Swanya Limited & 2 others v Homebay Property Limited (Environment & Land Case E250 of 2021) [2024] KEELC 4121 (KLR) (6 May 2024) (Judgment)

Neutral citation: [2024] KEELC 4121 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E250 OF 2021

JO MBOYA, J

MAY 6, 2024

BETWEEN

SWANYA LIMITED ..... 1ST PLAINTIFF

STEVE KAMUYA ..... 2ND PLAINTIFF

FAITH HAKI ..... 3RD PLAINTIFF

AND

HOMEBAY PROPERTY LIMITED ..... DEFENDANT

JUDGMENT

Introduction and Background:

1. The Plaintiffs herein approached the court vide Plaint dated the 26th November 2021 and in respect of which same [Plaintiffs] sought for a plethora of reliefs;

2. Nevertheless, the original Plaint was subsequently amended culminating into the amended Plaint dated the 28th January 2022; and wherein the Plaintiffs have sought for the following reliefs [verbatim];

    i. Order for Specific performance to complete the sale and transfer the suit property in the name of the Plaintiffs respectively;

    ii. Specific damages for the 1st Plaintiff:

        a. For rental income at USD. 2,250.00 from 17th May 2021 to completion of the suit with interests at court 2% bank rates.

        b. For loss of bargain at KES. 2,000,000.00 interests at 2% bank rate.

    2nd and 3rd Plaintiffs

a. For rental income at USD. 2,250.00 from 17th May 2021 to completion of the suit with interests at court 2% bank rates.

b. For loss of bargain at KES. 2000,000 plus interests at court 2% bank rates.

iii. General and Exemplary damages.

Or in the alternative iv.

iv. Refund of purchase price of:-

1st Plaintiff

a. Kes. 8, 687,000/= and Kes 10,700,000/= plus interest at 2% bank rates per month from 14th April 2020 until completion of the suit.

v. Loss of bargain at Kes. 2,000,000/- plus interest at 2% bank rates per month from 17th May 2021 until the completion of the suit.

vi. For loss of rental income at USD. 2,250.00 with interests at 2% bank rates per month from 17th May 2021 until the completion of suit.

vii. Refund of purchase price of:- 2nd and 3rd Plaintiff

a. Kes. 8, 687,000/= and 10,150,000/= plus interest at 2% bank rates per month from 14th April 2020 until the completion of the suit.

viii. Loss of bargain at Kes. 2,000,000/- Only, plus interest at 2% bank rates per month from 17th May 2021 until the completion of the suit.

ix. For loss of rental income at USD. 2,250.00 Only, with interests at 2% Bank rates per month from 17th May 2021 until the completion of suit.

And

i. Cost of suit and interests.

ii. Any other relief as the court may be pleased to grant.

3. Instructively, upon being served with the amended Plaint, the Defendant herein filed a statement of defense dated the 16th May 2022 and in respect of which the Defendant herein sought to inter-alia have the Plaintiff suit dismissed with costs and with an order that the Plaintiffs do pay up the balances of the purchase price plus [sic] interest.

4. Furthermore, the Defendant also contended that in the event of default to pay up the balances of the purchase price, then the Plaintiffs do get refund of the monies so far paid less 10% forfeiture.

5. Though served with the statement of defense, details in terms of the preceding paragraphs, the Plaintiffs herein did not file [better still] appear not to have filed any Reply to the statement of defense. Consequently and in this regard, there arose a joinder of issues on the basis of the last filed pleadings [statement of defense].

6. First forward, the pleadings in respect of the instant matter closed and the matter was subsequently listed for pretrial directions before the court on the 6th December 2022, whereupon the parties confirmed to the court that same [parties] had filed and exchanged the requisite pleadings, list and bundle of documents; as well as the relevant witness statement[s].

7. Premised on the foregoing, the court duly confirmed the matter as ready and ripe for hearing, culminating the matter being fixed for hearing.

Evidence by the Parties:

a. Plaintiffs' Case:

8. The Plaintiffs' case gravitates and revolves around the evidence of three witness, namely, Swanya Victor Ogeto, Martin Mugambi and Charles Mutinda, who testified as PW1, PW2 and PW3, respectively.

9. It was the testimony of PW1 [Swanya Victor Ogeto] that same is an advocate of the High court of Kenya and also a Director of the Plaintiff company. Furthermore, the witness averred that by virtue of being a director of the 1st Plaintiff company, same is thus conversant with and knowledgeable of the facts of the matter.

10. In any event, the witness [PW1] also testified that the 1st Plaintiff herein duly generated a resolution under seal and wherein the 1st Plaintiff mandated and authorized him [witness] to attend court and give evidence in respect of the instant matter.

11. On the other hand, it was the testimony of the witness that same is also familiar with the 2nd and 3rd Plaintiffs, whom the witness [PW1] intimated to have authorized and mandated same to testify on their behalf.

12. Additionally, it was the evidence of the witness that as pertains to the subject matter, same [witness] has recorded a witness statement dated the 25th May 2022 and which witness statement the witness sought to adopt and rely on as his [witness] evidence in chief.

13. Suffice it to state that the witness statement dated the 25th May 2022, [duly signed by the Witness], was thereafter adopted and constituted as the evidence in chief of the witness.

14. Other than the foregoing, the witness alluded to the List and bundle of documents dated the 25th May 2022; containing a total of 51 documents and which documents the witness sought to tender and produce before the court. For coherence, the various documents enumerated at the foot of the List and bundle of documents dated the 25th May 2022 were thereafter admitted and marked as Plaintiffs' Exhibit[s] P1 to P51, respectively.

15. Besides, the witness herein also adverted to the amended Plaint dated the 28th January 2022, together with the verifying affidavit attached thereto and thereafter implored the court to grant the reliefs sought thereunder.

16. On cross examination by learned counsel for the Defendant, the witness stated that by virtue of being an advocate of the High court of Kenya, same [witness] is therefore conversant with the relevant and applicable laws pertaining to contracts and agreements.

17. Whilst under further cross examination, the witness averred that when the Defendant herein generated the various letters of offer same [witness] was able to read through the letters of offer prior to and before the letters of offers were signed by the Plaintiffs.

18. Nevertheless, it was the testimony of the witness that even though the Defendant issued the letters of offers, copies of which have been tendered and produced before the court, no sale agreement was ever signed and/or executed between the parties.

19. On further cross examination, the witness added that even though no sale agreement was duly executed and/or signed between the parties, it was mutually agreed that the letters of offer would operate and suffice as the contract between the parties up to and until a formal sale agreement was signed.

20. Furthermore, it was the evidence of the witness that following the execution of the letter of offer, the Plaintiff proceeded to and made payments to and in favor of the Defendant, which payments, the Witness stated were duly acknowledged.

21. On the other hand, it was the testimony of the witness that the letters of offer which were duly signed by the parties intimated that the vendor [read Defendant] would be the one responsible for the preparation of the sale agreement.

22. In any event, the witness averred that there was a clause in the letter of offer which indicated that the sale agreement, if any, would be executed within 10 days from the date of the letter of offer.

23. On further cross examination, the witness averred that though same [Plaintiffs] received the sale agreements, same [Plaintiffs] did not sign/execute the sale agreements. In any event, the witness added that subsequently, the Plaintiffs received various emails correspondence from the Defendant relating to the execution of the sale agreements.

24. Additionally, it was the evidence of the witness that despite not having executed the sale agreement, same [Plaintiffs] made various payments on account of the purchase of the designated apartments. In any event, the witness added that the payments which were made were duly received and acknowledged by the Defendant herein.

25. Whilst under further cross examination, the witness averred that the Plaintiffs clearly indicated the reason why same [Plaintiffs] did not sign/execute the sale agreements.

26. On the other hand, it was the testimony of the witness that the Defendant herein failed to avail to the Plaintiffs the sectional plans pertaining to and concerning the apartments which were being sold to the Plaintiffs. Nevertheless, the witness conceded that the letters of offer does indicate that the sectional plans would be availed to and in favor of the Plaintiffs.

27. It was the further testimony of the witness that same has also tendered and produced before the court a copy of the sale agreement which was forwarded to the Plaintiffs for execution. However, the witness added that the sale agreement under reference also did not provide that the Plaintiffs would be entitled to and/or availed a copy of the sectional plan.

28. Other than the foregoing, it was the testimony of the witness that though no sale agreement was signed, the contract between the Defendant and the Plaintiffs continued to subsist. For good measure, the witness averred that the letters of offer did not lapse.

29. On further cross examination, it was the testimony of the witness that same [Plaintiffs] did not receive any default notices issued and/or sent by the Defendant. Instructively, the witness added that the letters which same receive from the Defendant did not constitute and/or amount to default notices.

30. On the other hand, it was the testimony of the witness that the Plaintiffs paid monies which constituted 10% deposit of the purchase price. In any event, the witness added that the Plaintiffs herein did not breach the terms of the letter of offer.

31. On the contrary, it was the evidence of the witness [PW1], that it is the Defendant who has breached the terms of the contract between the Plaintiffs and the Defendant.

32. It was the further testimony of the witness that the Plaintiffs herein did not execute the sale agreements because same [Plaintiffs] did not agree with the terms thereof. For good measure, the witness averred that the Plaintiffs were complaining about the terms of the sale agreements.

33. On the other hand, the witness averred that the letters of offer, which same has tendered and produced before the court are in respect of two [2] apartments. Further, it was the testimony of the witness that the two [2] apartments under reference were not complete as at 2020.

34. Whilst under further cross examination, the witness averred that the letters of offer which same [Plaintiffs] executed contained clear and explicit terms governing the relationship between the parties. In any event, the witness added that same was able to read through the contents of the letter of offer before affixing his signature thereto.

35. Other than the foregoing, it was the testimony of the witness that the Defendant intimated to same [Plaintiffs] that the designated apartment[s] were completed but subsequently it transpired that there were some defects that were noted in the apartments. In this respect, the witness averred that same [Plaintiffs] were obliged to and indeed issued a demand letter seeking for corrections as pertains to the defects.

36. Additionally, it was the evidence of the witness that the Defendant and the plaintiff herein thereafter undertook inspection of the designated apartment[s] and came up with a snag list, which contained the details of the defects in respect of the two [2] apartments.

37. Furthermore, it was the testimony of the witness that the Plaintiffs have made substantial payments towards and in respect of the suit apartment[s]. In any event, the witness added that the Plaintiffs are ready to proceed with the purchase of the apartments.

38. At any rate, the witness averred that the Plaintiffs have the requisite ability to complete the transaction[s] in question.

39. Be that as it may, the witness acknowledged that despite making various payments, including the payment at the foot of page 40 of the Plaintiffs' bundle of documents, there are still balance[s] of the purchase price due and outstanding on the suit apartments.

40. The second witness who testified on behalf of the Plaintiff was Martin Mugambi. Same testified as PW2.

41. It was the testimony of the witness that [PW2] that same is an architect duly registered with the regulatory body, namely, BORAQS. Furthermore, the witness averred that same has been an architect for over 12 years.

42. It was the testimony of the witness that same [PW2] was engaged and/or retained by the Plaintiffs herein to undertake and/or carryout an inspection in respect of some properties situate within Kilimani, along Kirichwa Road, Nairobi.

43. Additionally, the witness averred that upon receipt of the instruction[s] from the Plaintiffs herein, same [witness] proceeded to and undertook the requisite inspection of the designated apartments and thereafter proceeded to and generated a site inspection report dated the 11th October 2022.

44. On the other hand, it was also the evidence of the witness that same also recorded a witness statement over and in respect of the subject matter. In this regard, the witness adverted to the witness statement dated the 31st October 2022 and which witness statement the witness sought to adopt and rely on.

45. Suffice it to point out that the witness statement dated the 31st October 2022 [duly signed by the Witness] was thereafter adopted and constituted as the evidence in chief of the witness.

46. Other than the foregoing, the witness also alluded to a Supplementary List and bundle of documents dated the 31st October 2022, containing six [6] documents and which documents the witness sought to adopt and rely on. Instructively, the witness thereafter proceeded to and produced the site inspection report as an Exhibit before the court.

47. On cross examination, by learned counsel for the Defendant, the witness averred that same was retained and engaged by the Plaintiffs herein. Furthermore, the witness averred that upon retention, same proceeded to the apartments on the 5th October 2022.

48. It was the further testimony of the witness that after the inspection same [Witness] proceeded to and prepared a site inspection report, itemizing the various snags [defects], which were noted in the two [2] apartments.

49. On further cross examination, the witness averred that when same [witness] visited the designated apartments, there was a representative of the Defendant. However, the witness clarified that the representative was the receptionist, who opened the doors of the designated apartments.

50. Whilst under further cross examination, the witness averred that in the course of the inspection, same did not set sight on the [see] the overall bill of quantities [BQ] relating to the entire project.

51. Nevertheless, it was the testimony of the witness that arising from the inspection, same [witness] was able to come up with a snag list, itemizing various defects which were evident in the designated apartments.

52. Whilst under further cross examination, the witness averred that even though same visited the two apartment he [witness] did not visit/inspect any other apartment within the designated project.

53. Other than the foregoing, the witness averred that even though same is aware that another officer retained by the Plaintiffs prepared a bill of quantities, same [witness] is however not able to comment on the said bill of quantities. For good measure, the witness averred that the bill of quantities can only be spoken to by a Quantity surveyor.

54. On the other hand, the witness averred that in the course of his inspection of the designated apartments same [witness] came across a snag list which was prepared and signed by the parties. Nevertheless, the witness added that he [witness] proceeded to and generated another snag list, which contained additional snags [defects], which were not contained in the previous snag list signed by the parties.

55. The third witness who testified on behalf of the Plaintiffs was Charles Mutinda. Same testified as PW3.

56. It was the testimony of the witness that same is a duly registered Quantity surveyor. Furthermore, the witness averred that same [witness] was engaged and instructed by the Plaintiffs herein to carryout inspection in respect of two [2] apartments situate within Kilimani Area, Kirichwa Road, within the City of Nairobi.

57. It was the further testimony of the witness that upon receipt of the Instruction[s] same proceeded to and indeed undertook the inspection in respect of the designated apartments. In this regard, the witness averred that thereafter same [witness] prepared a bill of quantities pertaining to the proposed repairs and the attendant costs of repairs.

58. On the other hand, it was the testimony of the witness that same also proceeded to and recorded a witness statement dated the 31st October 2022 and which witness statement the witness sought to adopt and rely on as his evidence in chief.

59. For coherence, the witness statement dated the 31st October 2022 was thereafter adopted and constituted as the evidence in chief of the witness.

60. Additionally, the witness adverted to a Supplementary List and bundle of documents dated the 31st October 2022 and thereafter sought to produce documents numbers 1, 4 and 6, respectively.

61. There being no objection to the production of the named documents, same were duly tendered and produced as Exhibits on behalf of the Plaintiffs.

62. On cross examination by learned counsel for the Defendant, the witness averred that same proceeded to and undertook inspection in respect of the designated apartments, albeit on the instructions of the Plaintiffs.

63. Furthermore, the witness averred that upon carrying out the inspection, same [witness] proceeded to and prepared a snag list showing the various defects that were apparent in the designated apartments.

64. It was the further testimony of the witness that it is the said snag list, which same used and relied upon for purposes of preparing the bill of quantities, speaking to the proposed repairs and the costs thereof.

65. Nevertheless and whilst under further cross examination, the witness averred that in the snag list, which same prepared he [witness] alluded to replacement of the floor tiles in the two apartments.

66. Additionally, it was the testimony of the witness that whilst undertaking and/or carrying out the inspection of the designated apartment, same [witness] did not meet the Defendant's project architect or quantity surveyor in the premises.

67. At any rate, it was the testimony of the witness that subsequently, same prepared the bill of quantities, which same [witness] availed and/or handed over to the Plaintiffs.

68. Be that as it may, it was the testimony of the witness that whilst preparing his bill of quantities, same did not look at and/or take cognizance of the main bill of quantities that was prepared in respect of the entire project.

69. On further cross examination, the witness averred that after undertaking the inspection same proceeded to and assessed the costs of the intended repairs in the sum of Kes.3, 100, 000/= only.

70. Nevertheless, the witness admitted that same was aware of a snag list that have been prepared and signed by the parties herein.

71. On re-examination, the witness averred that the preparation of the snag list would have required the participation of both parties. However, the witness admitted that the snag list which was prepared by same did not attract any input from the Defendant or at all.

72. With the foregoing testimony, the Plaintiffs' case was duly closed.

b. Defendant's Case:

73. The Defendant's case is premised on the evidence of two [2] witnesses namely, Quim Minxue and Benson Mbugua, who testified as DW1 and DW2, respectively.

74. It was the evidence of the witness [DW1] that same is a real estate investor and currently one of the directors of the Defendant company. Furthermore, the witness averred that by virtue of being a director of the Defendant company, same [witness] is conversant with the facts of the instant matter.

75. On the other hand, the witness averred that same has since recorded a witness statement dated the 23rd May 2022 and which witness statement the witness sought to adopt and rely on as his evidence in chief.

76. Suffice it to point out that the witness statement dated the 23rd May 2022 [duly signed by the Witness] was thereafter adopted and constituted as the evidence in chief of the witness.

77. Other than the foregoing, the witness also adverted to the list and bundle of documents dated the 16th of May 2022, containing 12 documents and which documents the witness sought to tender and produce before the court as Exhibits.

78. There being no objection to the production of the documents at the foot of the list dated the 16th May 2022; same [documents] were thereafter admitted and constituted as exhibits D1 to D12, respectively.

79. Additionally, the witness adverted to the statement of defense dated the 16th May 2022 and sought to adopt the contents thereof.

80. On cross examination by learned counsel for the Plaintiff, the witness averred that the project relating to the suit apartments was commenced in the year 2017. In any event, the witness averred that at the point in time when the project commenced there was already a show house, which had been constructed.

81. Whilst under further cross examination, the witness averred that the show house which had been constructed was intended to show/demonstrate the nature and quality of finishes in respect of the intended apartments.

82. It was the further testimony of the witness that the Defendant herein generated and issued various letters of offer to the Plaintiffs before the court. In this respect, the witness adverted to the various letters of offer which were contained at the foot of pages 50 to 52 of the Defendant's list and bundle of documents.

83. Furthermore, the witness averred that the Plaintiffs herein proceeded to and executed the letters of offer, which contained various terms of engagement between the Plaintiffs and the Defendant. For good measure, the witness stated that the terms of the letter of offer were binding on the parties.

84. Whilst under further cross examination, the witness averred that the terms of the letter of offer were to subsist pending the execution of a sale agreement. For good measure, the witness averred that the execution of a sale agreement would have superseded the letters of offer.

85. On further cross examination, the witness averred that the terms of the letters of offer are still binding on the parties. On the other hand, it was the testimony of the witness that it was the obligation of the vendor [Defendant] to generate the sale agreement and thereafter to forward same to the Plaintiffs.

86. Nevertheless, the witness admitted that the Plaintiffs were at liberty to propose amendments to the sale agreement for consideration by the vendor.

87. It was the further testimony of the witness that though a sale agreement was generated and forwarded to the Plaintiffs herein, the Plaintiffs declined to sign/execute the sale agreement. In this regard, the witness added that no sale agreement has ever been signed/executed between the parties beforehand.

88. Notwithstanding the foregoing, the witness averred that the rest of the purchasers proceeded to and duly executed the sale agreements.

89. Whilst under further cross examination, the witness averred that the Plaintiffs before the court indeed paid the requisite deposit towards the purchase of the suit apartment. In any event, it was the testimony of the witness that the deposit[s] which were paid by and on behalf of the Plaintiff are still being held by the Defendant.

90. On the other hand, the witness averred that the Defendant herein has also not handed over the suit apartment[s] to the Plaintiffs. For coherence, the witness averred that the handing over of the suit apartment[s] can only be done upon receipt [payments] of the full purchase price.

91. On re-examination, the witness averred that the project wherein the suit apartments are contained was duly completed in the year 2020. Furthermore, the witness added that the developer was thereafter issued with a certificate of completion.

92. Additionally, it was the testimony of the witness that the developer was also issued with a certificate of occupation by the City County Government of Nairobi.

93. On further re-examination, the witness averred that there are outstanding payments which are due over and in respect of the suit apartment[s]. For clarity, the witness averred that the outstanding payments for apartment A21 is Kes.2, 847, 000/=; whilst outstanding balance for apartment B29 is Kes.2, 297, 000/= only.

94. Be that as it may, the witness averred that the outstanding balances alluded to are exclusive of interest.

95. It was the further testimony of the witness that the parties herein undertook the inspection of the suit apartments and came out with a snag list which was duly signed by both parties. Furthermore, the witness averred that thereafter the Defendant proceeded to and undertook repairs in line with the snag list that have been signed by both parties.

96. At any rate, the witness added that after the defects were corrected and remedied, the Defendant duly notified the Plaintiffs, but the Plaintiffs have failed to clear/pay the balances outstanding in respect of the suit apartments.

97. The second [2] witness who testified on behalf of the Defendant was Benson Mbugua. Same testified as DW2.

98. It was the testimony of the witness [DW2] that same is a trained mansion. Furthermore, the witness averred that same was engaged by the Defendant herein during the construction of the project wherein the suit apartments are located.

99. Other than the foregoing, the witness averred that by virtue of his engagement during the construction of the suit project, same [witness] is therefore conversant with the facts of this matter.

100. Other than the foregoing, the witness adverted to a witness statement which same had recorded and thereafter implored the Honourable court to adopt and rely on the said witness statement. Instructively, the witness statement under reference was duly admitted and constituted as the evidence in chief of the witness.

101. On cross examination by learned counsel for the Plaintiff, the witness averred that same is not an architect. In any event, the witness clarified that same was not the project architect in respect of the project beforehand.

102. Whilst under further cross examination, the witness averred that the project in question was undertaken in accordance with the Bill of quantities [BQ] and same was thereafter completed.

Furthermore, the witness added that upon completion, the developer was issued with a Certificate of completion.

103. On the other hand, the witness also testified that the developer was also issued with a Certificate of occupation by the City Government of Nairobi. Nevertheless, the witness averred, that same [witness] is not aware whether the said certificates have been tendered and produced before the court.

104. On re-examination, the witness stated that other than being a trained mansion, same is also an assistant architect. In this regard, the witness averred that same is privy to and knowledgeable of the import and tenor of a certificate of practical completion and a certificate of occupation.

105. On the other hand, it was the testimony of the witness that the Defendant herein undertook repairs in accordance with the snag list which was signed by both parties. In any event, the witness added that thereafter a handover certificate was also issued.

106. With the foregoing testimony, the Defendant's case was duly closed.

Parties Submissions:

a. Plaintiffs' Submissions:

107. The Plaintiffs filed two [2] sets of submissions dated the 29th January 2024 and 4th March 2024, respectively. For coherence, the Plaintiff raised, highlighted and amplified three [3] salient issues for consideration and determination by the court.

108. Firstly, learned counsel for the Plaintiff submitted that even though the parties herein did not execute a binding agreement [contract], pertaining to and concerning the suit apartments, however, the letter of Offer which was signed by the parties constituted a binding agreement as pertains to the suit apartment.

109. Furthermore, learned counsel for the Plaintiffs submitted that the letter of offer dated the 6th April 2020, which relates to the suit apartment[s] before the court contained a clause pertaining to the fact that same [Letter of offer] shall be binding on the parties until the sale agreement is duly signed. For good measure, learned counsel for the Plaintiffs invited the attention of the court to clause 14 of the letter of offer which confirmed the binding effect of the said letter of offer.

110. On the other hand, it was the submissions of learned counsel for the Plaintiff that insofar as the letter of offer was binding, same therefore constitute[s] an agreement/contract between the parties herein.

111. In support of the submissions that a letter of offer can constitute and/or be deemed as a binding contract, learned counsel for the Plaintiffs has cited and relied on inter-alia the decision in the case of Branca vs Cobarro [1947] 2ALL 77 and Halima N Wakabi vs Asaba Selevano, Civil Appeal No. 0064 of 2008 [UR], which is a decision of the High Court of Uganda.

112. Arising from the foregoing, learned counsel for the Plaintiffs has therefore implored the court to find and hold that there existed a lawful and binding contract between the Plaintiffs and the Defendant, as pertains to the suit apartments.

113. Secondly, learned counsel for the Plaintiffs has also submitted that the Plaintiffs herein are entitled to an order of specific performance as pertains to the suit apartments. For good measure, learned counsel has submitted that the Plaintiffs tendered evidence denoting that same have been ready, willing and able to conclude the transaction pertaining to the suit properties.

114. Furthermore, learned counsel contended that the non-completion of the sale transaction over and in respect of the suit apartment[s], has been caused and/or occasioned by the Defendant herein, who inter-alia has failed to remedy and rectify the defects which were evident in the suit apartments.

115. To buttress the submissions that the Plaintiffs herein have established and proved the requisite ingredients to warrant the grant of an order for specific performance, learned counsel for the Plaintiffs has cited and relied on inter-alia the case of Thomas Openda vs Peter Martin Ahn [1994]eKLR, Reliable Electrical Engineers Kenya Ltd vs Mantrac Kenya Ltd [2006]eKLR and Halsbury Laws of England, Vol 44 page 814, respectively.

116. Thirdly, learned counsel for the Plaintiffs has submitted that other than the remedy for specific performance, which the Plaintiffs are entitled to, the Plaintiffs are also entitled to recompense [compensation] on account of loss of rental income and loss of bargain.

117. Additionally, learned counsel has submitted that as pertains to loss of rental income it suffices that the Plaintiffs herein were always ready and willing to pay the outstanding balance but could not do so because of the omissions and/or inaction by the Defendant.

118. To vindicate the contention that the Plaintiffs are entitled to loss of rental income and loss of bargain in the manner impleaded at the foot of the amended Plaint; learned counsel for the Plaintiffs has cited and relied on inter-alia the case of Capital Fish Limited vs Kenya Power & Lighting Company Ltd [2016]eKLR, Hakika Transporters Services Ltd vs Albert Chula Wamitaire [2018]eKLR, James Nyakundi Ndege vs Backlays of Kenya Ltd [2012]eKLR and Jaswinda Singh Jing Jabal vs Mark John Tilbary & Another [2019]eKLR, respectively.

119. Premised on the foregoing submissions, learned counsel for the Plaintiffs has therefore implored the court to find and hold that the Plaintiffs herein have duly proved their case to the requisite standard and thus the court should proceed and grant the reliefs at the foot of the amended Plaint.

b.Defendant's Submissions:

120. The Defendant filed written submissions dated the 27th February 2024 and in respect of which same has similarly highlighted and canvassed three [3] pertinent issues for consideration by the court.

121. First and foremost, learned counsel for the Defendant has submitted that even though the Defendant generated and issued a letter of offer, which was duly accepted by the Plaintiffs herein, no sale agreement was ever formalized and/or entered into between the parties.

122. Furthermore, learned counsel for the Defendant has submitted that despite the fact that the Defendant generated and forwarded a sale agreement to and in favor of the Plaintiffs, the Plaintiffs herein failed and/or refused to execute the sale agreement for reasons only known to the Plaintiffs.

123. Owing to the foregoing, learned counsel for the Defendant has thus submitted that insofar as no sale agreement was ever entered into and/or executed, the transaction between the Plaintiffs and the Defendant stood and stands vitiated by dint of Section 3[3] of the *Law of Contract Act*, Chapter 23, Laws of Kenya.

124. In any event, learned counsel has submitted that in the absence of a duly executed agreement between the parties, the Plaintiffs' suit [claim] as pertains the suit apartments is therefore rendered illegal and void ab initio.

125. In support of the foregoing submissions, learned counsel for the Defendant has cited and relied on inter-alia the case of Kukal Properties Development Limited vs Tafazzal H Maloo & 3 Others

[1993]eKLR and Nyeri Teachers Investment Company Ltd vs Solio Ranch Ltd & Another [2015]eKLR, respectively.

126. Secondly, learned counsel for the Defendant has also submitted that insofar as there was no lawful and enforceable agreement [contract] entered into between the Plaintiffs and the Defendant herein, no order for specific performance can therefore issue and/or be granted.

127. Additionally, learned counsel for the Defendant has submitted that an order for specific performance is an equitable relief/remedy and hence same can only issue upon satisfaction of certain prescribed ingredient[s], which is not the case herein.

128. To buttress the submissions that the Plaintiffs are not entitled to the equitable remedy of specific performance, learned counsel for the Defendant has cited and relied on inter-alia the holding in the case of Godfrey Ngatia Njoroge vs James Ndungu Mungai [2019]eKLR; Reliable Electrical Engineers Ltd vs Mantrac Kenya Ltd [2006]eKLR and Maisha Investments Ltd vs Mohamed Hasanali Ali Mohammed Jan Momahhed & Another [2019]eKLR, respectively.

129. Thirdly, learned counsel for the Defendant has submitted that the Plaintiffs herein are guilty of breach of the contract and thus same are not entitled to the relief[s] sought or at all.

130. In any event, learned counsel for the Defendant has submitted that the sale agreement which was forwarded to the Plaintiffs for execution, but which the Plaintiffs declined to sign [execute] contained the remedies if any that would have been available to the Plaintiffs. In this regard, learned counsel for the Defendant invited the court to take cognizance of clause 10.7 of the unsigned sale agreement.

131. Furthermore, it was the submissions of counsel for the Defendant that the Plaintiffs herein can only be entitled to refund of the monies that were paid, albeit without interests and not otherwise.

132. All in all, learned counsel for the Defendant has submitted that the Plaintiffs have failed to establish and/or prove their case [claim] and hence same [Plaintiffs case] ought to be dismissed with costs.

Issues for Determination:

133. Having appraised the pleadings; the evidence [both oral and documentary] and upon consideration of the written submissions filed on behalf of the respective parties, the following issues do arise [crystalize] and are thus worthy of determination;

    i. Whether there exists a lawful and binding contract [agreement] between the Plaintiffs and the Defendant as pertains to the suit apartments or otherwise.

    ii. Whether the contract, if any has been breached; and if so by whom.

    iii. Whether the Plaintiffs are entitled to an order of specific performance either as sought or otherwise.

    iv. What remedies, if any; ought to be granted.

Analysis and Determination

Issue Number 1

Whether there exists a lawful and binding contract [agreement] between the Plaintiffs and the Defendant as pertains to the suit apartments or otherwise.

134. The dispute between the Plaintiffs on one hand and the Defendant on the other hand traces its roots to [sic] the letter of offer dated the 10th July 2017 but which was executed by the parties on the 14th July 2017. For good measure, the letter of offer under reference was generated by the Defendant and same related to designated apartment situate on L.R No. Nairobi/Block 2/421 Kirichwa Road Nairobi.

135. It is important to point out that upon the issuance of the letter of offer [details in terms of the preceding paragraphs] the Plaintiff proceeded to and paid the various deposits that was alluded to and highlighted thereunder.

136. Nevertheless, several events transpired between the parties herein culminating into the letter of offer dated the 10th July 2017 being superseded by another letter of offer dated the 6th April 2020. Instructively, it is the letter of offer dated the 6th April 2020, albeit executed on the 14th April 2020, which forms the basis of the dispute/suit beforehand.

137. Henceforth, the court shall be concerned with the interpretation and/or construction of the contents of the letter of offer dated the 6th April 2020, albeit executed on the 14th April 2020, with a view to discerning whether or not a lawful and enforceable agreement [contract] arose between the parties.

138. Nevertheless, it is imperative to point out that the two parties herein disagree on whether or not the contents of the letter of offer which was executed by the Defendant and upon which the Plaintiffs made various payments, does constitute an agreement or otherwise.

139. On behalf of the Defendant it has been contended that the letter of offer was a preliminary step towards the entry into and execution of a binding sale agreement between the parties. In any event, learned counsel for the Defendant has contended that an agreement was thereafter generated and sent to the Plaintiffs but same [Plaintiffs] declined to execute same.

140. Premised on the foregoing, learned counsel for the Defendants has therefore submitted that insofar as no sale agreement was entered into and/or executed, the Plaintiffs suit before the court is vitiated by dint of Section 3[3] of the *Law of Contract Act*, Chapter 23 Laws of Kenya.

141. Essentially, learned counsel for the Defendant has therefore invited the court to find and hold that no valid and enforceable agreement does arise between the Plaintiffs and the Defendant, to warrant enforcement by a court of law.

142. In support of the foregoing arguments, learned counsel for the Defendant has cited and relied on inter-alia the decision[s] in the case of Kukal Properties Developers Ltd vs Tafazzal H Maloo & 3 Others [1993]eKLR; Nyeri Teachers Investments Company Ltd vs Solio Ranch Ltd & Another [2015]eKLR and Maisha Investment Ltd vs Mohammed Hasanali Ali Mohammed Jan Mohammed & Another [2018]eKLR, respectively.

143. On the other hand, learned counsel for the Plaintiffs has submitted that the Defendant herein generated a letter of offer dated the 6th April 2020 but which was executed on the 14th April 2020 and which letter of offer was deemed to constitute a binding agreement/contract between the parties, subject to entry into a formal agreement.

144. Furthermore, learned counsel for the Plaintiffs has submitted that it was the parties position that the letter of offer was to bind the parties and same was only to be superseded upon the entry into and execution of a sale agreement.

145. Pertinently, the Plaintiffs contend that the terms and clauses of the letter of offer do suffice to constitute a lawful and binding contract, which is capable of being enforced as between the Plaintiffs on one hand and the Defendant on the other hand.

146. Having reviewed the rival submissions by and on behalf of the parties herein, I beg to take the following position;

147. First and foremost, there is no dispute that the Defendant herein generated and issued a letter of offer dated the 6th April 2020, albeit executed and attested on the 14th April 2020 and wherein same [Defendant] sought to sell to and in favor of the Plaintiff the designated apartments.

148. Furthermore, there is no gainsaying that upon the issuance of the letters of offer, the Plaintiffs variously paid monies in the manner that was intimated. For good measure, it is common ground that by the time the letters of offer dated the 6th April 2020 were being issued, the Defendant herein was already in receipt of various monies paid on account of deposit[s] by the Plaintiffs.

149. The foregoing notwithstanding, the determination on whether or not, there existed a lawful and binding agreement between the Plaintiff and the Defendant herein depends on the construction of certain clauses contained in the body of the letter of offer.

150. To this end, it suffices to reproduce certain pertinent clauses which form part of the letter of offer. For ease of reference, one of the pertinent the clause[s] is reproduced as hereunder;

> " You will enter into a formal sale agreement which will be drawn by the advocates of both the vendor and the purchaser in standard form which, when executed, will supersede this letter of offer; until then the terms of this letter are binding when both parties have signed it. It is hereby agreed that the purchaser shall execute and procure the return of the sale agreement together with certified copies of the purchaser's pin certificate and identity card to the vendors advocates within 10 working days of receipt of the sale agreement from the vendors advocate by the purchaser's advocate failing which this offer shall automatically lapse".

151. My understanding of the clause [whose details have been highlighted in the preceding paragraph] drives me to the conclusion that the parties herein, namely, the Plaintiffs on one hand and the Defendants on the other hand were of the same mind set that the letter of offer shall be deemed as a binding contract, until the formal agreement is duly signed.

152. In any event, the clause under reference is explicit as to when the terms of the letter of offer would cease to bind the parties. Notably, the letter of offer and the terms thereunder would only cease upon the execution of a formal agreement and not otherwise.

153. Based on the foregoing, it is my finding and holding that the letter of offer, [whose terms are explicit], constitute a binding contract between the Plaintiffs and the Defendant herein. In this regard, the contention by and on behalf of the Defendant that there does not exist a binding contract is not only misconceived, but erroneous and anchored on quick sand.

154. To buttress the foregoing finding, it suffices to adopt and reiterate the holding in the case of Branca V Cobarro [1947] 2 All ER 101 where the court shed light as follows: -

> " The decision must however turn on the last paragraph, and, in my opinion, that last paragraph does not indicate that the drawing up and signature of a formal document was to be a condition of there coming into existence a binding contract.
>
> Down to the end of the paragraph preceding that final paragraph there can be no question to my mind that the document is a contract. If that final paragraph had not been there, no question could have been raised about it. The sole question is whether that paragraph introduces an element which destroys any contractual efficacy in the rest of the document. It is in rather an unusual form. "This is a provisional agreement "until".
>
> That the parties contemplated and wished that there should be what they call "a fully legalized agreement" drawn up and signed is quite clear. But the first thing to notice about these words is that they are not words expressive of a condition of stipulation to that effect. The familiar words "subject to contract," and many other forms of words that one has come across in this class of case are words of condition. But these are not words of condition or stipulation. The words "until" in this context to my mind clearly means that what is called a "provisional agreement" is going to have some efficacy until a certain event happens; in other words, the efficacy of the document is not made in any sense conditional on the happening of that event. That event merely puts a term to the operation of what is described as "a provisional "agreement," and it is noticeable that the parties describe the thing which is to have that operation until that event happens as "an agreement."
>
> The ordinary meaning of the word provisional I should have thought was something that is going to operate until something else happens. If it was intended to show that the parties regarded themselves as entering into an agreement which was to last only until something else took its place or superseded it the words "provisional" would be the proper and apt word to describe that intention.
>
> An agreement which is only to last until it is replaced by a formal document containing the same terms and drawn up by a solicitor could I should have thought, be described by no more apt word than the word provisional. When the word "provisional is linked up with the word "until" the whole things seems to me to fall into shape. 6 "My reading of this document is that both parties were determined to hold themselves and one another bound.
>
> They realised the desirability of a formal document as many contracting parties do, but they were determined that there should be no escape for either of them in the interim period between the signing of this document and the signature of a formal agreement, and they have used words which are exactly apt to produce that result and do not, in my opinion, suggest that the fully legalised agreement is in any sense to be a condition to be fulfilled before the parties are bound, because, as I have said, the word 'until' is certainly not the right word to import a condition or a stipulation as to the event referred to. In my judgement, if the parties never signed a fully legalised agreement, the event putting an end to the provisional operation of this agreement would never occur and this document would continue to bind the parties...".(Emphasized)

155. Other than the construction of the clause [whose details were highlighted elsewhere herein before] there is also the evidence that was tendered by and on behalf of the Defendant. Notably, DW1

confirmed and admitted that even though no sale agreement had been signed, the terms of the letter of offer remained binding on the parties.

156. For brevity, it suffices to reproduce the salient aspects of the evidence by DW1 whilst under cross examination by learned counsel for the Plaintiffs.

157. Same stated as hereunder;

> " The letters of offers were duly executed by the Plaintiffs and the Defendant. I do confirm that the letter of offer once executed will be binding on all the parties. I also wish to state that upon execution of the sale agreement, the same would supersede the letter of offer. The terms of the letter of offer are still binding on the parties. The sale agreement has never bee executed by the parties. The Defendant herein did not execute the sale agreement".

158. From the testimony of DW1, there is no gainsaying that same [DW1] acknowledges and confirms the binding nature of the letter of offer, which were duly executed by both parties.

159. Furthermore, it is also worth recalling that the same witness [DW1] also confirms that no sale agreement was ever executed between the parties. Consequently and in this regard, it suffices to state and underscore that the document that continues to bind the two parties is the letter of offer dated the 6th April 2020.

160. Nevertheless, it is imperative to underscore that insofar as the parties beforehand chose to negotiate and transact at arms-length, same must be deemed to have understood the consequences of their dealings.

161. Owing to the foregoing, it would not lie in the mouth of the Defendant and/or her counsel to now seek to renege and/or resile from the clear meaning, import and tenor of a document, which was indeed generated by herself.

162. Suffice it to point out that parties to a contract, in this case, the letter of offer, are bound by the terms which were agreed upon. In this respect, the holding of the Court of Appeal in the case of National Bank of Kenya Ltd versus Pipe plastic Samkolit (K) Ltd & another [2001] eKLR would suffice.

163. For coherence, the Court of Appeal stated and held thus;

> A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

164. Similarly and premised on the foregoing decision, I am obliged to find and hold that there does exist a binding contract between the Plaintiffs and the Defendant as pertains to the suit apartments. [See also the ratio decidendi in the case of Centurion Engineers and Builders Limited versus Kenya Bureau of Standards [2023] KECA1289[KLR].

165. Thirdly, it is not lost on this court that based on the terms of the letter of offer dated the 6th April 2022 [whose terms were binding on the parties], the Plaintiffs proceeded to and paid various sums of monies which were received and acknowledged by the Defendant herein.

166. At any rate, it is common ground that the monies which were paid to and acknowledged by the Defendant, have neither been refunded nor returned back to the Plaintiffs.

167. On the contrary, the said monies have been retained by the Defendant, most certainly on the basis of the existence of a binding contract.

168. To this end, it suffices again to revert to the evidence of DW1 during cross examination. For coherence, DW1 stated as hereunder;

> " The Plaintiffs herein paid the deposit towards the suit apartment. The deposit that were paid are still being held by the Defendant. The Defendant herein has not handed over the suit apartments to the Plaintiffs".

169. In my humble view, the Defendant herein would have no lawful basis to hold on to the said monies, if in her view, there was no lawful and binding contract.

170. Notwithstanding the foregoing, it is also important to recall that even though learned counsel for the Defendant contends that there was no lawful and binding contract between the Plaintiffs and the Defendant herein, however, the Defendant herself is on record as intimating that same had concluded the repair of the defects and hence the apartments were ready.

171. For the avoidance of doubt, it is imperative to reproduce the contents of the Defendant's letter dated the 21st March 2022; and which was addressed to the Plaintiffs' advocate. Suffice it to point out that the letter in question was not crafted on a without prejudice basis.

172. Notably, the letter states as hereunder;

> Re: sale of apartment a21 on 10th floor and b29 on 13 floor on soho serviced apartment on kirichwa road, kilimani, nairobi, plot L.R 2723.
>
> Your email of 17th March 2022 refers.
>
> Do note that I have confirmed with our advocate that the judge raised the issue of parties attempting to settle out of court and our advocate has confirmed that you were not present yourself, but you had someone holding your brief in court. This is why we contacted you after our advocate informed as much. and there is no prejudice to any one if parties attempt to settle the matter out of court. If the attempts fails, that what the court is there for to settle the dispute between the parties if they cannot agree.
>
> Do note that the work on the snags was initially undertaken in 2020 and rechecked in February 2022 ensuring the snags are complete as per snags list recorded between the developer and the clients. The apartments are the same standards of all other apartments.
>
> You are welcome for a review for the same. We trust that we shall be able to reach a consensus.
>
> Regards.
>
> Quin Minxue
>
> Homebay Property Ltd

173. Without belaboring the point, the contents of the letter under reference which was produced and tendered as evidence [P48], is succinct and apt.

174. Simply put, the Defendant herein was speaking to a transaction touching on and/or concerning the suit apartments, which is underpinned by a binding document, namely the letter of offer dated the 6th April 2020.

175. In my humble view, the subsequent conduct, representations and correspondence by the Defendant suffice to confirm that indeed the Defendant acknowledges that there is a binding contract predicated on the basis of the letter of offer.

176. In any event, I hold the view that the conduct of and representation[s] made by the Defendant herein [which are explicit and unequivocal] would bring to the fore the application of the doctrine of estoppel. See Section 120 of the *Evidence Act*, Chapter 80 Laws of Kenya.

177. Additionally, it is apposite [appropriate] to invoke and adopt the holding of the Court of Appeal in the case of 748 Air Limited vs Theuri [2017]eKLR, where the court stated and held thus;

> Estoppel is not easy to define in legal terminology. In his customary innovativeness, Lord Denning in the case of McIlkenny vs Chief Constable of West Midlands, [1980] All ER 227 gave the history of its evolution from French origins and compared it to a house with many rooms. Let us hear him:
>
> > "..we have so many rooms that we are apt to get confused between them. Estoppel per rem judicatum, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying 'estoppel is only a rule of evidence. If you go into another room you will find a different notice: 'estoppel can give rise to a cause of action'. Each room has its own separate notices. It is a mistake to suppose that what you find in one room, you will find in the others."
>
> The rooms we shall enter in the matter before us is estoppel by conduct and estoppel by election or waiver. Waiver is an intentional relinquishment or abandonment of a known right or priviledge. In the case of Banning vs Wright (1972) 2 All ER 987, at page 998 the House of Lords stated thus:-
>
> > "The primary meaning of the word waiver in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted. A person who is entitled to a stipulation in a contract or of a statutory provision may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waivers are not always in writing. Sometimes a person's actions can be interpreted as a waiver - waiver by conduct".
>
> Closer home in the case of Sita Steel Rolling Mills Ltd vs Jubilee Insurance Company Ltd [2007] eKLR the Court stated thus:
>
> > “A waiver may arise where a person has pursued such a course of conduct as to evince an intention to waive his right or where his conduct is inconsistent with any other intention than to waive it. It may be inferred from conduct or acts putting one off one's guard and leading one to believe that the other has waived his right.”

This Court also did explore at some length the issues of waiver, estoppel and acquiescence in the Serah Njeri Mwobi case (supra) and we adopt its analysis in respect of waiver and estoppel by conduct, thus:-

> "The doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person. See Seascapes Limited vs Development Finance Company of Kenya Limited, [2009] eKLR. The words waiver, estoppel and acquiescence have also been defined by the Halsbury's Laws of England, 4th Edition, Volume 16. At page 992 waiver has been defined as follows:-
>
> > „Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may sometimes resemble a form of election, and sometimes be based on ordinary principles of estoppel, although, unlike estoppel, waiver must always be an intentional act with knowledge. A person who is entitled to rely on a stipulation existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration.
> >
> > Where the waiver is not express it may be implied from conduct which is inconsistent with the continuance of the right... The waiver may be terminated by reasonable but not necessarily formal notice unless the party who benefits by the waiver cannot resume his position, or termination would cause injustice to him?."

178. In view of the foregoing analysis, I come to the conclusion that there does exists a lawful and binding contract, between the Plaintiffs and the Defendant, whose terms are clear and explicit.

179. Furthermore, it is my finding and holding that the contents of the letter of offer dated 6th April 2020 suffice and indeed meets the threshold adverted to vide the provisions of Section 3[3] of the *Law of Contract Act*, Chapter 23 Laws of Kenya.

180. In a nutshell, my answer to issue number one [1] is that there exists a lawful and binding agreement between the parties herein.

Issue Number 2

Whether the contract, if any has been breached; and if so by whom.

181. Having found and held that there does exist a lawful and binding contract between the Plaintiffs on one hand and the Defendants on the other hand; the next question to be dealt with concerns whether the said contract has been breached and if so, by whom?

182. To my mind, the determination on whether or not the contract has been breached must also depend on the construction of the terms of the letter of offer dated the 6th April 2020 and which both parties agreed shall be binding until a formal agreement is signed.

183. Furthermore, it is imperative to state that the contents of the letter of offer which suffices as the binding contract, did not provide for a termination clause. To the contrary, the letter of offer indicated that whenever there would be a default in payment and/or remittance of the purchase price then such default [delay] shall attract interests at 2% per month from the date of default until payment in full.

184. Owing to the foregoing, it is therefore evident that the parties beforehand did not provide for and/or address termination in the event of default by either party.

185. Nevertheless, it is a common principle of the law that even where a contract doe not contain an express clause for termination, either party is at liberty to terminate the contract subject to issuance or service of a reasonable notice.

186. As pertains to the instant matter, the Defendant contended that same had issued and served termination notices upon the Plaintiffs. Indeed, PW1 was extensively cross examined on the question of termination notice.

187. For good measure, it is important to reproduce the salient aspects of PW1's evidence in this regard.

188. Same stated as hereunder;

> " I did not receive any default notices. I wish to add that what were sent to me were not proper default notices. The letter in question that was sent and which purports to be a notice was not sent to me. I did not receive a notice".

189. Instructively, PW1 contested the issuance of service of a termination/default notice.

190. Owing to the denial by and on behalf of PW1, it was incumbent upon the Defendant to tender and place before the court any such evidence confirming issuance and service of a termination/default notice. However, it is worth recalling that the Defendant herein only tendered before the court 12 documents, none of which was the termination notice.

191. On the other hand, even though the parties have engaged in a blame game on breach of the contract, both parties undertook joint inspection and thereafter came up with a snag list dated the 1st August 2020. [See exhibit P32].

192. My understanding of the joint inspection, which culminated into the preparation of the snag list is to the effect that the parties beforehand treated the contract as still existing and binding.

193. First forward, on the 1st September 2020, the Defendant herein generated a letter wherein same was intimating to the Plaintiffs that the process pertaining to the registration of leases was now ripe and hence same [Defendant] was calling upon the Plaintiffs to make arrangements and execute the sublease agreements. [See exhibit P36].

194. Moreover, it is still worth repeating the contents of the letter dated the 21st March 2022. [See exhibit P48].

195. Other than the foregoing, the evidence of DW1 which affirmed the binding nature of the letter of offer still suffice. For good measure, my understanding of the position taken by Dw1 up to and including the time of his testimony is to the effect that the terms of the letter of offer are still binding on the parties.

196. Additionally, the Defendant herein filed a statement of defense dated the 16th May 2022 and at the foot whereof, same [Defendant] states as hereunder;

> " The Defendant prays that the Plaintiffs' suit against it be dismissed with costs; with an order that the Plaintiffs pay up the balances plus interests, or they forfeit 10% of the purchase price and get refunded the remainder of sums paid".

197. In my humble view, the Defendant herein is reiterating the position that the contract between same [Defendant] and the Plaintiffs is still in existence and thus the necessity for the Plaintiffs to pay up the balances.

198. In a nutshell, it is my finding and holding that despite the back and forth [blame games between the parties], there appears to be a mutual understanding that the contract is still in existence and thus binding.

199. Arising from the foregoing, my answer to issue number two [2] is to the effect that the contract between the parties remains in existence and is binding and hence it behooves the parties to perform their respective parts of the bargain.

200. Before departing from this issue, there is an aspect that deserves a short mention. Clearly, the dispute before hand appear[s] to be informed by the failure, if not refusal of the legal counsel for the parties, to be objective and to render proper advise to their respective clients.

Issue Number 3

Whether the Plaintiffs are entitled to an order of specific performance either as sought or otherwise.

201. The Plaintiffs herein have contended that same proceeded to and paid the stakeholders sum [10%] deposit; as well as additional payments, which were duly received and acknowledged by the Defendant.

202. On the other hand, the Defendant herein confirms and acknowledges that the Plaintiffs have truly paid substantial amounts of monies towards and in respect of the purchase of the suit apartments.

203. For coherence, it is imperative to recall the evidence of DW1 whilst under cross examination and wherein same stated as hereunder;

> 'The outstanding balance for apartment A21 is Kes.2, 847, 000/= only. In respect of apartment B29 the outstanding balance is Kes.2, 297, 000/= only. This are the principal balances outstanding exclusive of interests".

204. Quiet clearly, there is no denial that out of the agreed purchase price which was Kes.10, 700, 000/= only, the Plaintiffs have paid much more than 75% of the agreed purchase price.

205. Other than the foregoing, there is also evidence on behalf of the Plaintiffs that same are still ready and willing to conclude their part of the bargain. To this end, I beg to reproduce the evidence of PW1 during cross examination by learned counsel for the Defendant.

206. Same stated as hereunder;

> " The Plaintiffs are still ready and willing to proceed with the purchase of the apartment. I wish to add that we are ready to complete the transaction. The Plaintiffs have the ability

to complete the transaction in question. I also do confirm that there was a balance of the purchase price which the Plaintiffs are ready and willing to pay".

207. To my mind, the position taken by the Plaintiffs demonstrates willingness to complete the transaction as pertains to the suit apartments.

208. At any rate, it is not lost on the court that the Defendant herein had also intimated the same position in terms of the letters dated 1st September 2020, and 21st March 2022. [See exhibits P36 and P48, respectively].

209. Arising from the foregoing discourse, I come to the conclusion that both parties are keen to see the transaction through. Consequently, I find and hold that an equitable remedy of specific performance suffice.

210. Furthermore, whilst dealing with issue number one [1] elsewhere herein before, the court found and held that there exists a lawful and binding contract, which is a precondition to the grant of an order for specific performance.

211. Before departing from this issue, it suffices to adopt and reiterate the holding in the case of Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR, where the court held thus;

> " Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles"
>
> "The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant."

212. In a nutshell, I am constrained to find and hold that the equitable remedy of specific performance suffices in respect of the instant matter, taking into account the obtaining circumstances and the totality of the evidence that was placed before the court.

Issue Number 4

What remedies, if any ought to be granted.

213. The Plaintiffs herein have sought for a plethora of reliefs at the foot of the amended Plaint. Notably, the Plaintiffs have sought for inter-alia an order for specific performance as pertains to the suit apartments.

214. Be that as it may, whilst discussing issue number three [3] herein before, the court has found and held that insofar as the contract between the parties is still existing and binding, an order for specific performance does suffice.

215. On the other hand, the Plaintiffs have also sought for payments of rental income at USD 2, 250 from 17th May 2021 up to the completion of the suit. Besides, the Plaintiffs have also sought for interests at 2% [bank rates].

216. As concerns the plaintiffs prayer for rental income, which has been computed at USD 2, 250 only, I beg to say four [4] things. Firstly, there is no gainsaying that the Plaintiffs herein are yet to become the lawful and registered proprietors of the suit apartment. Instructively, the Plaintiffs' rights to and in respect of the suit apartment remains inchoate.

217. Secondly, it was admitted by PW1 that up to and including the time of testifying before the court, there are still outstanding balances due and payable to the Defendant. In this regard, the question that does arise is whether the Plaintiffs can lay entitlement to rents even before actualizing ownership.

218. To my mind, the answer is in the negative. Suffice it to add, that rental income [is a benefit] that can only accrue to the Lawful owner of the designated property and not otherwise.

219. Thirdly, even assuming that the Plaintiffs herein had accrued legal rights to and in respect of the suit apartment [which is not the case], the document upon which the claim for rental income is predicated has no probative value. [See exhibit P50, which is computer generated but without showing the author thereof and which is similarly not signed].

220. Fourthly, a claim for rental income is one for special/liquidated damages. Consequently, such a claim must not only be pleaded and particulars supplied, but must also be specifically proved. [See Capital Fish Kenya Ltd vs Kenya Power & Company Ltd [2016]eKLR].

221. Sadly, the Plaintiffs herein only came up with the claim for rental income as part of the reliefs, but nowhere have the Plaintiffs pleaded and particularized the claim for loss of rental income.

222. Similarly, the Plaintiffs have also sought to be paid the sum of Kes.2, 000, 000/= only plus interests at 2% per month [bank rates] however, I beg to state that yet again the claim on account on loss of bargain has also been plucked from the blues.

223. In my humble view, the Plaintiffs herein have neither established nor demonstrated any basis for claiming loss of bargain, let alone the foundation of the claim beforehand.

224. Furthermore, the Plaintiffs herein have also laid a claim for cost of repairing the snags [defects], which were said to exist in the suit apartments. However, my short answer to the claims in this respect is discernable from a clause in the letter of offer which was signed by the Plaintiffs.

225. For good measure, the clause under reference states as hereunder;

> " It is understood that at the date of completion you will have inspected the property and agreed to buy it in the condition in which it then stands and the vendor will not be called upon to repair, renew or improve the property".

226. In my humble view, what is good for the goose must also be good for the gander. Simply put, the Plaintiffs have argued [and the court has found] that the letter of offer was binding.

227. Having found that the terms thereof were binding and thus culminated into a lawful and binding contract, then by parity of reasoning, the said terms which were acknowledged by the Plaintiffs herein suffices.

228. In a nutshell, the terms of the letter of offer [which is binding on the parties] did not afford unto to the Plaintiffs any latitude to undertake any repairs in respect of the suit apartments and if, any repairs were undertaken [or to be undertaken] then same shall be at the pleasure and expense of the Plaintiffs.

229. Similarly, the Plaintiffs also sought for refund of the costs incurred in [sic] engaging PW2 and PW3, respectively. However, I beg to draw the attention of the Plaintiffs and their legal counsel to the binding

clause of the letter of offer. [See also the dictum in the case of National Bank of Kenya vs Pipe Plastic Samkolit [K] & Another [2001]eKLR].

230. Finally, the Plaintiffs sought for general and exemplary damages. In this regard, I hold the view that what was beforehand was a suit for [sic] breach of contract. Such a suit, does not lend itself to an award of general damages for breach of contract. [See Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR].

231. As concerns the prayer for exemplary damages, I beg to underscore that no evidence was tendered and/or placed before the court. In any event, the preconditions to be met were not established. [See Municipal Council of Eldoret vs Titus Gatitu Njau [2020]eKLR].

Final Disposition

232. From the foregoing analysis [details in terms of the preceding paragraphs], it is evident and apparent that the subject suit was actually filed because the disputants failed to adopt and apply the objective lenses in evaluating the issue beforehand.

233. Otherwise the issue that arise from the subject dispute are ones which ought to have been sorted out via negotiation and/or mediation. [See Article 159 [2][c] of *the Constitution* 2010].

234. Be that as it may, I am minded to allow the Plaintiffs' suit and do hereby make the following orders;

i. The Plaintiffs' suit be and is hereby allowed to a limited extent, to wit, that an order of specific performance be and is hereby issued to compel the Defendant to execute the requisite subleases, transfer instrument and thereafter transfer the suit apartment[s] to and in favor of the Plaintiffs.

ii. Nevertheless, the Plaintiffs herein be and are hereby ordered to pay the outstanding balances as hereunder;

a. 1st Plaintiff to pay the sum of Kes.2, 847, 000/= only in respect of apartment A21 with interest in accordance with the Letter of offer dated 6th April 2020 albeit with effect from February 2022 [being the date when the snags were rechecked by the parties in terms of exhibit P48].

b. 2nd and 3rd Plaintiff to pay the sum of Kes.2, 297, 000/= only in respect of apartment B29 with interest in accordance with the Letter of offer dated 6th April 2020 albeit with effect from February 2022 [being the date when the snags were rechecked by the parties in terms of exhibit P48].

c. The payments in terms of clause [b] hereof [which are a precondition to the specific performance] shall be made within six [6] months from the date hereof.

d. The Plaintiffs shall also bear/meet the costs [expenses] attendant to the preparation of the sublease, stamp duty and registration], if any and where appropriate.

e. In default by the Plaintiffs to pay [liquidate] the outstanding balances together with interest in terms of clause [b] within the six [6] months duration, the orders of specific performance shall automatically lapse.

f. In the event of lapse of the order for specific performance in terms of clause [e] hereof, the Plaintiffs shall be entitled to refund the monies so far paid on account of the suit

apartments, less 10% forfeiture in terms of clause 18 of the letter of offer dated the 6th April 2020.

g. In the event of the payments being due in accordance with [f] herein above, same shall be payable within thirty [30] days from due date.

iii. Any other relief not expressly granted is Dismissed.

235. As concerns costs, I hold the opinion that either party should bear own costs. For coherence, the Plaintiffs herein knew of the terms of the letter of offer but instead of abiding by same [Plaintiffs] orchestrated an endeavor to re-write the terms without regard to the law.

236. On the other hand, the Defendant herein also kept playing lottery with the entire process wherein on one hand same invites the Plaintiffs to undertake joint inspection whilst on the other hand, positing that same [Defendant] had terminated the contract.

237. Notably, the mischief by the Defendant is even evident at the foot of the statement of defense dated the 16th May 2022 wherein same is calling for payment of the balances whilst at the foot of the submissions, the same Defendant adopts a diametrically opposed position.

238. To my mind, the conduct of both parties militates against an award of costs. [See Supreme Court Decision in Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate of & 4 others [2014] eKLR].

239. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF MAY, 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Kuria for the Plaintiffs

Mr. Thimba and Mr. Korir for the Defendant