REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CIVIL CASE NO. 404 OF 2019

PARAGON ELECTRONICS LIMITED.....PLAINTIFF

VERSUS

FATMA MUSES.....DEFENDANT

JUDGMENT

INTRODUCTION

1. Vide Plaint dated 5th December 2019, the Plaintiff herein has sought for the following Reliefs:

> ***a. To pay Rental Income loss from the date of the Deed of Settlement (11th July 2016) until reinstatement of the Apartment to its original state at Kshs 110, 000/= Only, Per month.***
>
> ***b. Orders directing the Defendant to convert apartment B1-9 to its original state that is a 4 bedroomed apartment.***
>
> ***c. To Pay Interests on (a) above at commercial compounded rate from the date of Deed of Settlement (11th July 2016) until payment in full.***
>
> ***d. Alternative to prayer a), b) and c) a Declaration that the Deed of Settlement is null and void.***
>
> ***e. To comply with the letter of Offer, dated 10th July 2011 and pay purchase price in the amount of Kshs.15, 650, 000/= Only.***
>
> ***f. To pay Interests on (e) above at Commercial Compounded rate from the date of the Completion of the apartment.***
>
> ***g. Costs of the suit.***
>
> ***h. Any other Relief that this Honourable court deems fit.***

2. Following the filing and service of Plaint and Summons to Enter to Appearance, the Defendant herein duly entered appearance and thereafter filed a Statement of Defense, both of which were filed and/or lodged on the 28th January 2020, respectively.

3. It is worthy to note, that the Defendant herein denied and/or disputed the claims by and/or on behalf of the Plaintiff and essentially contended that the claim by the plaintiff herein was barred by the terms of the Deed of Settlement which was entered into and executed between the Parties on the 11th July 2016.

EVIDENCE BY THE PARTIES:

THE PLAINTIFFS CASE:

4. The Plaintiff called two witnesses, namely, Mr. Bulent Gulbahar, who testified as PW1 and Mr. Simon Maina Muiruri, who testified as PW2.

5. According to PW1, same testified and indicated that he was a German/Turkish citizen, currently residing in Dubai, in the United Arabs Emirates.

6. Nevertheless, the witness further testified that at the time of delivery of his evidence , same was based at Istanbul in Turkey, where same had gone to seek for and obtain Medical treatment.

7. Be that as it may, the witness testified that he is a director of the Plaintiff Company and that by virtue of being a Director of the Plaintiff company, same is thus aware of and/or conversant with the subject matter before the court.

8. On the other hand, the witness further testified that same recorded a witness statement dated the 5th December 2019 and which was signed by himself and in this regard, the witness proposed to adopt and indeed adopted his witness statement as his Evidence in Chief.

9. Other than the witness statement, which the witness adopted as his evidence in chief, the witness also referred to various documents, which were filed and same proceeded to rely on and adopted the said Documents as Exhibits. For clarity, the first set of documents were at the foot of the List of Documents dated the 5th December 2019 and the said Documents were produced and marked as exhibits P1 to P5 respectively.

10. Secondly, the witness also referred the court to the Lists of documents dated the 13th February 2020, which List contained two (2) documents and which documents, the witness sought to rely on.

11. However, the said documents, which were essentially Valuation Reports, were objected to and same were thereafter marked as PMFI 6 & 7 respectively, on behalf of the Plaintiff.

12. Besides, the witness also referred the court to another set of documents at the foot of the list dated the 6th March 202, and same sought to rely thereon and the document herein, which contained and Bundle of email trail/correspondence, was produced and marked as exhibit P8.

13. Finally, the witness was further referred to the List of document dated 14th September 2020, containing one document, namely, the Resolution under seal of the company and the said Document was produced as exhibit P9.

14. Having referred to the various documents which were filed by and on behalf of the Plaintiff, the witness adopted his witness statement as well as the Plaint dated the 5th December 2019 and thereafter implored the Court to grant the reliefs sought at the foot of the said Plaint.

15. On cross examination, PW1 admitted that though he is a Director of the company, same has not adduced and/or produced before the court any evidence to show that he is such a Director.

16. Besides, PW1 also admitted that the deponent of the verifying affidavit, namely Clemence Wakio, is not Director of the Plaintiff company, but however, same is authorized Representative of the Plaintiff company. In this regard, the Witness, refered to the Resolution of the company to that effect.

17. On the other hand, Pw1 also admitted that there is also another case between the same Parties herein pending before the Chief Magistrate's Court, vide CMCC 4404 of 2017, which arises out of the said Agreement. However, the Witness contended that same is not aware of the current status concerning the said suit.

18. Other than the foregoing, the witness herein admitted that the Parties herein had agreed to compromise the subject matter and the Plaintiff was to refund to and in favor of the Defendant the sum of Kshs. 6, 022, 000/= Only,in settlement of the entire dispute.

19. Further, the witness also admitted that in line with Agreement, the Parties executed a Deed of settlement, which contained a range of terms of settlement between the Plaintiff and the Defendant and that the Deed of Settlement also extinguished any prior Agreements and/or engagements between the Parties.

20. Other than the foregoing, the witness further testified that the company does not disown the Deed of Settlement.

21. Nevertheless, it was PW1's answer that despite the terms of the Deed of Settlement, the Plaintiff herein still seeks for payment for rents in respect of the suit premises in the sum of Kshs.110, 000/= Only, from the date of the Deed of Settlement, in line with the valuation Reports.

22. Other than PW1, the other witness who testified on behalf of the Plaintiff, was Simon Maina Muiruri, who was PW2. According to PW2, same is a registered and practicing valuer, who has practiced as such for a duration of 15 years.

23. Besides, the witness also testified that same is currently the Managing Director of Topmark Valuers and that the organization was engaged and/or retained by the Plaintiff to carryout valuation concerning two apartments situate on L.R No 330/355, namely, Apartment B1-9 and A1-5, respectively and thereafter to report on their values.

24. The witness further testified that upon receipt of the instructions, same proceeded to and carried out the Valuation in respect of the two Apartments and thereafter prepared his Report, detailing his findings and recommendations.

25. Further, the witness testified that in the course of his valuation, same found out that Apartment B1-9 was a three bedroomed apartment, while Apartment A1-5, was a four (4) bedroomed apartment and that in terms of value, Apartment B1-9 was valued at Kshs..16, 500, 000/= only, whereas apartment A1-5 was valued at Kes.18, 000, 000/= only.

26. In terms of rental income, the witness testified that Apartment B1-9 would attract monthly rental income of Kes.90, 000/= Only, whereas apartment A1-5 would attract monthly kes.110, 000/= only.

27. It was the witness' further evidence that at the conclusion of the valuation exercise, same prepared Valuation report in respect of the two named Apartments and the reports were thereafter filed before the court. Consequently, the witness proceeded to and produced the Reports as Exhibits P6 and P7, respectively. With the testimony of PW2, the Plaintiff's case was closed.

28. The Defendant herein tendered her evidence as DW1 and for clarity, the Defendant indicated that same is an employee of the Ministry of Tourism and Wildlife.

29. On the other hand, the witness indicated that same was conversant with facts of this case and that same had recorded a witness statement dated 28th January 2020, and which same proposed to adopt and rely on as her Evidence in Chief. For clarity, the witness statement dated the 28th January 2020, was duly adopted as her Evidence in chief.

30. Besides, the witness also indicated that same had filed a List and Bundle of documents dated the 28th January 2020, containing a total 10 Documents and same proposed to adopt and rely on the said documents. In this regard, the document at the foot of the list dated 28th January 2020, were duly admitted as exhibit DD1 to D10, respectively.

31. In short, it was the Defendant's case that though same had initially expressed an Interest in purchasing and acquiring Apartment B1-9, which was constructed by the Plaintiff herein, same latter on communicated her desire to withdraw from the purchase of the Apartment.

32. It was the witness' further testimony that upon the communication of her desire to withdraw from the purchase, the Plaintiff herein expressly and explicitly, conceded to her request through her nominated advocate and thereafter a Deed of Settlement was entered into and duly executed.

33. According to the witness, the terms of the Deed of Settlement which was dated the 11th July 2016, were clear, and unequivocal and binding upon the Parties and therefore the suit by the Plaintiff herein is unnecessary.

34. On cross examination, the witness herein confirmed that same received a Letter of offer from the Plaintiff and that the Letter of offer has since be produced as exhibit D1.

35. On the other hand, the witness further admitted that the Letter of offer showed and confirmed the nature of the apartment that same was buying.

36. Further, the witness also admitted that when she received a Letter of offer, she thereafter requested for the Apartment to be changed into a Three bedroomed apartment and that indeed Apartment B1-9 is currently a Three-bedroom Apartment.

37. On the other hand, the witness also admitted that apartment B1-9 has not been reverted back into a Four Bedroomed Apartment to date. For clarity, the Witness confirmed that the apartment remains a three bedroomed apartment.

38. Further, the witness admitted that after the change of mind, she requested for a refund of the deposit that she had paid and thereafter a tabulation was done and upon the tabulation and/ or reconciliation, a figure of what was due and refundable was arrived at in the sum of Kshs.6, 022, 000/= Only.

39. It was the witness' further statement, that after the tabulation/ Reconciliation, a Deed was prepared and executed by the Parties and that the Deed of Settlement was signed on the 11th July 2016.

40. Other than the foregoing, the witness herein also stated that same has since filed a suit in the lower court wherein same is seeking for refund of the sum of kes.6, 022, 000/= Only, being the Monies at the foot of the Deed of Settlements.

41. On cross examination and in answer to the question as to whether she responded to the Letter dated 30th October 20117, which is as page 23 of the Plaintiff's bundle, the witness stated that same could not recall, whether she responded to same, namely, the said Letter.

42. On the other hand, the witness also sated that though same had received correspondence to propose any contractor for purposes of reinstatement of the suit property into a four bedroomed apartment, she did not make any Counter proposal.

43. Nevertheless, the witness further testified that she did not do so because she intended to visit the premises beforehand. However, the Witness stated that the intended visit did not materialize.

44. Finally, the witness sated that if there was an Agreement on reinstatement or restoration of the Apartment back to the Previous state, she would be amenable to bear the costs of such reinstatement.

45. On re-examination, the witness clarified that she did not respond to the Letter dated 30th October 2017, because same was made and/ or written on a Without prejudice basis.

46. Secondly, the witness also clarified that there was no Agreement on reinstatement or restoration of the Apartment into a Four-bedroom apartment and that the Deed of Settlement stated that same consisted of the Final and Binding Documents between the Parties.

SUBMISSIONS:

47. Upon the conclusion of the hearing, directions were taken and/or issued on the filing and exchange of written submissions. Consequently, the Parties proceeded to and indeed filed their respective submissions.

48. For clarity, the Plaintiff filed her lengthy and extremely elaborate submissions on the 5th March 2022 and also filed additional re-joinder submissions on the 16th March 2022. For coherence, the Rejoinder Submissions were in response to the Submissions by the Defendant herein.

49. On the other hand, the Defendant filed her written submissions on the 15th March 2022 and it is worthy to note that the three (3) sets of written submissions are on record.

50. Briefly, the Plaintiff has submitted that the Parties entered into and executed a Deed of Settlement dated 11th July 2016 and thereafter the Parties, engaged and/or indulged in various correspondence, whose net effect was to alter and/or vary the terms of the Deed of Settlement and to adjust same to accommodate the Issue of reinstatement of the Apartment to its initial state.

51. It is the Plaintiff's further submissions that the plethora correspondence vide email which were exchanged by the Parties, were such that same created a binding contract between the Parties herein, particularly, on issue of restoration and/or reinstatement of the apartment to the initial state and/or status, before the alteration of same at the request of the Defendant.

52. In support of the submissions that a Contract can be created on the basis of correspondence exchanged between the Parties, the Plaintiff relied on the following Decisions; **Tetu Housing Society Ltd v Peter Njoroge Njau t/a Njau Associates (2013) eKLR, Kukal Properties Development Ltd v Tafazzal H. Maloo & 3 Others (1993), Karanja Mbugua & Another v Marybin Holding Company Ltd (2014) eKLR, Central Farmers Garage Ltd v Rift Valley Outlet Ltd (2012) eKLR and Travel Creation Ltd v Paradise Safari Park Ltd (2014) eKLR.**

53. On the other hand, the Plaintiff further submitted that during cross examination, the Defendant herein admitted that same was willing to bear the costs of restoration and/or reinstatement of the Apartment back to its initial Status and that based on that admission by the Defendant, same is estopped from reneging on the Admission and from making good restoration.

54. Based on the foregoing, the Plaintiff herein has therefore implored the honourable court to find and hold that having entered into the Deed of Settlement, which was signed by the Parties on the 11th July 2016, the Parties exchanged various correspondence, which looked at in their totality, created a Further Contract between the Parties which is enforceable in the eyes of the law.

55. On her part, the Defendant only submitted on one issue, namely:

56. The Parties, namely, the Plaintiff and the Defendant knowingly and willingly entered into a Deed of Settlement which contained all the terms of engagement and in respect of which the Parties agreed to be binding.

57. It was the Defendant's further submissions that having entered into and executed the Deed of Settlement, the Parties created a Contract and that in the event of any dispute, it behooved the Court to interpret the Contract in accordance with the known cannons of interpretation and that the court should avoid an endeavor to re-write the Contract on behalf of the Parties.

58. Further, the Defendant submitted that the Deed of Settlement was carefully crafted and same contained Clauses 2.3, 2.3, 2.3, and 2.5 thereof, which effectively extinguished all previous Drafts, Agreements, Promises, Assurances, Warranties, Representations, and Understanding between the Parties herein, whether written or otherwise, relating to the subject matter.

59. In any event, the Defendant herein, invited the court to take note of the Decisions in the cases **of National Bank of Kenya v Pipeplastic Samkolit (k) Ltd & Another (2001) eKLR and Mamta Peeush Mahajan versus Yashwuant Kumari Mahajan (2017) eKLR**, which decisions underscored the role of the court in interpreting as Contract, like the one which was entered into and executed between the Parties herein.

60. Finally, the Defendant therefore implored the court to find and hold that the Plaintiff's suit herein is devoid of merits and that same ought to be Dismissed with costs.

ISSUES FOR DETERMINATION:

61. Having reviewed the Plaint dated the 5th December 2019, the verifying affidavit attached thereto, the witness statement dated the 6th December 2019, the documentary evidence adduced by and/or on behalf of the Plaintiff, the statement of defense and the documentary exhibits adduced on behalf of the Defendant and having similarly evaluated the oral testimony tendered by the Parties and their witnesses and having considered the submissions filed by the Parties, the following issues do arise and are germane for determination;

a. Whether the Deed of Settlement dated the 11th July 2016 was freely and voluntarily entered into and executed by the Parties.

b. Whether the Deed of Settlement is binding on the Parties and whether same was varied by the subsequent correspondence in the manner alluded to by the Plaintiff.

c. Whether the Plaintiff is entitled to the Reliefs sought.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Deed of Settlement dated the 11th July 2016 was freely and Voluntarily entered into and executed by the Parties.

62. The first issue herein may appear rhetorical in nature, but it becomes important and worthy of determination, given the contention by the Plaintiff herein that the Deed of Settlement was/ is null and void.

63. Given this kind of position and posture, which has been taken by and/or on behalf of the Plaintiff, it becomes appropriate and paramount to ascertain and/or authenticate the circumstance under which the Deed of Settlement was executed.

64. In view of the foregoing, it is imperative to note that after the execution of the letter of offer, which was dated 10th July 2011, a copy which was produced as exhibit D1 by the Defendant herein, same thereafter came to the conclusion that she was no longer interested in proceeding with and/or purchasing the suit property.

65. Consequently and in the premises, the Defendant, through her named advocates wrote to the Plaintiff vide letter dated 6th April 2016, signaling, her intention to rescind or Withdraw from the contract.

66. Pursuant to the letter by the Defendant, the Plaintiff through her nominated advocates, namely, M/s Henia Anzala & Associates wrote to the Defendant's advocates and indeed signaled to the Defendant's advocate vide letter dated 5th May 2016, that the Plaintiff herein was agreeable to the proposed rescission of the transaction.

67. On the other hand, the Plaintiff also indicated that same was similarly, agreeable to refund the sum of Kshs.6, 022, 500/= only. For clarity, the Plaintiff's letter under reference was produced as exhibit D7.

68. Following the letter by and/or on behalf of the Plaintiff's advocate, details in terms of the preceding paragraph, the Plaintiff's advocate thereafter proceeded to and prepared the Deed of Settlement, which was thereafter enclosed and forwarded to the Defendant's advocates on record for purposes of for execution and further action.

69. It is worthy to point out that the Deed of Settlement, which was prepared by the Plaintiff's own advocates, was thereafter executed by the Defendant herein and same was duly attested on behalf of the Defendant. For clarity, the said Deed of Settlement was also executed by and/or on behalf of the Plaintiff company and same was similarly attested.

70. During the entire proceedings before the court, the Plaintiff's witness, namely PW1, did not contest the execution of the Deed of Settlement and neither did same allege that the contents thereof were never explained to him or any of the Directors of the Plaintiff Company.

71. Notwithstanding the foregoing, it is also worthy to recall that during cross examination PW1 stated as hereunder;

"The plaintiff does not disown the Deed of Settlement"

72. It is worthy to note that the Deed of Settlement was prepared and/or originated by the Plaintiff's own advocate, obviously, on instructions of the Plaintiff. I say, obviously on instructions of the Plaintiff, because the Plaintiff's witness did not complain about the Deed of Settlement having been prepared without instructions and/or knowledge of the Plaintiff.

73. Secondly, up to and including the time of the testimony of the Plaintiff's witnesses, it is evident that no proceedings have been commenced and/or taken to challenge the validity and/or propriety of the Deed of Settlement.

74. Thirdly, the Plaintiffs own Director, while answering a Question during cross examination, unreservedly admitted that the Plaintiff does not disown the Deed of Settlement.

75. Based on the foregoing, the only logical and reasonable conclusion that one can come to, is that the Deed of Settlement was voluntarily, willingly and knowingly executed and signed by the Parties acting at arms-length, with the sole aim of bringing to a close the issues pertaining to the subject matter, relating to the rescission of the purchase of the suit property, namely, Apartment B1-9.

76. In the premises, it is not open for the Plaintiff herein to contend that the Deed of Settlement was/is null and void. However, even if the Plaintiff was keen to pursue the said limb of the claim, the foregoing observations, would be sufficient to disabuse the Plaintiff of the notion to the contrary, namely, that the Deed of Settlement, was Null and Void.

ISSUE NUMBER 2

Whether the Deed of Settlement is binding on the Parties and whether same was varied by the subsequent Correspondence in the manner alluded to by the Plaintiff.

77. Having resolved the first issue herein, it is now appropriate to deal with the issue as to whether or not the Deed of Settlement was binding on the Parties.

78. First and foremost, the Deed of Settlement contained terms and conditions, which were explicitly and expressly negotiated and thereafter agreed upon between the Parties. For clarity, after the negotiation and subsequent Agreement, both Parties confirmed their assent by appending their signatures and seal, where appropriate on the document.

79. It is worthy to note that the appendage or affixation of the signature or seal, where appropriate, was meant to show that the concerned Parties had internalized and acknowledged the terms of the Deed of Settlement and that same agreed to be bound by the said terms and conditions, unreservedly.

80. In the premises, the Deed of Settlement dated the 11th July 2016, formed a contract between the Plaintiff and the Defendant herein, whose terms were meant to bind the Parties thereto and in this regard, the Plaintiff and the Defendant signaled their readiness and willingness to be so bound. Consequently, I find and hold that the Deed of Settlement was indeed binding on the Plaintiff and the Defendant.

81. Secondly, having crafted a binding contract between themselves, the Parties herein are therefore to guided by the said Contract and in the event of a dispute, a court of law is enjoined to construe and/or interpret the Contract within the confines of the law and in accordance with the established cannons of interpreting Contracts, Agreements and or Deeds, which cannons are well documented.

82. Before venturing to address whether or not the terms of the Deed of Settlement were varied or otherwise, it is appropriate to consider some of the leading case law touching on the interpretation and/ or construction of Contracts. In this regard, I beg to start with the decision in the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR,** where the Court of Appeal stated as hereunder;

> ***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.***
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> ***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".***

83. The other leading case that is also worthy of being mentioned and considered is the Decision in the case of **Twiga Chemicals Industries Ltd v Allan Stephen Reynolds (2014) eKLR**, where the Court of Appeal cited with approval, where the court cited a passage in Odgers Construction Of Deeds And Statutes (5th edn) at p.106 noting in respect to the rule that:

> ***"It is familiar rule of law that no parol evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument. The rule applies as well as deeds as to contracts in writing. Although the rule is expressed to relate to parol evidence, it does in fact apply to all forms of extrinsic evidence".***
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> ***<u>This position is also reiterated in Halsbury's Laws of England (4th edn) vol. 9 (1) where para 622 partly states that:</u>***
>
> ***"Where the intention of parties has in fact been reduced to writing, under the so-called parole evidence rule, it is generally not permissible to adduce extrinsic evidence, whether oral or written, either to show the intention, or to contradict, vary or add to the terms of the document, including implied terms".***

84. The third decision worthy of consideration is the case of **The Speaker Kisii County Asembly & 2 Others v James Nyaoga Omariba (2015) eKLR,** where the Court Of Appeal stated 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 paragragh,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 terms 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."***

85. The foregoing decisions, are unanimous in the finding and holding that where the terms of a Contract and/or Deed are explicit and

unequivocal, the court is obliged to give effect and meaning to the said terms and the court must eschew an invitation to re-write the contract at the instance of either Party.

86. Simply put, a Party must be prepared to live within the terms of her bargain, unless any of the established exceptions, which were discussed in the National Bank case (supra) are proven and/ or established.

87. In respect of the subject matter, the Plaintiff and the Defendant willingly agreed to execute the Deed of Settlement and same covenanted that the Deed of Settlement shall constitute the entire agreement between the Parties and supersedes and extinguishes all previous draft, agreements, promises, assurances, warranties, representations and understanding between them whether, written or oral relating to the subject matter.

88. In my understanding, having executed and signed the Deed of Settlement, the Plaintiff herein cannot now revert back to the terms and/or clauses which were contained in the Letter of offer dated 10th July 2011 and or purport to anchor a claim for restoration of the Apartment to the Status *ante* in terms of paragraph 8 of the Plaint. For clarity, that kind of antic was extinguished by clause 2.2 of the Deed of Settlement.

89. On the other hand, the Plaintiff herein has also contended that subsequent to the signing and/or execution of the Deed of Settlement, the Parties herein exchanged various correspondence via email and that the correspondence which were exchanged via email constituted and/or created a complete Contract binding on the Parties and relating to the reinstatement or restoration of the suit apartment into a Four bedroomed apartment by the Defendant.

90. I must point out that the correspondence alluded to and which the Plaintiff contends have created a contract between the Plaintiff and the Defendant for restoration of the suit apartment, do not actually constitute a Contract in the first place.

91. For clarity, it is important to note that the said correspondence via email are correspondence between the Parties advocates in respect of Nairobi CMCC NO 4406 of 2017, which is pending before the Chief Magistrate's Court and which is not yet concluded.

92. Obviously, the said email correspondence are correspondence being exchanged in an attempt to negotiate a settlement in respect of Milimani Chief Magistrate's Court No. 4406 of 2017 and have thus been exchanged on a without prejudice basis, to facilitate negotiation in the said case.

93. Consequently and in the premises, the said email correspondence do not have any probative value, until and unless a Settlement was/ is arrived at and/or achieved in the concerned matter, that is, the matter in respect of which such correspondence were being exchanged.

94. Secondly, the said correspondence are not related to the subject matter, which is ELC NO 404 of 2019, and therefore it cannot be contended that the said email communication had anything to do with the subject matter herein. In my humble view, I cannot import the terms and tenor of the said correspondence, made on a Without prejudice basis in another matter, to impact on the subject suit.

95. Notwithstanding the foregoing, another critical issue that does arise is that the said email correspondence would still not impact on the Deed of Settlement because same is not directed to the Deed of Settlement and neither do they concern the Deed of Settlement. For clarity, if the correspondence, were intended to affect the Deed of Settlement, certainly, the said Deed of Settlement would have been the subject thereof.

96. Finally and even assuming that I was wrong on the three observation herein before, it is important to take note of the provisions of clause 2.5 of the Deed of Settlement which provides as hereunder;

> ***"No provision of this Deed may be changed, waived, discharged or terminated unless it is in writing and duly executed by and/or on behalf of the Parties"***

97. I must say, that the Parties herein exercised their wisdom succinctly and clearly and made their choice known to all and sundry, that the only way to vary, change and/or discharge the terms of the Deed of Settlement was by an addendum in writing duly signed. Clearly, correspondence, in the manner proffered by the Plaintiff herein were expressly envisaged.

98. Be that as it may, where a Contract and/or Deed are clear and explicit and beyond peradventures, the Court cannot imply a term into the Contract, even if the Court were to deem it that the term would have been reasonable. Such kind of a recourse, must be avoided, eschewed and frowned upon.

99. For clarity, the foregoing position was emphasized by the Court of Appeal in the decision in the case of **Travel Creation Ltd v Paradis Safari Park Ltd (2014)eKLR**, where the court observed as hereunder;

> ***Commerce is about profit making not losses. The latter are the exception and not the general rule. This was discussed in the Court of Appeal case of Campling Bros & Vanderwal Ltd – Vs – United Air services Ltd [1952] XIX 155 that :***
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> ***"A term can only be implied if it is necessary in the business sense to give efficacy to the contract."***
>
> ***Explaining this holding, Sir Barclay Nihill (President of the Court of Appeal for Eastern Africa) referring to the case of Rufate – Vs – Union Manufacturing Co (Ramsbolton([1919] LRI KB 592, where Scrutton J said thus:-***

"The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the Court thinks it would have been reasonable to have inserted it in the contract. A term can only be implied if it is necessary in the business sense to give efficacy to the contract that is, if it is such a term that can comfortably be said that if at the time the contract was being negotiated someone had said to the parties

100. In my humble view, the Deed of Settlement dated the 11th July 2016, whose terms were explicit, was binding on the Parties and same was neither altered nor varied by any subsequent correspondence or events, whatsoever.

ISSUE NUMBER 3:

Whether the Plaintiff is entitled to the Reliefs sought.

101. Before venturing to resolve the issue herein, it is important to take cognizance of clauses 2.2, 2.3, 2.5 and 2.6 of the Deed of Settlement dated the 11th July 2016.

102. For brevity purposes, the clauses are reproduced as hereunder;

Clause 2.2

This Deed constitutes the entire Agreement between the Parties and supersedes and extinguished all previous agreements, assurance, promises, understanding between them, relating to the subject matter"

Clause 2. 3

"each Party acknowledges that, in entering into this deed, it does not rely on and shall have no remedy in respect of, any statement, representation, assurance or warranty (whether made innocently or negligently) that is not set out in this deed

Clause 2.5

"No provision of this Deed may be changed, waived, discharged and/or terminated unless in in writing and duly executed by and/or on behalf of the Parties"

Clause 2.6

"Each of the Parties hereby agrees and confirms for purposes of the law of contract Act, Chapter 23 Laws of Kenya, that she/it as the case maybe, has executed this deed with the intention to bind herself/itself, as the case maybe, to the contents hereof.

103. Without belaboring the point, it is important to take note that upon the execution of the Deed of Settlement the Parties herein covenanted that each of them shall have no remedies in respect of the subject matter, whether arising out of any statement, representation, assurance or warranty (*innocently or negligently made*), which is not set out in this Deed.

104. Simply put, the Parties herein acknowledged that all the remedies, if any, were contained and/or stipulated in the Deed of Settlement.

105. Based on the terms of the Deed of Settlement, the only evident remedies that were available to the Parties were the retention of the sum of kes.1, 000, 000/= only, by the Plaintiff herein out of the deposit that had been paid by the Defendant and Refund of the sum of kes.6, 022, 500/= Only, to the Defendant.

106. For clarity, even the refund herein was to be made within the timeline stipulated vide clause 1.2 of the Deed of Settlement.

107. Suffice it to note, that the Refund in the sum of Kshs.6, 022, 500/= only, at the foot of the Deed of Settlement has not been made to and in favor of the Defendant and the same is the subject of the proceedings before Milimani Chief Magistrate's Court vide CMCC 4406 of 2017. Consequently, I will say no more.

108. Nevertheless, I therefore beg to state that the Plaintiff herein is not entitled to any claim and/or relief outside clause 2.3 of the Deed of Settlement, which was freely and voluntarily executed by herself.

FINAL DISPOSITION:

109. Having reviewed the Issues for Determination that were itemized herein before, it is now appropriate and/or expedient to render a determination in respect of the subject matter.

110. In a nutshell, I come to the conclusion that the Plaintiff's case is devoid and or bereft of merits and same is therefore a candidate for dismissal.

111. Consequently and in the premises, same be and is hereby Dismissed with costs to the Defendant.

112. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20th DAY OF APRIL 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Mr. Valentine Ataka for the Plaintiff.

Mr. Chege for the Defendant.