



**ABC Investments Limited v Co-operative Bank of Kenya Limited (Civil Suit 18 of 2018) [2025] KEHC 433 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 433 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL SUIT 18 OF 2018  
SM MOHOCHI, J  
JANUARY 17, 2025**

**BETWEEN**

**ABC INVESTMENTS LIMITED ..... PLAINTIFF**

**AND**

**CO-OPERATIVE BANK OF KENYA LIMITED ..... DEFENDANT**

**JUDGMENT**

1. This suit was initiated, first in the High Court through a plaint 18<sup>th</sup> of April 2018 filed in the High Court on the 9<sup>th</sup> May, 2018. On the face of the claim set out in the initial plaint, the Court on its own motion, transferred the claim to the Chief Magistrate's Court for hearing and determination. In the Lower Court the matter was serialized Nakuru CMCC No. 1475 of 2018. While in the Lower Court, the Plaintiff made an application dated 29<sup>th</sup> of March, 2021 seeking to amend its plaint which was allowed on 22<sup>nd</sup> June, 2021 culminating to the consent order, the plaintiff filed an amended plaint dated 23<sup>rd</sup> of June, 2021 following the said amendment, the Plaintiff filed an application dated, 29<sup>th</sup> of July, 2021 at Nakuru High Court (MISC APP No.E147 of 2021) seeking reinstatement of the matter back to the High Court for hearing and determination which application was allowed through an order issued on 29<sup>th</sup> of March, 2022 resulting in the matter being transferred back to this Court.
2. As a prelude, the Parties entered into a loan agreement dated 16<sup>th</sup> May, 2016 for extension of a financial facility to the plaintiff by the defendant of three hundred and twenty-four million and five hundred thousand shillings (324,500,000) for construction of ten-floor building on the parcel Nakuru Municipality Block 5/34 which was to become known Alpha Business Centre.
3. That charge in favour of the defendant of said parcel of land Nakuru Municipality Block 5/34 was registered by the plaintiff who expended two million, six hundred and ninety-two thousand, and five hundred shillings (2,692,500).



4. The plaintiff paid to the defendant, a sum of five million, three hundred and fifty-four thousand, two hundred and fifty shillings (5,354,250,) being a commitment fee and other fees payable on acceptance of the loan offer.
5. The plaintiff expended, by works and materials on site, an amount of one hundred and sixteen million, three hundred and ninety thousand. two hundred and eight one shilling (116, 390,281) on the project. This is inclusive of its contractual obligation to raise 90.5 million towards the project, being its contribution equity for the project.
6. Following commencement of the project, the plaintiff raised a claim for disbursement by the defendant of Ksh, twenty-five million, eight hundred and ninety thousand, two hundred and eight one shilling (25,890,281), this being the monies above its contributory equity, which it had incurred in the project.
7. That, in spite of plaintiff's several requests and reminders, honour the disbursement request, ultimately leading to suspension and stoppage the construction the defendant did not disburse.
8. That the defendant's refusal to honour the disbursement was on account of its alleged non-compliance by the plaintiff, of clause 3.14 of the loan agreement.
9. That eventually, on its construction that the bank had totally refused to fund the project, the plaintiff requested the defendant to discharge its property and it did, in the process, incur one hundred and eight four thousand, eight hundred and ten shillings (184,810) inclusive of legal fees.
10. Hearing proceeded with Mr Daniel Munywoki adopting his Plaintiff's Statement dated 8th June 2018; Plaintiffs Written Statement dated 12<sup>th</sup> June 2018 and the undated plaintiffs consolidated Witness Statement filed on 2<sup>nd</sup> March 2023 testifying on behalf of the plaintiff company and produced a whopping 25 documents in proof.
11. After close of case by the plaintiff they moved Court in an application dated 19<sup>th</sup> July 2023, to further amend their plaint which application was allowed on the 5<sup>th</sup> March 2024.
12. The Plaintiff filed his further amended plaint dated 23rd June 2024 seeking;
  - a), A finding and declaration by the honorable Court that clauses 3.8, 3.14, 3.15, 3.21 and 3.29 of the loan agreements created ambiguity in the contract and the same should be visited upon the defendant as it's the one that drafted the agreement.
  - aa) A declaration that clause 3.14 of the loan agreement was unjust and contractually absurd as the same related to third parties' contracts with the Plaintiff, yet the contract between the parties herein was time-bound and for a specific purpose.
  - aa) Restitution of the sum of Kshs: 8,046,750/= with interest at Court rate until payment in full being commitment and legal fees in the regularization of the security documents in respect of LR No. Nakuru Municipality Block 5/34.
  - b) Payment of the sum of Kshs: 167,410/= to facilitate the registration of the Discharge of Charge in respect of Nakuru Municipality Block 5/34 registered in favor of the Defendant.
  - c) A finding that the defendant was in breach of the contract-and-General-damages for breach of contract-the-said-breach-of-contract-
  - cc.) Special damages pursuant to findings under paragraphs (a) and (c) above, of Ksh: 116,390,281.05 being restitution of the monies that the plaintiff expended and applied to the project of the contract;



- d) Cost of the suit and interest thereon in at Court rates;
- e) Any other relief that this Honorable Court may deem fit to grant.

### **The Plaintiff's Claim**

13. The Plaintiff proposes in submission that, the following are the issues for determination by this Court are: -
  - i. Whether it has established a case of unjust enrichment, and if the defendant is to be allowed to keep the five million, three hundred and fifty-four thousand, two hundred and fifty shillings (5,354,250) paid being commitment fee and other fees payable on acceptance of the loan offer?
  - ii. Whether there was ambiguity in the loan agreement more so with relation to clause 3.14 and 3.15 on-
    - a. when the initial drawdown was payable; and
    - b. what were the conditions for drawdown under the said conditions?
  - iii. Whether the defendant was in breach of the loan agreement?
  - iv. Whether the loan agreement was unfair and contractual absurd?
  - v. What are the damages payable in this claim and their quantities?
14. The plaintiff submits that it has indeed established a case of unjust enrichment against the defendant. That the plaintiff paid to the defendant, kes. 4,876,500/- being 'non-refundable' commitment fee exclusive of exercise duty. The plaintiff additionally paid, on account commitment fee, a total of amount, Ksh. 486,750 termed as being 'excise duty'. (see plaintiff's Exhibit 11 a & b the same being current account statement for escrow account.
15. That this money, has no legal or contractual basis or consideration, as one fails to understand why a person seeking a loan from a bank would be asked to first pay to the lender 5,363,250 as commitment fee. It is our submission that the monies lack contractual consideration from or on the part of the defendant, and if such consideration existed, the same was a guarantee that it would lend the monies borrowed by the plaintiff, which never eventually happened. The defendant should therefore not be allowed to keep the said monies for it would be, in the circumstance of this case, be unjust to allow the bank to continue keeping the monies. Furthermore, the defendant denied that these monies were commission.
16. The plaintiff invites this Court to note paragraph 5 of the "Terms and Conditions of Home Loan Facility which formed part of the loan agreement. The paragraph is titled "Commission, Charges, and Commitment Fee which implies that the monies paid under this particular condition, were either charges, Commission or Committee Fee. The offer letter clear elaborated what the charges were which were documentation fee and standing order fee. The defendant could not explain what amounted to Commitment Fee as an expenditure to the loan agreement.
17. Reliance is placed on the case of Chase International Investment Corporation and Another v Laxman Keshra and 3 others [1978] eKLR and in the case of Madhupaper International Limited & Another- v-Kenya Commercial Bank Limited & 2 Others (2003) e KLR on unjust enrichment,
18. On the issue of contract ambiguity, the plaintiff contends that on the basis of the evidence before the Court, there was indeed an ambiguity, initiated or created by the defendant (during performance of the agreement), on when drawdown was payable under the loan agreement particularly the initial



- drawdown and what conditions were needed to precede. In this regard, Clause 3.14 stated: Prior to drawdown, borrower must sign up buyers up space of at least 3,215 sq. meter who are to commit a minimum of 20% deposit up front and demonstrate ability to raise balance of the purchase price.
19. That Clause 3.15 on its parts stated: Draw down is subject to the developer evidencing contribution of equity of Kes. 90.5 million in value of work done and materials on/offsite through a Quantity Surveyor Valuation and Architects' Certificate before the initial draw down. According to the Defendant, this clause meant that the plaintiff had to meet two conditions before the initial drawdown.
  20. First and in accordance to the evidence of the defendant's witness, the plaintiff had to first make an equity contribution of works worth 90.5 million; and secondly, present to the bank, sale agreement of buyers committing to buy up space of at least 3,215. The buyers, according to the defendant's witness, did not need to pay anything or deposit any monies into the escrow account.
  21. According to the plaintiff, the clauses meant that upon making its contributory equity of 90.5 million, it would be entitled, in accordance with Clause 3.15, to initial draw down. This belief is the basis upon which it made an application of reimbursement of 25,890,281/ being the money applied to the project over and above the 90.5 million of its equity contributions.
  22. The plaintiff submits that, the Court should determine whether there was an ambiguity created by these clauses because for one must then be able, from the contract, to tell at what point in the contract, was the plaintiff reasonably or contractually expected to apply its equity of 90.5 million towards the project.
  23. The plaintiff submits that, initial drawn down, in accordance to the offer loan agreement, was subject to the plaintiff applying its contributory equity of 90.5 million and not as suggested by the defendant, that it was, additionally, upon the plaintiff presenting agreements of buyers committing to buy up space of at least 3,125 square meter.
  24. That, the defendant having admitted in evidence to drawing up the loan agreement/ offer letter, the plaintiff submits that, the apparent ambiguity, created by its own interpretation of the agreement when the plaintiff requisitioned for the initial drawdown as to rests and should be visited upon the defendant. Reliance is made to the case of *Techno service Limited v Nokia Corporation & 3 others* [2021] eKLR.
  25. That, in 2019, Professor A Burrows QC in *Federal Republic of Nigeria v JP Morgan Chase Bank NA* [53] usefully summarized the modern approach to contract interpretation in the following terms: -

“The modern approach is to ascertain the meaning of the words used by applying an objective and contextual approach. One must ask what the term, viewed in the light of the whole contract, would mean to a reasonable person having all the relevant background knowledge reasonably available to the parties at the time the contract was made (excluding the previous negotiations of the parties and their declarations of subjective intent). Business common sense and the purpose of the term (which appear to be very similar ideas) may also be relevant. But the words used by the parties are of primary importance so that one must be careful to avoid placing too much weight on business common sense or purpose at the expense of the words used; and one must be astute not to rewrite the contract so as to protect one of the parties from having entered into a bad bargain.”
  26. In order to determine the relevant context of the contract, the wider context (outside of the contractual document itself) is admissible. Courts adopt a broad test for establishing the admissible background. A recent ruling provided clarification that the 'background' to a contract includes 'knowledge of the genesis of the transaction, the background, the context and the market in which the



parties are operating. Other important points to note regarding the Courts' approach to contractual interpretation include:

- a. the Courts will endeavor to interpret the contract in cases of ambiguity in a way that ensures the validity of the contract rather than rendering the contract ineffective or uncertain; [55]
  - b. That the Courts will strictly interpret contractual provisions that seek to limit rights or remedies, or exclude liability, which arise by operation of law; and
  - c. where a clause has been drafted by a party for its own benefit, it will be construed in favour of the other party (the contra proferentem rule).
27. With regards to unfair terms or the apparent contractual absurdity the plaintiff submit that, the loan agreement was unfair and laced with contractual absurdity that in the evidence, of the defendant's witness he denied or refuted that clause, 3.14 required the buyers to deposit at least 20% of the space they were buying into account, opened by the defendant for the plaintiff and termed as an escrow account which would, in accordance with the offer letter be for the purpose of collecting all the sales proceeds and service interest throughout the loan period including liquidating the loan upon completion of the construction.
28. That, the plaintiff through the testimony of its witness, stated that it was selling one (1) sq. foot at 12,000/=, and therefore, the 20% of the 34,593 sq. foot would have raised 83,023,200/= and that during cross-examination, the defendant did not give its estimated price of the space per square meter with view of establishing how much the 20% would have raised.
29. That the plaintiff's evidence on the selling price therefore, remain uncontroverted on evidence. Ultimately, the sale of 34,573 sq. m would have been enough to raise 415,116,000 the monies required to finance the entire building.
30. That, Clause 3.17 of the loan agreement stated: -
- 'Interest shall be paid on a monthly basis. ABC Investment Limited must deposit and maintain a sum equivalent to three (3) months of interest payment in advance on escrow account to be established by ABC Investments Limited and the bank. The escrow account shall at all times maintain a balance of not less than the equivalent of 3 months' interest payment during the tenure of the loan'.
31. That, on its part, clause 36 stated that the: the loan facility shall have loan tenure of twenty-four (24) months, inclusive of a moratorium of eighteen (18) months on principal serving during the construction period.
32. That, on its part, clause 3.5 stated: Interest is accrued and calculated on the basis of a 36-day year and the number of day elapsed Interest shall be paid on a monthly basis commencing at the end of the month following the first advance under offer. Prior to drawdown ABC Investment Limited must deposit and maintain a sum equivalent to three (3) months of interest payment in advance on an escrow account to be established by ABC Investments Limited and the bank the proposed cash flows of buyers deposits into the project as presented, must be adhered to at all times and any deviation would result in a revaluation of the project implementation cash flows as presented.
33. That Clause 3.16 on its hand states: Disbursement shall be tailored to the progress of the project implementation and paid directly to the contractor upon presentation of certificates of works completed or services rendered. The disbursement will be subject to Co-operative Bank inspection and subject to establishment of ABC Investment Limited's equity funds having been applied to the project.



34. That, from the above clauses, it clear that the first disbursement was -
- i. to be the amount of the certificates of works or services rendered, to be paid directly to the contractor, and
  - ii. subject to establishment of plaintiff having applied its equity to the project.
35. That, the defendant's vehement rebuttal that clause 3.14 required an upfront deposit of 20% of the purchase price into the 'escrow account' prior to drawn down, an amount approximate to 83,023,200/=, is because of its realization of the apparent unfairness of this condition. This is because that would mean, which is actual is the case given that defendant refused to disburse the funds on allegation of non-compliance with by the plaintiff of clause 3.14, that the plaintiff was required to do the following before the initial disbursement: -
- a. apply its equity of 90.5 to the project;
  - b. sell space of at least 3,125 sq. m. and deposit 20% -83,023,200/= and
  - c. deposit, prior to drawdown, three months' interest of 24,337,500 (the loan was at 6%, see clause 3.30)
36. That therefore, when the plaintiff requisition for 25, 890,281 shillings, the defendant was, on its part, demanding, over and above the 90.5 equity contribution to works or materials, a further deposit into the 'escrow account of Ksh, 107,360,700 million shillings, before the initial drawdown. This was not the intention of the parties as they entered into the agreement and this requirement, essentially made it difficult for the plaintiff to enjoy the loan or monies that the defendant should have extended under the loan agreement.
37. That, it is apparent therefore, that by insisting that the plaintiff deposits at least 20% of the space before the initial drawdown, the defendant would not be using its money in the transaction, but the monies raised by the plaintiff through sales or its own money of three (3) months interest deposit. This unconscionably unfair, and the agreement had been crafted in favour of the defendant's interest only.
38. That, if the defendant had observed that the plaintiff had no, means to repay the loan as was suggested in the defendant's witness testimony, then the defendant too had the choice of not getting into the contract with such unfair or unconscionable terms.
39. That, in making a finding on this issue of unfair or contractually absurd terms, we urge the Court to be guided by the following authorities and statutory provisions.
40. Reliance is made to the following caselaw CIS v Directors, Crawford International School & 3 others [2020] eKLR; Vanzant V Coates. [1969] 14 and LTI Kisii Safari Inns Ltd & 2 others v Deutsche Investitions-Und Entwicklungsgellschaft ('Deg') & others [2011] eKLR

### **Defendants Case and Submissions**

41. It was the defendant's case that, the Plaintiff a Party to a contract was unable to adequately protect their interests. That, it was a matter of common sense that parties did not often enter a substantively improvident bargain when they had equal bargaining power.
42. That, according to the principle of. perceptive restraint a Court had to exercise perceptive restraint when approaching the task of invalidating, or refusing to enforce, contractual terms. A Court would use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases. Contracts, freely and voluntarily entered into, should be honoured."



43. That, based on the above established principles, the Plaintiff has not tendered any evidence to demonstrated that the Agreement the subject of the suit was unfair, unjust, contractually absurd and/ or unconscionable to warrant the reliefs sought.
44. As to Whether clauses 3.8, 3.14, 3.15 and 3.29 of the loan agreement between the Plaintiff and the Defendant created ambiguity in the contract, the defendant contends that the loan agreement was not ambiguous as argued by the Plaintiff or at all. That, Clause 3.8 is about disbursement of the loan facility tailored on the progress of the project subject to the Defendant's inspection. That Clause 3.14 is as explained hereinabove. That Clause 3.15 is about the Defendant's equity contribution (90.5million) to the project in value of work. This is in addition to the requirements of Clause 3.14, which in the defendant's submission are not contradictory to each other.
45. That, Clause 3.29 requires the Plaintiff to submit monthly sales reports and sales agreements on the project.
46. That, the Plaintiff impliedly argues that there would be ambiguity in the two clauses because "one must be able, from the contract, to tell at what point in the contract was the plaintiff reasonably expected to apply its 90.5 million towards the project." Yet the Plaintiff has not presented any evidence, submission or interpretation of clauses 3.14 and 3.15 to support this argument or to demonstrate any contradiction or ambiguity in the two clauses. Equally, the Plaintiff has not demonstrated any ambiguity of the two clauses as read together with clauses 3.8, 3.29 or any other clause of the loan agreement herein.
47. That, it is plainly evident that the two clauses speak to what is to happen prior to drawdown on the loan facility. That the requirements of the two clauses are to be complied with before drawdown of the facility. This is evident from the use of the words "prior to drawdown" in clause 3.14 and "before the initial drawdown" at the end of clause 3.15. The fact that the loan agreement has not specified which, between the requirements of the two clauses are to be performed first does not mean the clauses are ambiguous or contradictory.
48. Accordingly, the defendant submits that, the loan agreement dated 9<sup>th</sup> May 2016 is not ambiguous as alleged by the Plaintiff or at all. The declaration/relief sought to that effect should therefore be declined.
49. As to Whether the Defendant breached the loan agreement between the Plaintiff and the Defendant as alleged by the plaintiff, the Defendant Contends that, the Plaintiff did not meet the requirements of clause No. 3.14 of the agreement, a condition precedent to the drawdown on the loan facility. Whereas it met the requirements of clause 3.15, this was not the only condition to
50. As to whether the Plaintiff is entitled to restitution of the monies it expended pursuant to the loan agreement? The Defendant submit that the Plaintiff is not entitled to the monetary reliefs sought.
51. That the Plaintiff did not perform its obligations under clause 3.14 of the loan agreement resulting into non- disbursement of the loan. Specifically, the reliefs are not merited, for the following reasons:
52. That, the Kshs.8,046,750 is commitment fees and legal fees as Per the loan agreement, and contrary to the Plaintiff's claim that the amount "has no legal or contractual basis or consideration" the fees were provided for in the loan agreement and were designated as non-refundable, whether or not the loan proceeded to drawdown.
53. That the relevant provision of the loan agreement is aptly titled "Non-Refundable Commitment Fees and Other Payables on Acceptance of This Letter" and further, according to the Terms and Conditions of the loan agreement, Clause 16.1, the Plaintiff was obligated to pay "all fees, commissions and charges as set out in the letter [of offer]"



54. That, equally, under clause 16.2 of the said terms and conditions, the Plaintiff was required to "...pay to the Bank ... all expenses (including legal, valuation, all taxes including Excise duty at 10% on all fees, charges and commissions and other out of pocket expenses..." See page 12 of the Defendant's bundle of documents dated 8<sup>th</sup> June 2018.
55. Further, at Clause 3.1 of the Special Conditions to the loan agreement/letter of offer "The security taken by the bank shall be in a form agreed by the Bank and shall be prepared, executed and perfected at the Borrower's expense by Advocates of the Bank's choice and must be completed before drawdown.
56. That the Plaintiff does not deny that the said commitment fees were non-refundable whether or not the loan facility proceeded to drawdown. Equally, the Plaintiff does not deny that the perfection of the security the subject of the loan facility was done, and as such the legal fees paid were for the work done and therefore earned by the Advocates Involved, and not by the Defendant.
57. That, it is not unjust enrichment, and the Plaintiff is not entitled to a refund of the amount.
58. That, the Discharge of Charge was procured at the request of the Plaintiff following its non-performance of its obligations under Clause 3.14 of the letter of offer and that the expense of Kshs.167.410 for registration of Discharge of Charge is thus untenable.
59. That if awarded, this will be unjust compensation and reward to the Plaintiff for its established breach of Clause 3.14 as explained (c) with Kshs.116.390.281.05/-being monies expended to the project, it is not in dispute that these monies were incurred for the benefit of the Plaintiff's development herein, and were expended by the Plaintiff fully aware of its breach of the terms of clause 3.14 of the executed loan agreement/letter of offer.
60. That the benefit or work allegedly done to the tune of the Kshs. 116,390,281.05 still remains with the Plaintiff notwithstanding its discontinuation of the project. It would therefore be unjust enrichment, and an act of double benefit if the Court were to award the amount sought when the Plaintiff still retained the benefit of the work done on the project for the amount.
61. That, Equity abhors such unjust enrichment or benefit, and the Court should not grant the relief sought herein.
62. The defendant prays that the suit be dismissed with costs.

### **Analysis and Determination.**

63. The Court has carefully considered the plaintiff's case the evidence presented in support and the defendant's case as presented in Opposition and the extensive submissions by parties as well as the case law cited.
64. The Court recalls that the reliefs being sought are significantly discretionary relief and that the Court is accordingly guided as to the prevailing judicial standards for grant of discretionary reliefs.
65. A contract ambiguity suit presupposes that a dispute exists where one party has raised allegations of ambiguities in the contract and that the counterpart must have had notice of the said alleged ambiguities. I am afraid in this instance that the Court could not locate the dispute centered on contract ambiguities until the suit was filed, the Court is unable to find explicit notice to the defendant on contract ambiguity in fact on the contrary this Court is persuaded that the plaintiff attempted to comply with condition contained in clause 3.14.
66. In the Absence of a pre-existing contract ambiguity between the parties then declaratory reliefs sought become academic as this Court is of the view that the Plaintiffs voluntarily accepted the terms of offer



- and that where they encountered difficulties in fully complying therewith they unsuccessfully sought a variation from the defendant.
67. The primary reason for plaintiffs seeking the variation was on the 5<sup>th</sup> January 2017 had nothing to do with contract ambiguity. The letter by the plaintiff to the defendant dated 3<sup>rd</sup> October 2017 equally retains stealth silence on the alleged contract ambiguity.
68. This Court is guided by following conditions, to be satisfied by a party before declaratory reliefs can be granted;
- a. The Court had to have jurisdiction and power to award the remedy.
  - b. The matter had to be justiciable in the Court.
  - c. As a declaration was a discretionary remedy, it had to be justified by the circumstances of the case.
  - d. The plaintiff had to have locus standi to bring the suit and there had to be a real controversy for the Court to resolve.
  - e. Any person whose interests might be affected by the declaration should be before the Court.
  - f. There had to be some ambiguity about the issue in respect of which the declaration was asked for so that the Court's determination would have the effects of laying such doubts to rest.
69. This Court decline the invitation to undertake an interpretive exercise to locate purported ambiguities within the parties. This Court is of the view that no such dispute existed prior to the initiation of this suit.
70. In the case of Samuel Kamau Macharia Vs Kenya Commercial Bank Limited, Kenya Commercial Finance Company Limited [2003] eKLR the Court laid bare the grounds which form the basis of a restitutionary claim as follows;
1. non-voluntary conferment of a benefit, such as through mistake or on account of compulsion, necessity, or in ignorance, or due to an unequal condition between the payor and payee;
  2. voluntary conferment of benefit for total failure of consideration;
  3. benefit conferred in consequence of a wrongful act, such as where a trustee benefits from a breach of trust;
  4. ultra vires demand;
  5. abuse of a power entrusted to the defendant by Parliament or by a contractual instrument such as a debenture or other agreement;
  6. illegitimate use of self-help sanctions;
  7. vindication of equitable title to property.
71. This Court is unable to find wrong-doing on the part of the defendants insisting on full compliance with the terms and conditions and that the expenses incurred were part of the terms and conditions being satisfied by the plaintiff. This suit lack evidence in support of wrong doing giving rise to a restitutionary relief.
72. The plaintiffs have not shown on a balance of probability that, the expenses incurred for the sum of Kshs: 8,046,750/= which includes payment of commitment fee and unilaterally registering a charge in



favour of the defendants as well as legal fees. In fact, the Plaintiff admits in his exhibit 16 letter dated 3rd October 2017, of satisfying the conditions precedent? At this juncture the Plaintiff is only Appealing to the defendants to release the first disbursement.

73. The Plaintiff was fully conscious of All terms and conditions Letter of offer dated 9<sup>th</sup> May 2016 including clause 3.14 and that as at 5<sup>th</sup> January 2017 sought variation of the condition on sales to be achieved.
74. With regards to the special damages in the nature of funds expended on the project so far, having found that the plaintiff's failure to fully comply with the terms and conditions triggered the current dispute and that, they cannot be then be seen to lament or argue that as a result thereof they were exposed to special damages, of Ksh 116,390,281.05.
75. This Court is unable to award the Plaintiff any restitutionary as not basis or evidence has been laid and that none of the grounds for grant of this relief has been satisfied.
76. All in all, this Court is unable to find any merit in the Plaintiff's claim and accordingly dismisses the same with costs to the defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 17<sup>TH</sup> OF JANUARY, 2025**

**MOHOCHI S.M.**

**JUDGE**

