Saad v Tudor Heights Limited & another (Civil Suit 72 of 2020)
[2023] KEELC 21586 (KLR) (7 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21586 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

CIVIL SUIT 72 OF 2020

LL NAIKUNI, J

NOVEMBER 7, 2023

BETWEEN

SAAD M SAAD ..... PLAINTIFF

AND

TUDOR HEIGHTS LIMITED ..... 1ST DEFENDANT

SULEIMAN AHMED ALI MOHAMED ..... 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. This Judgment is in respect to a Plaint dated 20th May, 2020, Saad M. Saad, whereby the Plaintiff sued Tudor Heights Limited and Suleiman Ahmed Ali Mohamed, the 1st and 2nd Defendants herein in this suit. In a nutshell the issues from the suit pertain to a sale of a property agreement terms and conditions stipulated thereof, a subsequent breach of the said agreement and the consequences thereof.

2. Upon service of the Plaint, Summons too Enter Appearance and other related pleadings, the 1st and 2nd Defendants herein entered appearance through filing of a Memorandum of Appearance dated 14th August, 2020 and Statement of Defence dated the same day. The Plaintiff filed a Reply to Defence. Parties having fully complied with the provision of Order 11 on Pre – Trial conference in accordance with Order 11 of the Civil Procedure Rules, 2010, the matter was slated for full trial accordingly. Unfortunately, although they were served with notices as evidenced from the Affidavit of Service under Order 5 Rule 15 of the Civil Procedure Rules, 2010, the Defendants failed to participate in the hearing of the case.

II. The Plaintiff's Case

3. The brief facts of the case as per the filed pleadings are that at all material the 1st Defendant was the bona fide proprietor of all that parcel of land known as Mombasa/ Block XI/Parcel 498. That on the

property the 1st Defendant had erected or caused to be erected a development consisting of a block of fifteen (15) floors comprising of fifty - five (55) Apartments together with ancillary (Hereinafter referred to as "The Suit Property"). The 1st Defendant started developing the property, thereafter offered for sale on an off-plan basis the said apartments.

4. On the 27th day of September 2017, the Plaintiff and the 1st Defendant entered into an agreement for sale of Apartment Number D 14 on the 14th Floor existing on the property, for a purchase price of a sum of Kenya shilling five Million and five hundred thousand. (Kshs. 5,500,000/=).

5. It was part of the sale agreement that the Plaintiff pays a deposit of a sum of Kenya shillings one million one hundred thousand (Kshs. 1,100,000/=) before signing of the aforementioned agreement. This happened and receipt whereof was acknowledged. The outstanding balance being a sum of Kenya shillings four Million and Four Hundred thousand (4,400,000/=) was to be paid in fourty four (44) equal monthly instalments of a sum of Kenya Shillings Hundred Thousand (Kshs. 100,000/=) until Payment in full was done.

6. On the 4th October, 2017; 10th November 2017 and 14th November of the same year, the Plaintiff paid by way of installments the following amounts; a sum of Kenya shilling Two hundred thousand (Kshs. 200,000/=); One hundred thousand (Kshs. 100,000/=) and another One hundred thousand (Kshs. 100,000/=) respectively hence making a total of a sum Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500, 000.00/=) paid so far by the Purchaser to Vendor. The 1st Defendant being the Vendor was under the obligation to utilize the payment received in the construction of the development. However, the 1st Defendant had since not made any effort to develop the property despite receiving part of the purchase price.

7. The agreement further provided for a special condition that in the event the vendor shall have been in breach of its obligation under the agreement the Purchaser would in writing, elect to rescind the agreement and the Vendor would pay back monies received towards the purchase price including the deposit to be refunded to the Purchaser within 90 days from the date of rescission.

8. The Plaintiff averred that four (4) other purchasers and himself being concerned that the project had stalled. Further, that there was bare minimum activity on the site signaling that the project had hit a snag. Thus, they decided to write a letter dated 14th January 2019 to the 1st Defendant's Advocate informing them of their wish to opt out immediately and sought for the reimbursement of all monies paid in full within 21 days of receipt of the letter, failure to which the Plaintiff and the said four would seek alternative remedy for recovery of the monies.

9. It had been more than one year since the Vendors received the above-mentioned letter, Despite of that, he had since neglected, failed and/or refused to make any effort to develop the property or explain themselves and the reasons why the development has been stalled and have not responded to the letter or made any refund of money paid despite being given more than enough time to do so. Resultantly the Plaintiff decided to institute this suit against the Defendants herein.

10. The Plaintiff relied on the following particulars of breach of contract by the 1st Defendant:

    a. Breach of agreement for sale dated 27th day of September 2017 by failing to continue with development of property as per Clause 2.2 of the Agreement for sale where by the Vendor was to use the purchase monies paid to develop the apartment but did not.

    b. Breach of its obligation under Clause 5 of the agreement by failure to honor the letter written to them to pay back all monies received towards the purchase price.

11. As a result the Plaintiff had suffered loss and damages. Thus, he claimed for the damages. Unless this Honourable Court intervened conclusively, the Plaintiff was likely to suffer great loss and prejudice as a direct result of the actions by the 1st and 2nd Defendants to deprive the Plaintiff of her rightful Property. The Plaintiff came to this Honourable Court with clean hands and it was in the interest of justice that the orders sought be granted. Despite a demand and notice of intention to sue being given, the Defendants had not made good the Plaintiff's claim.

12. The Plaintiff filed a Reply to Defence after the Defendants filed their Statement of Defence where he reiterated as follows:-

    i. The Plaintiff reiterated all the contents of the Plaint and joined issue with the Defendant in regard to each and every allegation set out in the Defence save where the same had been expressly admitted;

    ii. In response to the averments made out under Paragraph 3 of the Defence, the Plaintiff reiterated the contents of Paragraph 4 of the Plaint and stated that it should be during the hearing of this suit call them for strict prove.

    iii. In response to the contents made out under Paragraph 4 of the Defence, the Plaintiff reiterated the contents of Paragraph 5 of the Plaint and stated that it should be, during the hearing of this suit call them for strict prove that there was an agreement for sale of property between the plaintiff and the 1st Defendant;

    iv. In response to the averments made under Paragraphs 5 of the Defence, the Plaintiff reiterated the contents of Paragraphs 6, 7, 8 and 9 of the Plaint and stated that it should be during the hearing of this suit call them for strict prove;

    v. In response to the averments made out under Paragraphs 6 of the Defence, the Plaintiff reiterated the content of Paragraph 10 of the Plaint, and further stated that the Defendant had their part to play and the alleged failure to complete the purchase due to frustration of contract, arose from self-election;

    vi. In response to the averments made out under Paragraphs 7,and 8 of the Defence, the Plaintiff reiterated the contents of Paragraphs 10,11,13,14,15 and 16 of the Plaint;

    vii. The Plaintiff denied the averments contained in Paragraph 9 of the Defence and reiterated the contents of Paragraphs 18 and 19 of the Plaint and stated that it should be calling them for strict prove during the hearing of this suit, prove;

13. The Plaintiff prayed for Judgement to be entered against the 1st and 2nd Defendants jointly and severally for:

    a. A declaration that the Agreement dated 27th November 2017 is rescinded

    b. Payment of all monies paid to the 1st Defendant in respect of the Agreement amounting to Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/=)

    c. General damages for breach of contract

    d. Costs of the suit

    e. Further or any other relief which this honorable court may grant.

f. Interest on (b)and (c) above at court rates

III. The testimonial evidence by the Plaintiffs

14. On 9th March, 2023 the hearing for the Plaintiff commenced in earnest whereby he summoned one witness– the PW – 1 who testified as follows:-

A. Examination - in - Chief of PW - 1 by Mr. Bosire Advocate

15. PW – 1 was sworn and testified in English language. He identified himself as Saad M. Saad. He informed Court that he was an advocate of the High Court of Kenya. He filed a witness statement dated 5th May, 2020 which he adopted as his evidence in Chief. He told the court that he also filed a list of documents which he produced as Plaintiff Exhibit 1 to 3.

16. The witness stated that the dispute emanated from a contractual agreement entered between the Plaintiff and the Defendants for the purchase of the suit property. The agreement was duly executed and dated 27th September, 2017 – terms and conditions stipulated thereof. The total purchase price was a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5.500,000/-) for the apartment. The purchase price was to be made in equal monthly installments after making a deposit. PW – 1 paid a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs 1,500,000/-) on diverse dates of 27th September, 2017 and January 2019 as the agreed deposit of the purchase price. Specifically, he paid on the 4th October, 2017; 10th November 2017 and 14th November of the same year, the Plaintiff paid by way of installments the following amounts; a sum of Kenya shilling Two hundred thousand (Kshs. 200,000/=); One hundred thousand (Kshs. 100,000/=) and another One hundred thousand (Kshs. 100,000/=) respectively hence making a total of a sum Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500, 000.00/=) paid so far by the Purchaser to Vendor.

17. PW - 1 testified that the amount had not be disputed by the Defendants. As at the time of filing the case, he had paid an amount of a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs 1,500,000/-). Despite of this, the Defendants had not done anything. The Defendant failed to deliver the apartment. He had suffered damages and had incurred loss. He needed to be compensated and for the grant of the relief he sought. That marked the close of the Plaintiff's on 9th March, 2023.

IV. The Defendants' Case

18. The 1st Defendant is a Limited Liability Company duly incorporated and registered pursuant to the provisions of the *Companies Act*, Chapter 486 Laws of Kenya and having its registered office and principal place of business at Mombasa. The 2nd Defendant is male adult of sound mind residing and working for gain in Mombasa County within the republic of Kenya and is also a Director/ Shareholder of Tudor Heights Limited, the 1st Defendant.

19. The 2nd Defendant through a Statement of Defense dated on 14th August, 2020 and having entered appearance of the same date went ahead to aver that he never entered into any contractual arrangements with the Plaintiff. The 2nd Defendant further denied the contents of Paragraphs 5,6,7,8 and 9 of the Plaint. If at all there was any contractual arrangements between the Plaintiff and the 1st and 2nd Defendants, the said sums that were allegedly paid to the Defendants had been utilized fully and that the project was under construction.

20. The 1ts and 2nd Defendants had faced frustration of contract since the projections between the parties could not have been fulfilled owing to unforeseen circumstances by the Engineer and this led to

escalation of the amount of money that was needed for the construction and hence the project could not be completed on time.

21. The 1st and 2nd Defendants therefore pleaded frustration of contract and the allegations of Paragraphs 10, 11,13,14,15 and 16 were denied. Despite the course of action emanating from this Honourable court's jurisdiction, no demand and notice of intention to sue had ever been served upon the 1st an 2nd Defendants at all.

22. The 1st and 2nd Defendants prayed for this suit to be dismissed with costs. The 1st and 2nd Defendants never called any witnesses.

V. Submissions

23. On 9th March, 2023 after the closure of both the Plaintiff's and 1st and 2nd Defendants' case, in the presence of both parties the Court directed that the suit be dispensed off by way of written submissions. On 10th May, 2023 after the Honourable Court confirmed that both parties had complied and their written submissions were on record, the Honourable Court reserved a Judgment on notice accordingly.

A. The Written Submission by the Plaintiff

24. On 28th March, 2023 the Plaintiff through the Law firm of Messrs. Abdulrahman Saad & Associates Advocates filed their written submissions dated 27th March, 2023. Mr. Bosire Advocate commenced his submission by providing a brief facts of the case. He informed Court that the suit was initiated through filing of a Plaint dated 20th May, 2020 and filed in court on 6th July, 2020. He stated that the Plaintiff filed this suit against the 1st and 2nd Defendants' seeking;

    a. A declaration that the agreement dated 27th November, 2017 is rescinded

    b. Payment of all monies paid to the defendants' in respect of the agreement amounting to Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/)-

    c. General damages for breach of contract

    d. Costs of the suit

    e. Any other relief which the Honourable court may grant

    f. Interest on (b) and (c) above at court rates.

25. According to the Learned Counsel, the brief facts of the case were that on 27th September, 2017, the Plaintiff entered into a binding sale agreement with the 1st Defendant for the purchase of an off-plan Apartment constructed on suit land. Further, in honour of a term/obligation in the subject sale agreement, a pre-requisite deposit was made by the Plaintiff to the 1st Defendant to the tune of Kenya shillings One Million One Hundred Thousand (Kshs. 1,100,000/-) and followed by subsequent payments amounting to a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/-). The apartment remained undelivered up to now, all construction having been put to a standstill hence the court action. After making all efforts for the refund of the deposit had failed, the Plaintiff decided to institute this suit. All parties complied and the trial was ripe for hearing. On 14th October, 2022 the matter was listed for mention for pre-trial directions and certified ready for hearing with notice to issue to the 1st and 2nd Defendants. The matter was set down for hearing which commenced on 9th March,2023 in the absence of the Defendants' having been duly served with the notice for hearing

but failed to attend. The Plaintiff proceed on to testify and closed its case and the Honourable court directed to file its submissions which they hereby do.

a.

On the issues for determination the Learned Counsel submitted that it was their considered opinion that the germane four (4) issues for determination before this Honourable Court as follows:-

26. Firstly, on whether there was breach of contract by the 1st and 2nd Defendants. The Learned Counsel submitted that the court had rich jurisprudence on what amounted to a breach of contract and how the courts intervene through a contract formed voluntarily between parties. To support its argument on the breach of contract, the Counsel referred Court to the case of:- "Pius Kimaiyo Langat – Versus – Co - operative Bank of Kenya Ltd [2017] eKLR", after reviewing case law on the subject reiterated as follows:

> " We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved."

27. The Learned Counsel submitted that the Plaintiff and the 1st and 2nd Defendants' were legally bound by the terms of the contract/agreement duly executed and dated 27th September, 2017 that was binding upon them. The 1st and 2nd Defendants' in this matter breached the terms of the agreement by;

a. Failing to utilize the money paid by the Plaintiff in the completion of the subject apartment;

b. Stalling the project way and above the agreed contractual timelines

c. Failing to complete the works and finishes on the project

d. Failing to reimburse the plaintiff all monies paid in full in accordance with the contractual agreement despite a demand notice rescinding the agreement.

28. The Counsel argued that the 1st and 2nd Defendants actions of failing to refund the amount that was paid by the Plaintiff at the onset of the alleged project despite a demand to do so after it was clear that the project was a non - starter further amounted to a fundamental breach of the contract. He averred that in interpreting the conduct of the parties in execution of a contract, the Court in "Hassan Zubeidi – Versus - Patrick Mwangangi Kibaiya & another [2014] eKLR" held that:

> " The legal position is that a party should never be allowed to take advantage of his wrongs/ omissions at the expense of the other party. The 1st respondent is seeking to walk away from the JVA with the sole intention of defeating the Applicant's interest notwithstanding the fact that the Applicant's money has been used to significantly reduce the 2nd Respondent's indebtedness to the bank."

29. Further to this, the Learned Counsel opined that in defining when a breach of contract occurred, the court in "Gatobu M'ibuutu Karatho – Versus - Christopher Muriithi Kubai [2014]eKLR" cited the

High Court in Kampala case "Nakana Trading Co. Ltd – Versus - Coffee Marketing Board 1990-1994 EA 448", which dealt with the issue of breach of contract as follows:-

> " In contract, a breach occurs when one or both parties fail to fulfill the obligations imposed by the terms since the contract between the parties was reduced into writing, the duty of the court is to look at the documents itself and determine whether it applies to existing facts."

30. Having proved that the 1st and 2nd Defendants herein defaulted to perform their obligations the Learned Counsel submitted that the Defendants fundamentally breached the contract and should by all means compensate the Plaintiff for the loss suffered.

31. Secondly, on whether the Plaintiff had suffered loss and damages subject to contractual breach. The Learned Counsel submitted that it was evident that the 1st and 2nd Defendants breached the binding agreement by failing to deliver a ready apartment unit as required under Agreement to the Plaintiff despite payments having been made. The Plaintiff had for all intents and purposes suffered loss on the investment made towards purchase of the apartment noting that property prices had now bloated making it extremely difficult for the Plaintiff to capitalize on what has been lost. The Plaintiff held their end of the bargain until it was apparent that the subject project was nothing but a sham to their detriment.

32. The Learned Counsel placed reliance on the decision in "Union Technology Kenya Limited – Versus - County Government of Nakuru [2019] eKLR" in which the Court referred to the decision in "Kilimanjaro Construction – Versus - The East African Power & Lighting [1985]eKLR" where the Court held as follows:-

> " the innocent party is entitled to damages that will put him back to the position he would have been were the contract executed. Of course, the Plaintiff must have lost any profit he would have earned had the contract been completed as initially intended. The Plaintiff having not executed the entire contract, through for no fault of his, he cannot claim the entire balance of the contract sum since that would in my view amount to unfair enrichment. What this court would have expected the Plaintiff to prove is the profit he would have earned if the contract was fully executed. That is the opportunity value that the Plaintiff lost as a result of the breach of contract by the Defendant".

33. Further, he cited the case of: "Millicent Perpetua Atieno – Versus - Louis Onyango Otieno (2013) eKLR", the Court of Appeal quoted with approval Halsbury's Law of England, Volume 12, 4th Edition at paragraph 1183 on the type and measure of damages recoverable by a purchaser upon breach by a seller of land.

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

34. In respect to the afore-stated case law, the Learned Counsel submitted that indeed the Plaintiff suffered loss and damage for the non-performance of the contractual terms by the Defendants, and as such deserving reimbursement for damages.

35. Thirdly, on what the amount, in compensation, due and owing from the 1st and 2nd Defendants to the Plaintiff. The Learned Counsel contended that it was trite law that Courts should not rewrite contracts between parties, see "Pius Kimaiyo Langat (Supra). The execution of the binding Sale Agreement dated 27th September, 2017, a deposit of Kenya Shillings One Million One Hundred (Kshs 1,100,000/-) had been paid as per clause 2.1.1 of the annexed copy of Sale Agreement dated 27th September, 2017 in the Plaintiff's bundle of documents to wit:

> " the Purchaser has paid the Vendor the sum of Kenya shillings One Million One Hundred (Kshs. 1,100,000/-) on or before signing of this agreement receipt of whereof is hereby acknowledged" (emphasis ours)

36. By virtue of appending their signatures to execute the agreement, the contracting parties were in agreement that as at that juncture, the particular sum had been paid and that it was not in dispute whatsoever. Further to the above, the Plaintiff at the hearing produced before the court Exhibit 3 being copies of cheques' paid on diverse dates cumulatively amounting to a sum of Kenya Shillings Four hundred Thousand (Kshs. 400,000/-). In light of the above, the Learned Counsel humbly submitted that the amount, in compensation, due and owing from the 1st and 2nd Defendants to the Plaintiff was to the tune of a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1,500,000/-).

37. Finally, on the issue of which party was liable to pay costs of these proceedings. The Learned Counsel asserted that it was a well settled principle of law that costs follow the event. To buttress his point, he cited the case of:- "Cecilia Karuru Ngayu – Versus - Barclays Bank of Kenya & another [2016] eKLR" which cited the authority in "Republic – Versus - Rosemary Wairimu Munene, Ex-Parte Applicant – Versus - Ihururu Dairy Farmers Co-operative Society Ltd[2]" court held as follows:-

> " The issue of costs is the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event.....It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case."

38. According to the Learned Counsel, the Plaintiff herein had gone through a lot of trouble including filing of this case in a bid to access what is duly owed, and in the process accumulated significant costs to their disadvantage. The Learned Counsel prayed for the costs to be awarded to him.

39. In conclusion, the Learned Counsel humbly prayed to the Honourable Court to issue a final Judgement in favour of the Plaintiff and allow all the prayers sought by the Plaintiff including the costs of this suit.

VI. Analysis and Determination

40. I have carefully read and analyzed all the pleadings herein – the filed Plaint by the Plaintiff, the Defence by the 1st and 2nd Defendants and the replies to defence by the Plaintiff, the evidence adduced by the PW – 1 as the only witness summoned in this case, the written submissions, the cited authorities made by the Plaintiff and the Defendant and the relevant provisions of *the Constitution* of Kenya, 2010 and the statures.

41. For the Honourable Court to reach an informed, fair, just and reasonable decision it has framed three (3) issues for its final for its determination herein:

    a. Whether the suit instituted by the Plaintiff through a Plaint dated 20th May, 2020 against the 1st and 2nd Defendants herein has any merit.

    b. What remedies should be granted to the parties in the circumstances?

    c. Who meets the costs of the suit?

Issue No. a) Whether the suit instituted by the Plaintiff through a Plaint dated 20th May, 2020 against the 1st and 2nd Defendants herein has any merit.

42. Under this Sub heading, as indicated at the beginning of this Judgement, the Honourable Court noted that the main substratum of this suit is existence of a sale agreement terms and conditions entered by parties; the breach of it and the consequences thereof. Thus, first and fore most it imperative to assess the meaning, nature and scope of a contract and its validity in law. Simply put, a contract is a legal agreement made between one or more people (offer and acceptance) who undertake to do a certain thing or things in a transaction or transactions and where there is a consideration and which is enforceable in law.

43. According to "A Treaties on Law of Contract" 2nd Edition by Samweul Wiliston holds that:-

> " A Contract is a promise, or a set of promise, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. This definition may not be satisfactory since it requires a subsequent definition of the circumstances under which the law does in fact attach legal obligation to the promises. But if a definition were attempted which should cover these operative facts, it would require compressing the entire law relating to formation of contracts into a single sentence."

44. In short, there are four ingredients for it to constitute a legal contract. These are namely:

    a. An agreement or promise made between one or more people (offer and acceptance);

    b. An agreement to undertake to do a certain thing or things in a transaction or transactions;

    c. There is a consideration; and

    d. The agreement is enforceable in law.

45. Validity of a contract is provided for in law. The provision of Section 3 (3) of the *Law of Contract Act* Cap. 23 read together with Section 38 of the *Land Act*, No. 6 of 2012 provide that no suit shall be brought upon a contract for the disposition of an interest in land unless; the contract upon which the suit is founded is in writing, signed by all the parties, and the signature of each party signing has been attested by a witness who is present when the contract was signed.

46. Specifically, the provision of Section 3 (3) of the Contract Act provides that:-

> " 3(3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
>
> (a) the contract upon which the suit is founded—
>
> (i) is in writing;

(ii) is signed by all the parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.

This was supported in the decision of the Court in the case of: "Machakos District Co - operative Union – Versus - Philip Nzuki Kiilu CA No 112 of 1997".

47. It is on record and an undisputed fact that the parties executed an agreement of sale dated 27th September, 2017 in respect to Title No. Mombasa/ Block XI/498 for an off plan apartment construction for a consideration of a sum of Kenya Shillings Five Million Five Hundred Thousand (Kshs. 5,500,000/-). The parties covenants including the special conditions of sale, the warranties, the obligations of the parties, the default clauses and inter-alia general provisions which the parties agreed to bind themselves. Earlier the offer was made by the Plaintiff and accepted by the 1st and 2nd Defendants leading to the execution of the said agreement for sale.

48. According to PW - 1 he had paid a Kenya Shillings One Million (Kshs. 1,500,000/-) and that the apartment remains undelivered up to the time of filing the suit, all construction having been put to a standstill hence the court action.

49. It is therefore the holding of the Court that the existence of a valid agreement of sale has not been assailed. The law of contract gives effect to consensual agreements entered into by particular individuals in their own interests. Remedies granted by the courts are designed to give effect to what was voluntarily undertaken by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed. This position was appreciated as early as in 1848 in the case of "Robinson – Versus - Harman (1848) 1Exch 850" in which Parke B said "the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed."

50. The above statement of the law has been endorsed in numerous judicial pronouncements in literally all jurisdictions of the world to the extent it can safely be said that it has acquired the singular distinction of the force of law.

51. The Court has carefully perused the sale agreement produced as Exhibit by the Plaintiff and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties.

52. It is important to assess whether their was any breach of the agreement. In order to determine whether or not there was breach of the contract, this Court must first determine whether there was a valid contract in place. The Plaintiff has alleged that he entered into a sale agreement with the Defendant for the purchase of the suit property. Further that the same was reduced into writing and signed by all the parties.

53. The Plaintiff has contended that further, in honor of a term/obligation in the subject sale agreement, a pre-requisite deposit was made by the Plaintiff to the 1st defendant to the tune of Kenya shillings One Million One Hundred Thousand (Kshs. 1,100,000/-) and followed by subsequent payments amounting to a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/-). The apartment remains undelivered up to now, all construction having been put to a standstill hence the court action.

54. As to whether the 1st and 2nd Defendants breached the agreement for sale, the Black's Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as;

> "a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages."

55. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of "Rufale – Versus - Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592", Scrutton L.J. held as follows:

> " 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."

56. Equally in the case of "Attorney General of Belize et al – Versus - Belize Telecom Ltd & Ano. (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs Northwest Metropolitan Regional Hospital Board (1973) I WLR 601 at 609", held as follows:

> " The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."

57. Based on the above decisions, the starting point for this Honourable Court will be the agreement that the parties signed and the terms therein. According to the agreement the completion date should have been the 1st January, 2020 and the handover would have occurred after the full payment had been effected.

58. It is the Plaintiff's position that the Defendants breached the agreement and failed to meet the obligations set out in the agreement to wit; breaching the conditions in the agreement, entering into an agreement without sufficient funds to complete and failure to deliver the apartment at the agreed time.

59. The Plaintiff relied on the particulars of breach of contract by the 1st Defendant as follows:-

a. Breach of agreement for sale dated 27th September 2017 by failing to continue with development of property as per clause 2.2 of the Agreement for sale where by the vendor was to use the purchase monies paid to develop the apartment but did not.

b. Breach of its obligation under clause 5 of the agreement by failure to honor the letter written to them to pay back all monies received towards the purchase price.

60. On the other hand the Defendants have pleaded frustration but did not call evidence to prove the alleged frustration. I must point out that wherever a person seeks to rely on the Doctrine of frustration, such a person is obliged to provide and/or the particulars of frustrations and/or facts that are sought to be relied on in a bid to prove frustration.

61. In support of the foregoing pronouncement, I find support in the decision in the case of "Billey Oluoch Orinda – Versus - Ayub Muthiee M'igwetta and 2 others [2017]eKLR" where the Court of Appeal held as hereunder:

> " A party who wishes to rely on a frustrating event cannot as in this case simply mention it in passing as was done in paragraph 11 of the Amended Plaint that I have set above. Particular facts which they seek to rely on resulting in the frustration of the contract must be clearly set out in the pleadings to enable the other side to prepare and defend the same. This not having been done, the learned Judge was clearly wrong."

62. On the other hand, the Doctrine of frustration and the circumstances that can lead to the invocation of same, were further dealt with and analyzed by the Court of Appeal in the case of "Lucy Njeri Njoroge – Versus - Kalyahe Njoroge [2015]eKLR" where the Court observed as follows:

> " For frustration to be held to exist, there are certain factors that require to be taken into consideration. One factor is whether the frustration was caused by the default of the parties. It is trite that the frustrating event cannot arise from default of the parties. In Maritime National Fish vs Ocean Trawlers [1935] AC 524., self-induced frustration was held to have occurred where a party elected to allocate a fishing licence to three of their other trawlers leaving no licence to operate the contracted trawler.
>
> In Davis Contractors Ltd – Versus - Farehum U.D.C. (supra), it was stated thus,
>
> > " "The doctrine of frustration is in all cases subject to the important limitation that the frustrating circumstances must arise without fault of either party, that is, the event which a party relies upon as frustrating his contract must not be self-induced ."

63. From the foregoing, what becomes evident and/or apparent is the fact that before a Party can invoke and rely on the Doctrine of frustration, such a Party must plead particulars of the circumstances leading to frustration. Secondly, it is also important for the Party pleading frustration, to show that the circumstances which are alleged to found frustrations are neither self-induced nor self-inflicted. Nevertheless, the circumstances that are being relied upon by the 1st and 2nd Defendants herein to constitute frustration is that the terms of the Contract which was drafted by the 1st and 2nd Defendants' own Advocate and which was executed and dully sealed by the 1st and 2nd Defendants are now said to be radically different from the imagination and/or contemplation of the 1st and 2nd Defendants.

64. Seriously, that allegation cannot be taken at face value. For clarity, the 1st and 2nd Defendants herein, is not an illiterate natural person, who may claim that the terms were not well understood by them at the time of entry into and execution of the Contract. At any rate, it is on record that long after the execution of the Contract, the 1st and 2nd Defendants herein kept sending promises and assurance to the Plaintiff, that despite the delay to complete the transaction, same was in progress and would be completing and/or finalizing the transaction. For clarity, the 1st and 2nd Defendants kept on seeking indulgence of the Plaintiff.

65. The provision of Section 109 of the *Evidence Act* provides that the burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence. The onus was on the Defendants to prove frustration of the contract by the Plaintiff. The Court has taken great exception by the lethargy depicted by the Defendants in their outright failure to participate in the hearing of the case, where perhaps they would have been able to ventilate their case through examination – in – chief, cross examination of witnesses by the Plaintiff and their own and also through filing of written submissions. As it stands, none of the allegations put through by the Plaintiff was controverted. Nor has the Court gotten a first opportunity the hear the side of the Defendants and the alleged frustrations they were compelled to undergo as result of the agreement. It was replica of where only one playing team turning up for a match – it tantamount to Summary Judgement on admission being entered under the provision of Order 13 (1) and (2) of the Civil Procedure Rules, 2010.

66. In view of the foregoing, I find and hold, that the Doctrine of frustration, does not apply to the circumstances of this case and neither does it come to the aid of the 1st and 2nd Defendants.

Issue No. c) What remedies should be granted in the circumstances

67. Under this Sub title, the Court wishes to assess the remedies the parties are entitle from the breach of the agreement herein. The Plaintiff has sought for various Reliefs as contained at the foot of the Plaint, herein. Legally speaking, the principal remedy under common law for breach of contract is an award of damages, with the purpose of damages being to compensate the injured party for the loss suffered as a result of the breach, rather than (except for very limited circumstances) to punish the breaching party. This general rule, which can be traced back to "Robinson v Harman (supra)" is to place the claimant in the same position as if the contract had been performed, with the guiding principle being that of restitution. The compensatory nature of damages for breach of contract, and the nature of the loss for which they are designed to compensate, were explained by Lord Diplock in "Photo Production Ltd – Versus - Securicor Transport Ltd (1980) AC 827 – 849":-

> " The contract, however, is just as much the source of secondary obligations as it is of primary obligations ... Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach ..." (p 849)

68. On their part, the 1st and 2nd Defendants have impleaded that the contract was frustrated and therefore same ought to be discharged from the contract. Nevertheless, while discussing the issues, I have found and held that the 1st and 2nd Defendants did not sufficiently plead the circumstances and/or particulars constituting frustration. Consequently, I find and hold that the claim by the Defendants that the contract was frustrated, has not been proven and/or established, whatsoever.

69. As stated above, the Plaintiff pleaded for general damages for breach of contract. Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. The court's function is confined to enforcing either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance.

70. The objective of compensating the claimant for the loss sustained as a result of non-performance makes it necessary to quantify the loss which he sustained as accurately as the circumstances permit. What is crucial is first to identify the loss: the difference between the claimant's actual situation and the situation in which he would have been if the primary contractual obligation had been performed. Once the loss has been identified, the court then has to quantify it in monetary terms.

71. From the Plaintiff's testimony and as per the sale agreement, it is clear that there is a case of breach of contract, the party that is in breach of the Contract will pay the other party damages of 25% of the purchase price.

72. As concerns Special Damages, same can and do issue for breach of contract. However, before any amount can be awarded on account of Special Damages, the claimant must particularly plead and thereafter specifically prove same. In this particular case the Plaintiff has provided cheques to show that he made his installments. In support of the foregoing proposition, I can do no better than to reproduce the decision in the case of "John Richard Okuku Oloo – Versus - South Nyanza Sugar Company Limited[2013]eKLR" where the court decided as hereunder:

> " We agree with the Learned Judge that a claim for special damages must indeed be specifically pleaded and proved with a degree of certainty and particularity but we must add that, that degree and certainty must necessarily depend on the circumstances and the nature of the act complained of."

73. As pertains to the subject matter, the Plaintiff has pleaded and particularized his special damages. Thus, the up and shot of it all, the Plaintiff is entitled to damages suffered from the failed transaction at the behest of the 1st and 2nd Defendants herein.

IssueNo. d) Who meets the costs of the suit

74. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap. 21).

75. It follows that a successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See "Hussein Janmohamed & Sons – Versus - Twentsche Overseas Trading Co. Ltd [1967] EA 28". The court finds no good reason why the successful party should not be awarded costs of the action. Accordingly, the Plaintiff shall be awarded costs of the Suit.

VII. Conclusion and Disposal

76. The upshot of the foregoing is that after conducting such an intensive and elaborate analysis to the framed issued, the court is satisfied that the Plaintiff in the Plaint dated 20th May, 2020 has on balance and preponderance of probability established its case and is entitled to the prayers sought in the Plaint against the 1st and 2nd Defendants. Therefore, for avoidance of any doubts, I proceed to specifically order:-

    a. ThatJudgment be and is hereby entered in favour of the Plaintiff as against the 1st and 2nd Defendants.

    b. Thatthere be a declaration that the Agreement dated 27th November 2017 be and is hereby rescinded.

    c. That an order be made for the 1st and 2nd Defendants to refund the Plaintiff a sum of Kenya Shillings One Million Five Hundred Thousand (Kshs. 1, 500, 000.00) being monies paid to

them arising from the executed agreement within the next 45 days from the date of delivery of this Judgement.

d. Thatthe Plaintiff be and is hereby awarded a sum of Kenya Shillings One Million Three Hundred and Seventy Five (Kshs. 1,375,000/-) being 25% of the Purchase price as damages for breach of contract spanning for period of six (6) years from the time of the execution of the sale agreement within the next the next fourty five (45) days from the date of the delivery of this Judgement.

e. Thatthe Plaintiff shall have the Costs of this suit and interests at Court rates.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT VIRTUAL TEAMS MEANS, SIGNED AND DATED AT MOMBASA THIS 7TH DAY OF NOVEMBER,2023.

HON. JUSTICE L.L NAIKUNI (MR.)

ENVIRONMENT AND LAND COURT AT,

MOMBASA

Judgement delivered in the presence of:-

a. M/s. Yumna – the Court Assistant

b. M/s. Halake Advocate holding brief Mr. Mohammed Advocate for the Plaintiff.

c. No appearance for the 1st and 2nd Defendants