintiff for execution is enough to estop the 1st Defendant from denying the existence of a valid and lawful Sale agreement.
71. Furthermore, the circumstances of this case, warrants the invocation and application of the Doctrine of Estoppel as against the 1st Defendant. (See Section 120 of the *Evidence Act*, Cap 80 Laws of Kenya). Other than the foregoing, it is also appropriate to invoke and apply the doctrine that; “Equity that treats as done that which ought to have be done”.
72. To this end, I wish to adopt and reiterate the holding of the Court of Appeal in the case of Ali Abdi Mohamed Versus Kenya Shell & Co. Limited (2017) eKLR, where the court cited and adopted the dictum in the RTS Flexible Systems Ltd versus Molkerei Alois Müller GmbH [2010] UKSC 14 as hereunder;-

“The general principles are not in doubt. Whether there was a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance have not been finalised, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement”.

Lord Reid in *Steadman – vs- Steadman* (1976) AC 536, 540 stated:

“If one party to an agreement stands by and lets the other party incur expense or prejudice his position on the faith of the agreement being valid he will not then be allowed to turn around and assert that the agreement is unenforceable”.

11. It therefore follows that a contract can exist where no words have been used but where it can be inferred from the conduct of the parties that a contract has been concluded. See *Timoney and King v King* 1920 AD 133 at 141. In the circumstances of the instant case, there existed an enforceable contract between the parties by reason of Conduct. Indeed it was not disputed by the respondent that it supplied petroleum products to the appellant at a specific amount per litre and for a certain period of time.”
73. The Second limb of the issue herein relates to whether the Agreement between the Plaintiff and the 1st Defendant was breached; and if so; by whom. In this respect, I must reiterate that I have since found and established that there existed a lawful Sale Agreement between the Plaintiff and the 1st Defendant.
74. However, despite the existence of the said Agreement, the 1st Defendant decided to transfer the suit Apartment to and in favour of the 2nd Defendant and not to the Plaintiff. Furthermore, the 1st Defendant transferred and caused the suit Apartment to be transferred and registered in the name of the 2nd Defendant admittedly long after receipt of revocation of the nomination of the 2nd Defendant by the Plaintiff.
75. Clearly and to my mind; the transaction in question was between the Plaintiff and the 1st Defendant and hence it is only the Plaintiff and the 1st Defendant who were bound by the contract under the Doctrine of privity of Contract.



76. To buttress the legal import and tenor of the foregoing Doctrine, the ratio decidendi in the case of Agricultural Finance Corporation Versus Lengetia Farm Limited & Jack Mwangi [1985] eKLR), is apt and relevant.
77. For coherence, the Court of Appeal in the said case stated and held thus:-
- “As it stated in Halsbury’s Laws of England, 3rd Edition, Volume 8 at paragraph 110:
- “As a general rule a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”
78. Based on the foregoing, I hold the firm view and position that the 1st Defendant could not endeavor to act outside the terms of the contract unless there were express and explicit instructions to that effect. However, in respect of the instant matter, the previous instructions that had hitherto been granted stood revoked and hence the 1st Defendant cannot be heard to say that same acted on instructions of the Plaintiff.
79. In short and arising from the observation in the preceding paragraph, it is my finding and holding that the 1st Defendant breached the terms of the Sale Agreement/contract with the Plaintiff.
80. In view of the foregoing, my answer to issue number one [1] herein is two-fold. Firstly, there was in existence a lawful and valid contract between the Plaintiff and the 1st Defendant. Secondly, the valid and lawful agreement which existed was breached/violated by the 1st Defendant herein.

Issue Number 2 Whether the Transfer and ultimate registration of the suit Apartment in favour of the 2nd Defendant was fraudulent and illegal

81. It is common ground and in any event, there is no dispute that it is the Plaintiff who was issued with the Letter of offer as pertains to and in respect of the suit apartment. Furthermore, the Honourable court has since found and held that it is the Plaintiff who had an agreement for sale/purchase of the suit Apartment with the 1st Defendant.
82. Consequently, if the contract was to be concluded; no doubt, the same would have been concluded in favour of the Plaintiff or subject to the terms of the contract, to such other person duly nominated by the Plaintiff.
83. On the other hand, it is also important to recall that on or about 18th of August 2015, the Plaintiff herein wrote to and informed the 1st Defendant of the nomination of the 2nd Defendant to receive the Apartment. [See the email correspondence to that effect].
84. Premised on the nomination of the 2nd Defendant to receive the Apartment, the 2nd Defendant engaged with the 1st Defendant on various occasions and even made certain payments towards and in completion of the balance of the purchase price.
85. Nevertheless, on or about March and April of 2017, the Plaintiff herein wrote and informed the 1st Defendant of the revocation of the nomination of the 2nd Defendant and furthermore, the Plaintiff intimated to the 1st Defendant that he would want the Apartment, to be transferred to and registered in his (Plaintiff’s) name.



86. Additionally, the Plaintiff also instructed his transaction Advocate, to write to and inform the 1st Defendant of the revocation of the nomination of the 2nd Defendant. For coherence, the Plaintiff's transaction Advocates duly complied and indeed wrote to and informed the 1st Defendant of the revocation of the nomination of the 2nd Defendant.
87. Other than the foregoing, it is also important to recall and reiterate that the 1st Defendant's witness also confirmed that the 1st Defendant received the correspondence on the revocation of the nomination of the 2nd Defendant. However, it was the position of the 1st Defendant that the revocation of the nomination of the 2nd Defendant was disputed by the 2nd Defendant and hence the 1st Defendant preferred to and stood by the nomination of the 2nd Defendant.
88. Arising from the foregoing, the 1st Defendant proceeded to and indeed transferred the suit Apartment to the 2nd Defendant, albeit, in flagrant and utter disregard of the fact that the 2nd Defendant's nomination had been revoked.
89. In the premises, the question that now arises and which is worthy of determination is; whether the transfer and registration of the suit property/Apartment to and in favour of the 2nd Defendant was lawfully or better still, fraudulent.
90. According to the Plaintiff, the transfer and registration of the suit Apartment to and in favour of the 2nd Defendant was done long after the revocation of her nomination by the Plaintiff and hence the same was fraudulent.
91. On the part of the 1st Defendant, the transfer of the suit Apartment in favour of the 2nd Defendant was lawful and legitimate because the Plaintiff had fully assigned and transferred his rights to the 2nd Defendant and hence the same could not purport to revoke the nomination of the 2nd Defendant long after he had communicated the nomination to the 1st Defendant.
92. Notwithstanding the contention by and on behalf of the 1st Defendant, it is not lost on the Honourable court that the contract and/or Sale Agreement pertaining to the suit Apartment was between the Plaintiff and the 1st Defendant; and the 2nd Defendant was a stranger to the said contract.
93. Notably and for good measure, the 2nd Defendant was only introduced by the Plaintiff on the basis of her nomination to receive the suit Apartment, albeit on behalf of the Plaintiff.
94. Nevertheless, the nomination of the 2nd Defendant was subsequently revoked and the revocation was duly communicated to the 1st Defendant. Further and in any event, the 1st Defendant admitted receipt of the revocation.
95. Based on the foregoing, the court comes to the conclusion that that by the time, namely, the 20th June 2019, when the suit property/Apartment was transferred to and registered in the name of the 2nd Defendant, as evidenced by the Certificate of Lease; the authority to and in favour of the 2nd Defendant had long been revoked and was thus ineffectual for all intents and purposes.
96. Simply put, the 1st Defendant had no lawful basis to effect the transfer and registration of the suit Apartment in favour of the 2nd Defendant after same was duly and effectively informed to the revocation of her [2nd Defendant's] nomination.
97. Consequently, and in view of the foregoing, I come to the conclusion that the transfer and registration of the suit Apartment in favour of the 2nd Defendant was fraudulent and unlawful.



98. Further and in addition, I also find and hold that the Plaintiff has been able to establish and prove fraud and collusion between the 1st Defendant and the 2nd Defendant to the requisite Standard of proof.
99. In a nutshell, my answer to issue number two [2] above; is to the effect that the transfer and registration of the suit Apartment to and in favour of the 2nd Defendant was fraudulent and without any legal anchorage/foundation or at all.

Issue Number 3 Whether the Plaintiff is entitled to the Reliefs sought or otherwise

100. The Plaintiff herein has sought for plethora of reliefs at the foot of the Plaintiff. Instructively, one of the reliefs that has been sought for relates to a declaration that the transfer and registration of the suit Apartment to and in favour of the 2nd Defendant long after the revocation of her nomination, was fraudulent.
101. For coherence, while dealing with issue number two]2) hereinbefore, the Honourable court has found and held that the transfer was fraudulent and without any legal anchorage.
102. Secondly, the Plaintiff has also sought for an order for Refund of the payments, that were made to and received by the 1st Defendant on account of the purchase of the suit Apartment.
103. As pertains to refund of the monies that were paid to the 1st Defendant, the Plaintiff seeks for the sum of Kshs.21,692,000.00 only, being the total remittance paid to and acknowledged by the 1st Defendant.
104. Nevertheless, it is important to state and observe that the Letter of offer and the sale Agreement, which the Plaintiff voluntarily executed contained a Clause relating to a non-refundable sum of money.
105. In this respect, having found and held that the terms of the Sale Agreement and/or contract were violated/breached by the 1st Defendant, there is no difficulty in finding and holding that the Plaintiff is entitled to refund of the total/ aggregate amount or money paid to and in favour of the 1st Defendant, albeit less the non-refundable amount alluded in the Letter of offer and the Sale Agreement, both of which were duly executed by the Plaintiff.
106. Notably, to the extent that the Plaintiff had executed the Letter of offer, as well as the Sale agreement, which included the term pertaining to non-refundable amount, same is therefore bound by the said terms, irrespective of whether same was onerous or otherwise.
107. In this respect, it suffices to adopt and reiterate the holding of the Court of Appeal in the case of National Bank Kenya Limited Versus Pipeplastic Samkolit (K) Limited & another (2001) eKLR where the court stated and held as hereunder:-

“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.

As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.



108. Thirdly, the Plaintiff has sought for an order to the effect that same had intended to sell the suit Apartment to a Third Party and in this regard, the Plaintiff even engaged an Estate agent to search for prospective buyers.
109. Furthermore, the Plaintiff has contended that the Estate Agent, namely, Palm Golden Limited, who were retained by the Plaintiff were able to find a prospective buyer who was ready to pay the sum of Kshs.35,000,000.00 only towards the suit Apartment.
110. Arising from the foregoing, the Plaintiff now contends that as a result of the actions and/or omissions of the 1st Defendant, the Plaintiff herein has lost business opportunity and profits in the sum of Kshs.4,100,000.00 only, being the difference between the purchase price of the suit Apartment and the price that the prospective buyer, who was found by the Estate Agent, had promised to pay.
111. Nevertheless, it is important to point out at the onset, that by the time the Plaintiff herein engaged and retained the Estate Agent to search for and procure a prospective buyer for the suit Apartment in the year 2017, the Plaintiff herein was not the owner of the suit Apartment. For good measure, the Plaintiff herein was still paying for the suit Apartment and had not even paid the Full Purchase price thereof.
112. Surely, would the Plaintiff be at liberty to search for a prospective purchaser and/or buyer of a property which does/ did not belong to him or at all. Sadly, my answer to the question, is in the negative. For clarity, the Plaintiff had not acquired any title to and in respect of the suit Apartment which could be sold out to and transferred to any Third Party.
113. Furthermore, it is also important to point out that any sale, transfer and/or assignment of the suit Apartment prior to and before the completion of the purchase price, could only be undertaken with the consent of the 1st Defendant herein, namely, the Vendor.
114. However, despite being aware of the said Clause in the Letter of offer and the Sale Agreement, which were duly executed by the Plaintiff; the Plaintiff herein has not shown and/or demonstrated that the same sought for and or procured the consent and concurrence of the 1st Defendant to (sic) sell the suit Apartment.
115. Thirdly, it is also evident that despite the engagement of the Estate Agent by the Plaintiff, the Estate Agent was not able to procure and obtain a firm prospective buyer of the suit Apartment and hence the same kept on stating, inter-alia, that the 1st Defendant still had units in the same property which had not been sold and hence the presence of unsold units was giving the Estate Agent difficulty in obtaining a firm price as pertains to the suit Apartment.
116. From the foregoing, there is no gainsaying that the Plaintiff herein has not been able to place before the Honourable court any credible evidence to warrant a finding that same lost business and/or profits pertaining to and in respect of the suit Apartment.
117. Lastly, the Plaintiff has sought for an order of Interest at court rates. In this respect, I wish to point out that interest is indeed payable and the same suffices as an indemnity for the diminished value of money over time.
118. Consequently and in my humble view, the Plaintiff herein is duly entitled to payment of Interests for purposes of indemnity and atonement on account of depreciation in the value of money, which would have been used for a different purpose [opportunity cost], had it not been for the suit Apartment.
119. Finally, there is the question of the applicable Interest rates and I wish to point out that the Plaintiff is entitled to Interest at the rate of 14% per annum from the date when the Sale Agreement was breached.



120. For the avoidance of doubt, I reckon the effective date for computation of Interest to be the 20/06/2019, when the suit Apartment was transferred to and registered in the name of the 2nd Defendant and thereby effectively terminating the contract in favour of the Plaintiff.
121. To this end, I wish to adopt and reiterate the holding of the Court of Appeal in the case of Highway Furniture Mart Limited versus Permanent Secretary Office of The President & others [2006] eKLR, where the Honourable court stated and held as hereunder:-

“In *Gulam Husein v French Somaliland Shipping Co. Ltd* [1959] EA 25 the predecessor of this Court while referring to section 34 of Indian Code of Civil Procedure which is in pari materia with section 26 of the *Civil Procedure Act* said, obiter:

“Section 34 of the Indian code was considered by the Privy Council in the case of *Bengal Magpur Railway Co. v Ruttanji Ramji* 1938 AIR PC & 67 and it was indicated by their Lordships that the section has no application to interest prior to date of the suit, which is a matter of substantive law. It was also indicated that the power conferred is to order interest upon the principal sum adjudged from the date of suit to the date of the decree but from that date to the date of payment it may be ordered to be paid upon the aggregate of the principal and interest as at the date of the decree”.

That construction of section 26 (1) of the *Civil Procedure Act* was adopted by this Court in *New Types Enterprises Ltd v Kenya Achand Insurance Company Ltd* [1988] KLR 380 where the Court held that the award of interest for any period prior to the filing of the suit is a matter of substantive law.

Section 34 (1) of the Indian Code of Civil Procedure is still intact and is in the same language as section 26 (1) of the *Civil Procedure Act*, (see Mulla – *The Code of Civil Procedure* 16th Edition vol.1 page 505). At page 511 of Mulla (supra) the authors state:

“Interest up to date of suit is a matter of substantive law and the section does not refer to payment of interest under the first head (that is interest accrued prior to the institution of the suit).

..... It has been said the right to interest prior to the suit is a substantive one whereas *Pendente Lite*, it is one of procedure within the discretion of the court”.

Final Disposition:

122. From the discourse, [evident in terms of the preceding paragraphs], it must have become apparent that the Plaintiff herein has substantially proved his suit/claim as against the 1st Defendant.
123. Nevertheless, it is important to observe and underscore that despite the various allegations that were made against the 2nd Defendant herein, there is no claim and/or relief which was sought for against her.
124. Consequently, even though the 2nd Defendant neither entered appearance nor filed a Statement of Defence, no relief can be awarded against her, which was not prayed for or otherwise. For coherence, it is important to underscore and reiterate the Doctrine of Departure and essentially, the provisions of Order 2 Rule 6 of the Civil Procedure Rules, 2010.
125. Finally and before making the final order, it is also important to point out that the 1st Defendant herein did not file a Notice of Indemnity or Third Party Notice against the Co-defendant herein or at all.



In this regard, the court can also not be called upon to make any further pronouncement, if at all, as against the 2nd Defendant concerning the title over and in respect of the suit property.

126. Having made the foregoing observations, the Honourable court now proceeds to and enters Judgement in favour of the Plaintiff as hereunder;-

- a. Declaration be and is hereby made that the 1st Defendant breached the terms of the Sale Agreement entered into and with the Plaintiff herein over and in respect of the suit Apartment.
- b. The Plaintiff herein is entitled to Refund of the Purchase Price that was paid to and in favour of the 1st Defendant, less the non-refundable amount in terms of the Clause 6.1.1 of the Letter of Offer, amounting to Kshs.3,098,880.00 only and the Sale Agreement Clause 9.2.3 executed by the Plaintiff.
- c. For clarity, the Plaintiff is entitled to the sum of Kshs.18,593,280.00 only.
- d. The Plaintiff is also entitled to Interest at 14% per annum on the sums contained in Clause (c) hereof from 20/06/2019 until payment in full.
- e. The Plaintiff be and is hereby awarded costs of the suit as against the 1st defendant and the same to be agreed upon; and in default, to be taxed by the Deputy Registrar of the Court in the usual manner.
- f. Any other reliefs not expressly granted is hereby declined/dismissed.

127. It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF OCTOBER 2023.

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – court Assistant.

Mr. Hans Oichoe for the Plaintiff.

Mr. Paul Maina for the 1st Defendant .

No appearance for the 2nd Defendant.

