



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAIROBI**

**ELC CASE NO 11 OF 2020**

**KENNEDY MULWA NGUMBAU ..... PLAINTIFF**

**VERSUS**

**GEORGE MUSYOKA MWILU ..... 1ST DEFENDANT**

**AGNES KASALU ..... 2ND DEFENDANT**

**MOGI ANGWENYI ..... 3RD DEFENDANT**

**JUDGMENT**

1. Through a plaint dated 20/1/2020, the plaintiff sought the following reliefs against the defendants:

- a) An order of specific performance to compel the defendant to avail to the plaintiff the completion documents set out at clause 8.2 of the agreement for sale dated 16th February 2018 in the manner set out in the aforesaid agreement for sale.*
- b) A permanent injunction to issue restraining the defendants whether by themselves, servants, agents or whomsoever from disposing off  $\frac{3}{4}$  of an acres to be excised from L.R No 2327/288 to any other person other than the plaintiff and/or alienating, leasing, charging or in any way interfering with the  $\frac{3}{4}$  of an acre to be excised from L.R No 2327/288 in a manner that would prejudice the plaintiff's interest in the aforesaid parcel of land.*
- c) Costs of this suit and interest thereon at court rates.*
- d) The sum of Kshs 14,045,000/= being the deposit of the purchase price paid to the defendant together with interest thereon at commercial rates from February 2018 until payment in full.*
- e) Loss of business income in the sum of Kshs 5,700,000 as pleaded at paragraph 26(b) above.*
- f) Interest on (e) above at commercial rates from February 2018 until payment in full.*
- g) Special damages in the sum of Kshs 10,755,164/= as pleaded at paragraph 26(c) – (k) above.*
- h) Interest on (g) above court rates from February 2018 until payment in full.*
- i) General damages.*
- j) Costs of the suit and interest thereon.*

**Plaintiff's Case**

2. The plaintiff's case was contained in the plaint dated 20/1/2020, his reply to defence dated 3/3/2021; his testimony in court; his written submissions dated 6/7/2021; and his rejoinder written submissions dated 10/12/2021. In summary, his case was that, at all material times, the 1st defendant was the registered proprietor of **Land Reference Number 2327/288 (Original Number 2327/233/1)** situate in Karen, Nairobi **[the suit property]**. The 2nd defendant was the 1st defendant's wife. By an agreement dated 16/2/2018, the 1st defendant agreed to sell to him  $\frac{3}{4}$  of an acre which was to be excised out of the suit property and he agreed to purchase the said  $\frac{3}{4}$  of an acre portion on the terms and conditions that were set out in the said agreement.

3. The recital part of the agreement provided that the 1st defendant had already sold 0.27 of an acre portion to **Mogi Angwenyi** [the interested party who owned an abutting parcel of land] and was now selling the remaining  $\frac{3}{4}$  of an acre portion of the land to the plaintiff. Some of the salient terms and conditions of the agreement were that: (i) the agreed purchase price was Kshs 35,000,000; (ii) Kshs 10,000,000 was to be paid as a deposit to be disbursed as stipulated in the agreement and the balance of the purchase price was to be paid on completion date; (iii) the completion date was 180 days from the date of execution of the agreement; (iv) since 0.27 of an acre portion of the suit property had already been sold to the interested party, the 1st defendant was to undertake the amalgamation and subdivision exercise; and (v) the 1st defendant was to bear the amalgamation and subdivision costs.

4. The plaintiff contended that upon execution of the agreement, he discharged his contractual obligations by paying the agreed deposit of **Kshs 10,000,000**. At the request of the 1st defendant, he paid a further sum of **Kshs 2,825,000** over and above the agreed deposit, making a total of **Kshs 12,825,000**. As at the completion date [16/8/2018], he was ready, able and willing to complete the transaction, but the 1st defendant was not ready because he had not undertaken amalgamation and subdivision as stipulated in the agreement. Further, the 1st defendant was in need of funds at that point in time.

5. Consequently, on 17/10/2018, parties to the agreement executed an addendum to the agreement. Some of the salient features and terms of the Addendum which was dated 17/10/2018 were that: (i) the 1st defendant acknowledged receipt of the deposit totaling Kshs 12,825,000 from the plaintiff and confirmed the mode of receipt of the money; (ii) the parties agreed that the plaintiff would make a further payment of Kshs 1,100,000 to the 1st defendant and the mode of paying the said additional sum was stipulated in the addendum; (iii) the balance of the purchase price [Kshs 21,075,000] was to be paid on or before the extended/new completion date which the parties had mutually agreed on; (iii) the mutually agreed new /extended completion date was to be 31/1/2019; and (iv) the 1st defendant was to procure finalization of the amalgamation process and obtain all completion documents on or before the mutually agreed new/extended completion date.

6. The plaintiff contended that upon execution of the addendum dated 17/10/2018, he paid the additional deposit of Kshs 1,100,000 as agreed. Come 31/1/2019 [the extended completion date], the 1st defendant was not ready with the completion documents. Consequently, through his advocate, the plaintiff wrote to the 1st defendant indicating that he was ready to complete the transaction. Through the letter, he asked the 1st defendant to avail completion documents, in tandem with the addendum. Thereafter, the 1st defendant, through his advocate, engaged the plaintiff and the interested party and the engagement culminated in meetings where it was agreed that a tripartite agreement involving the three parties would be signed pursuant to which the 1st defendant would transfer the suit property to the plaintiff and thereafter the plaintiff and the interested party would undertake the amalgamation and subdivisions processes themselves. The 1st defendant, however, declined to execute the tripartite agreement when it was presented to him by his own advocate.

7. The plaintiff contended that at all material times, he was ready with the balance of the purchase price but the 1st defendant had failed to honour the agreement and the addendum by declining to avail the completion documents. He added that he secured a financial facility in the sum of Kshs 22,000,000 from **Equity Bank** for the purpose of paying the balance of the purchase price and the said facility was attracting interest at 13% p.a. from 3/8/2019.

8. The plaintiff contended that, as a consequence of the 1st defendant's failure to discharge his contractual obligations, he had suffered the following loss

and damages which he specifically pleaded in the plaint:

*a) Purchase price paid to the 1st defendant ..... Kshs 14,045,000/=*

*b) Loss of business income arising from the remittance of sum of Kshs 14,045,000 to the defendants ..... Kshs 5,700,000/=*

*c) Fees paid to the plaintiff's advocates for preparation of the sale agreement ..... Kshs 1,870,000/=*

*d) Money paid to Nairobi City Council being arrears of land rates in respect of the suit property .....Kshs 140,381/=*

*e) Money paid to the Vendor's agent, Mr Gilbert Mutuku ..... Kshs 4,500,000/=*

*f) Funds paid to Equity Bank for processing of the loan facility through the Plaintiff's Account No. 0180292785128 ..... Kshs 792,000/=.*

*g) Funds paid to Equity Bank for Insurance Cover of the loan facility ..... Kshs 162,333/=.*

*h) Money paid to Equity Bank's lawyers being legal fees for the loan transaction ..... Kshs 240,000/=.*

*i) Interest paid to Equity Bank being interest on the loan facility at the rate of 13% ..... Kshs 2,860,000/=.*

*j) Money paid towards valuation of the property to be offered as security for the loan ..... Kshs 140,000.*

*k) Money paid towards valuation of the suit property for purposes of amalgamation and subdivision ..... Kshs 50,000.*

9. The plaintiff added that in August 2019, he received credible information that the 1st defendant was in the process of disposing the suit property and this prompted him to lodge a complaint at the Directorate of Criminal Investigations. On being summoned by the Directorate, the 1st defendant declined to honour the summons and instead initiated **Nairobi ELC JR No 49 of 2019; George Musyoka Mwilu & another v the Inspector General & 2 others**, in which he obtained exparte orders prohibiting the Directorate and the Office of the Director of Public Prosecutions against arresting or prosecuting him.

10. At the hearing, the plaintiff produced the following 16 exhibits to support his case:

- a) *Copy of sale agreement dated 16/2/2018.*
- b) *Addendum to the sale agreement dated 17/10/2018.*
- c) *Copy of a letter from the 1st defendant's advocates confirming that the 1st defendant had received the deposit towards the purchase price.*
- d) *Documents in support of payment of monies to the 1st defendant in respect of the purchase of the suit property.*
- e) *Acknowledge of receipt of funds dated 4th December 2018 by Gilbert Mutuku.*
- f) *Letter dated 6th March 2019.*
- g) *Copy of the letter erroneously dated 15th March 2019 instead of 15th April 2019.*
- h) *Copy of the email correspondence by the 1st defendant's advocates addressed to the plaintiff's advocates.*
- i) *Copy of unexecuted tripartite deed of addendum.*
- j) *Copy of letter from Equity Bank Ltd confirming that the plaintiff held funds in his account for purchase of the suit property.*
- k) *Land rate payment receipt dated 22nd October 2018.*
- l) *Copy of fee note issued to the plaintiff in respect of the conveyancing and copies of cheques issued to the plaintiff's advocates by the plaintiff in respect of the conveyancing.*
- m) *Receipt dated 21/11/2019 in respect of valuation of the property offered as security to Equity Bank.*
- n) *Documents in respect to the funds paid to Equity Bank's lawyers being legal fees for the loan transaction.*
- o) *Receipt in respect of money paid towards valuation of the suit property for purpose of amalgamation and subdivision.*
- p) *Management Accounts in respect of the plaintiff's business; Heritage Bliss Hotel*

11. Lastly, during trial, the plaintiff stated that because of what he had gone through in trying to get the 1st defendant to complete the transition, he was abandoning the plea for an order of specific performance. He urged the court to grant him the alternative reliefs set out in the plaint.

12. In written submissions dated 23/8/2021 and rejoinder submissions dated

10/12/2021, filed through the firm of *Ngatia & Associates*, counsel for the plaintiff identified the following as the three key issues falling for determination in this suit: (i) Whether the plaintiff fulfilled his contractual obligations as set out in the agreement for sale dated 16/2/2018 and the addendum to the agreement for sale dated 17/10/2018; (ii) Whether the 1st defendant breached the terms of the agreement for sale dated 16/2/2010 and the addendum thereto; and (iii) Whether the plaintiff is entitled to the orders sought in the suit.

13. On whether the plaintiff fulfilled his contractual obligations, counsel for the plaintiff submitted that under Clause 4.1 of the agreement dated 16/2/2018, the plaintiff was required to pay a deposit of Kshs 10,000,000. Counsel added that the plaintiff not only paid the sum of Kshs 10,000,000 but made a further deposit of Kshs 2,825,000 making a total sum of Kshs 12,825,000. It was the position of counsel that in Clause of 2.1 the Addendum dated 17/10/2021, the 1st defendant acknowledged receipt of the deposit totaling Kshs 12,825,000.

14. Counsel for the plaintiff further submitted that Clause 2.2 of the Addendum provided for a further deposit of Kshs 1,100,000 which the plaintiff duly paid as agreed, a fact which was acknowledged by the 1st defendant through his advocate's letter dated 31/7/2019 and through his written statement which he adopted as part of his sworn evidence-in-chief. Counsel added that the plaintiff had demonstrated through evidence that he obtained a disbursed loan facility of Kshs 22,000,000 secured by a different property, for the purpose of paying the balance of purchase price. Lastly, counsel referred the court to the letter dated 6/3/2019 in which the plaintiff's advocate confirmed to the defendant's advocate that the plaintiff was ready and willing to complete the transaction by paying the balance of the purchase price.

15. On whether the 1st defendant failed to fulfill his contractual obligations, counsel for the plaintiff submitted that under clause 5 of the agreement the 1st defendant covenanted to undertake amalgamation and sub-division of the suit property within 180 days from 16/2/2018 and under clause 8.2, the 1st defendant covenanted to avail completion documents to the plaintiff's advocates before the completion date [16.8.2018]. counsel argued that as at the completion date, the 1st defendant had not undertaken the process of amalgamation and sub-division and did not avail completion documents.

16. On whether the plaintiff is entitled to the orders sought, counsel cited the decision in **Millicent Perpetual Atieno v Loius Onyango Otieno [2003] eKLR** in which the court held that where a vendor wrongfully refused to complete a contract, the measure of damages

payable is the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor and these would include a return of any deposit paid by the purchaser with interest together with expenses which he has incurred. Counsel reiterated the plaintiff's position that he had abandoned the prayer for specific performance. Counsel added that in paragraph 4 of his written statement, the 1st defendant had admitted that the plaintiff paid him a total of **Kshs 14,045,000**. Counsel urged the court to grant the plea for return of the sum of **Kshs 14,045,000** together with interest at commercial rates from **February 2018** until payment in full.

17. Counsel added that the plaintiff was entitled to an award of damages for the loss incurred as the natural and direct result of the repudiation of the contract by the 1st defendant which includes: (i) Kshs 5,700,000 being the loss incurred in the plaintiff's business as a result of remittance of Kshs 14,045,000 to the 1st defendant by the plaintiff. Counsel argued that the plaintiff had demonstrated in evidence that he ran a hotel under the name of **Heritage Bliss Hotel** and that had the sum of kshs 14,045,000 been put into the business, it would have earned him the sum of Kshs 5,700,000.

18. Counsel added that the plaintiff was, on account of the same principle, entitled to expenses incurred in securing a loan from Equity Bank to pay the balance of the purchase price namely: (i) Kshs 792,000 - being loan processing fees; (ii) Kshs 162,333 - being loan insurance cover premiums; (iii) Kshs 240,000 paid to Equity Bank's lawyers as legal fees on the long transaction; and (iv) Kshs 140,000 being valuation fees relating to the property used as a collateral to secure the loan from equity.

19. Counsel further submitted that the plaintiff was entitled to **Kshs 4,290,000** being the sum paid to Equity Bank as interest on the loan at the rate of 13% from 3/8/2019 when the loan facility was disbursed to 9/2/2021 when the 1st defendant filed a written statement stating that he was willing to refund the deposit paid [1 ½ years]. Counsel added that the plaintiff was also entitled to the sum of **Kshs 140,381** being rates paid to the Nairobi City County Government in relation to the suit property. Counsel for the plaintiff further submitted that the plaintiff was entitled to the sum of **Kshs 4,500,000** which he paid a Mr Gilbert Mutuku as agency commission relating to the transaction. Lastly, counsel submitted that the plaintiff was entitled to the sum of **Kshs 50,000** paid to M/s **Bel Air Properties Ltd**, a company that was engaged to assist in the amalgamation process. Counsel urged the court to award costs of the suit to the plaintiff.

### **1st and 2nd Defendants' Case**

20. The 1st and 2nd defendants filed a joint statement of defence dated 9/2/2020. At the hearing, the 1st defendant testified as **DW1** and the two defendants closed their case at that point. They did not produce any exhibit. Subsequently, the two defendants filed written submissions dated **9/12/2021**. In their joint statement of defence, they admitted that the 1st defendant was at all material times the proprietor of the suit property. They denied the contention that the 1st defendant entered into an agreement dated **16/2/2018** with the plaintiff. They nonetheless admitted the salient terms of the agreement as captured in paragraph 6 of the plaint. They added that the sum of Kshs 12,825,000 which the plaintiff paid prior to the signing of the addendum was paid to third parties. In response to paragraphs 8,9,10 and 11 of the plaint, they averred that the process of amalgamation was being conducted by the interested party with the full knowledge of the plaintiff. They denied the plaintiff's contention that the plaintiff wrote to the 1st defendant's advocates confirming that the plaintiff was ready and willing to complete the transaction and asking for completion documents. They denied the plaintiff's averments to the effect that there were tripartite meetings during which the plaintiff, the 1st defendant and the interested party agreed that the entire parcel would be transferred to the plaintiff by the 1st defendant and the plaintiff and the interested party would thereafter jointly undertake amalgamation and subdivision. They further denied that the 1st defendant declined to execute the resultant tripartite agreement. They denied breach of the agreement by the 1st defendant by failing to avail completion documents in terms of the contract. They further denied the contention that the plaintiff borrowed money from Equity Bank for the purpose of paying balance of the purchase price.

21. In his testimony in court, DW1 [the 1st defendant] adopted his written statement dated 9/2/2021. His testimony was that he indeed entered into the sale agreement dated 16/2/2018 with the plaintiff. The plaintiff made a deposit of Kshs 14,045,000 over a period of one year and left a balance of Kshs 20,955,000 outstanding. The interested party had purchased ¼ of an acre out of the suit property. It was a condition of the agreement that the suit property was to be amalgamated with the interested party's parcel before sub-dividing it to excise the ¾ acre portion sold to the plaintiff. The amalgamation process was delayed when the plaintiff and the interested party engaged in abortive sale negotiations for the ¼ acre portion which the interested party had purchased. A sum of Kshs 12,825,000 was paid to third parties by the plaintiff. The plaintiff engaged the police to enforce the transfer of the suit property and this prompted him (the 1st defendant) to initiate judicial review proceedings. The plaintiff was never ready to complete the transaction. The agreement stood "cancelled and revoked" for running out of time. He added that he was willing to refund the deposit paid by the plaintiff less 10% and have the agreement cancelled. He stated that he notified his advocates about his intention to cancel the agreement and he trusted that his advocates gave notice, hence the agreement stood cancelled. He urged the court to dismiss the plaintiff's suit and to allow him to refund the deposit paid less 10%.

22. In cross-examination, DW1 stated that the size of his land was one (1) acre and because he had already sold ¼ of an acre to the interested party, he needed to undertake amalgamation of his land with that of the interested party before excising the ¾ of an acre which he had agreed to sell to the plaintiff. He confirmed that he signed the witness statement dated 9/2/2020 and he was relying on it. He added that he signed the sale agreement dated 16/2/2018 and the deed of addendum dated 17/10/2018. He admitted that the deposit of Kshs 14,045,000 was paid. He also admitted that he confirmed in the deed of addendum that he had received the deposit of purchase price. He added that the agreement dated 16/2/2018 had a completion date of 180 days which was to lapse in mid August 2018 and that the agreement required him to avail completion documents which he did not have on the completion date. He further stated that the completion date in the deed of addendum was 31/1/2019 and that he covenanted to procure finalization of the amalgamation process and procure the completion documents before 31/1/2019. He confirmed that he neither procured amalgamation nor availed completion documents as agreed. It was his evidence that there was no other agreement between him and the plaintiff. He stated that he did not have any termination notice relating to the contract. He confirmed that he had not refunded the plaintiff the sum of Kshs 14,045,000 paid to him by the plaintiff. Lastly, he said he was willing to refund the money less 10% because he was inconvenienced.

### **Interested party's Case**

23. The interested party did not lead evidence. He however, filed written submissions dated 8/12/2021, through the firm of *Oonge & Company Advocates*. Counsel identified the following as the two issues falling for determination in the suit: (i) Whether the plaintiff should be granted an order of specific performance; and (ii) Whether the plaintiff is entitled to the relief of permanent injunction. On the first

identified issue, counsel submitted that there was a valid contract in force and the amalgamation process was ongoing. It was the position of counsel for the interested party that, the relief of specific performance was not available to the plaintiff until after completion of amalgamation. Counsel urged the court to order that completion documents be availed to the plaintiff upon completion of amalgamation.

24. On whether the plaintiff was entitled to the relief of permanent injunction, counsel submitted that the plaintiff was entitled to the relief and that the interested party had no interest in the  $\frac{3}{4}$  of an acre portion which the 1st defendant had sold to the plaintiff. Counsel urged the court to award the interested party costs of the suit.

### **Analysis and Determination**

25. I have considered the parties' pleadings, evidence and submissions. I have also considered the relevant legal frameworks and jurisprudence on the key issues falling for determination in this suit. Parties to the suit did not present an agreed common statement of issues. Having looked at the pleadings, evidence and submissions of the parties, the following are the key issues that fall for determination in this suit: (i) Whether the plaintiff fulfilled his contractual obligations under the land sale contract between him and the 1st defendant; (ii) Whether the 1st defendant breached his contractual obligations under the said contract; and (iii) Whether the plaintiff is entitled to the alternative reliefs sought in the plaint. I will make brief sequential analysis and findings on the three issues in the above order.

26. The first issue is whether the plaintiff fulfilled his contractual obligations under the land sale contract. I have looked at the documentary evidence presented to the court. The land sale contract was contained in two instruments: (i) the sale agreement dated 16/2/2018; and (ii) the deed of addendum dated 17/10/2018. The key contractual obligation of the plaintiff under the contract was the obligation to pay the agreed purchase price in the manner stipulated in the contract. Initially, parties agreed that the purchase price of Kshs 35,000,000 was to be paid in two instalments: (i) a sum of Kshs 10,000,000 was to be paid by the plaintiff upon signing the agreement; and (ii) the balance [Kshs 25,000,000] was to be paid on completion. There was uncontroverted evidence that the plaintiff not only paid the agreed deposit of Kshs 10,000,000 but additionally paid a sum of **Kshs 2,825,000** over and above the agreed deposit, making a total of **Kshs 12,825,000**. Through the deed of addendum dated 17/10/2018, the 1st defendant acknowledged receipt of the sum of Kshs 12,825,000/=

27. The deed of addendum dated 17/10/2018 provided for payment of an additional deposit of Kshs 1,100,000. The plaintiff paid this money too. Indeed, in a letter dated 31/7/2019, the 1st defendant's advocates confirmed receipt of a total of Kshs 14,000,000/=. In his written witness statement which he adopted as part of his sworn evidence, the 1st defendant admitted receipt of a deposit totaling Kshs 14,045,000 from the plaintiff. There was no evidence led by the 1st defendant to suggest that the plaintiff failed to discharge his obligations under the land sale contract.

28. The plaintiff testified that having executed the contract, he made arrangements for a loan from Equity using a different title as security. He testified that he was ready and willing to complete the transaction but this was not possible because the 1st defendant had failed to undertake amalgamation and subdivision as agreed in the contract. He presented evidence showing that a sum of Kshs 22,000,000 was credited to his account as "disbursement credit." From the above evidence, it is the finding of the court that the plaintiff discharged his obligations under the contract and did not breach the contract.

29. The second issue is whether the 1st defendant breached the said land sale contract. The plaintiff contended that the 1st defendant breached the land sale contract in two aspects: (i) he failed to undertake amalgamation and subdivision as agreed; and (ii) he failed to provide completion documents on or before the completion date as agreed or at all. **Clause 5** of the agreement dated 16/2/2018 provided as follows:

***"The amalgamation and subdivision of the plots shall be undertaken within one hundred and eight (180) days from the date of this agreement and the vendor shall bear the charges and cost of the amalgamation and subdivision."***

30. Clause 8.2 of the agreement obligated the vendor to avail completion documents on or before the completion date. In clause 2.7 of the deed of addendum dated 17/10/2018, the 1st defendant covenanted as follows:-

***"Further to the provisions of Clause 2.3 above, the vendor undertakes as follows:***

***a) That he shall on or before the extended completion date procure the finalization of the amalgamation process;***

***b) That he shall procure and obtain all the requisite completion documents as outlined in the sale agreement;***

***c) That upon payment of the balance of the purchase price in the sum of Kenya Shillings Twenty One Million and Seventy Five Thousand (Kshs 21,075,000/-) as noted in clause 2.5 above, he will within ninety (90) days vacate the property and thereafter hand over vacant possession to the purchaser; and***

***d) That he shall pending completion maintain the property in its current state and condition.***

31. Did the 1st defendant discharge the obligations he covenanted to discharge

in the deed of addendum dated 17/10/2018? From the evidence presented to this court, he did not. He did not procure amalgamation as agreed in the deed of addendum. Similarly, he did not avail completion documents as agreed. Indeed, in his evidence under cross-examination, he stated that he did not have the completion documents and he did not procure the amalgamation. Based on the above evidence, the court finds that the 1st defendant breached the land sale contract in that: he failed to procure amalgamation; and he similarly, failed to procure and avail completion documents as agreed in the deed of addendum.

32. The third issue is whether the plaintiff is entitled to the alternative reliefs sought in the plaint. The plaintiff abandoned the plea for an order of specific performance, contending that he had suffered a lot as a result of the 1st defendant's failure to complete the contract and he was no longer interested in the remedy of specific performance. He urged the court to grant him the alternative reliefs sought in the plaint. The alternative reliefs consist of loss and damages which the plaintiff contends he suffered as a result of the 1st defendant's breach. The court has made a finding to the effect that the 1st defendant breached the land sale contract executed between him and the plaintiff.

33. The key question to be answered under this issue relates to the type and measure of damages recoverable by the plaintiff as a consequence of the 1st defendant's breach of contract. **The Halsbury's Laws of England, Volume 12, 4th Edition** contains the following principle which govern the type and measure of damages recoverable by a purchaser in a scenario where a vendor fails to complete a contract.

*“Where it is the vendor who wrongfully refuses to complete, the measure of damages is, similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain”*

34. It is therefore proper to note that, generally, the measure of damages recoverable by the purchaser is the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. It is with this principle in mind that I will briefly examine and pronounce myself on the various reliefs sought by the plaintiff.

35. Alternative prayer number (d) is a plea for a refund of the sum of Kshs 14,045,000 together with interest thereon at commercial rates from February 2018. The 1st defendant admitted receipt of this money in his evidence. There is therefore no proper basis why this money should not be recovered. I will allow recovery of the principal sum of Kshs 14,045,000.

36. On interest, none of the parties led evidence on the rate of interest to be applied on the sum of Kshs 14,045,000 or the duration for which the specific interest rate should apply. I will, in the circumstances award interest at court rate from the date of default, which is **31/1/2019**.

37. Alternative prayer number (e) is a plea for a sum of Kshs 5,700,000 - being

the equivalent of loss of income during the period the 1st defendant has held the plaintiff's money. The view I make out of this plea is that, having awarded the plaintiff interest on the sum of Kshs 14,045,000 from the date of default until the money is recovered, it would be a duplication of the indemnification on the same head of loss/damages which is basically the cost of the money held by the 1st defendant. I will not award the plaintiff this particular relief. Prayer (e) having been rejected, prayer (f) automatically fails.

38. Alternative prayer (g) relates to special damages suffered by the plaintiff as a result of the 1st defendant's illegal repudiation of the contract. They relate to legal costs, land rates, agency commission, loan processing fees, insurance premiums paid to procure an insurance policy cover for the loan facility intended to pay balance of the purchase price, interest suffered and paid by the plaintiff on the disbursed loan facility, valuation costs relating to the loan collateral, and valuation costs relating to the suit property. The items were specifically pleaded. Uncontroverted documentary evidence was tendered to support each of the above items. The court is, in the circumstances, satisfied that the costs were incurred in necessary furtherance of the repudiated agreement. Consequently, I will grant the relief. The pleaded and proved limbs of special damages come to a total of **Kshs 10,754,714**. In their written submissions dated 23/8/2021, counsel for the plaintiff urged the court to award interest paid to Equity Bank at Kshs 4,290,000. I have only awarded the sum of Kshs 2,860,000 because that is what was pleaded. I decline to award the said interest from February 2018 because the special damages had not been suffered as at the date of entering into the sale agreement. I will instead award the prayer for interest [prayer h] on special damages at court rate from the date of filing suit.

39. Prayer (i) is a plea for general damages. I will not award the plea because the purpose of the remedy of damages for breach of contract is to restore the aggrieved party to the position he would have been in had the breach not been committed. Our courts have consistently stated that the relief of general damages is not available in a claim for breach of contract. Not too long ago, the Court of Appeal reiterated this principle in **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR** in the following words:

*“... 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.....”*

40. Lastly, the plaintiff's suit having succeeded, the general principle in Section 27 of the Civil Procedure Act requires that the plaintiff be indemnified in terms of costs of the suit. The plaintiff is accordingly awarded costs. Similarly, the 1st defendant will bear costs of the 2nd defendant [if any] and costs of the interested party.

#### **Summary of Findings and Disposal Orders**

41. In light of the foregoing, it is the finding of the court that the plaintiff fully discharged his obligations under the land sale contract between him and the 1st defendant. It is also the finding of the court that the 1st defendant breached the said land sale contract in the sense that: (i) he failed to procure amalgamation as agreed; and (ii) he failed to avail completion documents within the period stipulated in the contract.

42. It is my further finding that the plaintiff is entitled to, and is hereby awarded the following reliefs as against the 1st defendant:

*(a) A refund of the sum of Kshs 14,045,000 together with interest at court rate from 31/1/2019 [the date of default] until the*

*money is paid in full.*

*(b) Kshs 1,870,000 being legal costs paid to the plaintiff's advocates in relation to the aborted contract.*

*(c) Kshs 140,381 paid to Nairobi City County Government.*

*(d) Kshs 4,500,000 being agency commission costs incurred by the plaintiff.*

*(e) Kshs 792,000 being loan processing fees charged by Equity Bank*

*(f) Kshs 162,333 being insurance premiums on the loan facility*

*(g) Kshs 240,000 being legal costs paid to Equity Bank's lawyers.*

*(h) Kshs 2,860,000 being pleaded interest paid to Equity Bank on the loan facility.*

*(i) Kshs 140,000 being valuation costs on the loan collateral.*

*(j) Kshs 50,000 being valuation costs relating to the suit*

*property.*

43. In addition, the 1st defendant will bear costs of the 2nd defendant [if any] and the interested party relating to this suit.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 24TH DAY OF JANUARY 2022**

**B M EBOSO**

**JUDGE**

**In the Presence of: -**

Ms Nyaga for the Plaintiff

Mr Nyaberi for the Defendants

Mr. Oonge for the Interested Party

Court Assistant: Phyllis Mwangi

**NOTE:**

*This suit was fully heard before me when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why, upon filing of submissions by the parties, the Presiding Judge of the Court directed that the file be transmitted to me to write and render a judgment.*

**B M EBOSO**

**JUDGE**