



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CIVIL CASE NO. 1252 OF 2013

PHILIP JALANGO.....PLAINTIFF

VERSUS

RYAN PROPERTIES LIMITED.....DEFENDANT

JUDGEMENT

1. The Defendant is the registered proprietor of land reference number 12767/3, IR53720 in Nairobi situated along Bogani East Road Karen where it proposed to construct ten residential houses with gardens, a swimming pool and other common amenities. The development was to be known Grash Gardens. The Plaintiff expressed interest in purchasing house number 7 in Grash Gardens and was shown the sketch map for the site, the site plan and three dimension images of the house on the approved building plans dated June 2010. The Defendant's selling agents forwarded a letter of offer to the Plaintiff on 20/2/2012. The Plaintiff was to pay Kshs. 33,000,000/= as the purchase price for the house and was to deposit 55% of that amount which translates to Kshs. 18,150,000/= upon execution of the letter of offer. He was to pay part of the purchase in the eleventh month of construction and the balance of 15% within 14 days of the registration of the lease in his name.

2. The Plaintiff entered into a sale agreement with the Defendant dated 10/10/2012 which incorporated the terms of the letter of offer. He paid Kshs. 17,250,000/= in total towards the purchase price to the Defendant. The Defendant demanded payment of 20% of the purchase price on 7/2/2013. The Plaintiff sought to know whether construction had started before he could make this payment. He was informed that the Defendant had not secured financing.

3. The Plaintiff averred that the Defendant did not provide any status update on the commencement and progress of the construction as earlier represented in the offer. The Plaintiff claimed that he rescinded the agreement on 24/4/2013 when the Defendant failed to address the Plaintiff's issues, and demanded a refund of the sum of Kshs. 17,250,000/= on 6/5/2013 which he had paid towards purchase of house number 7, together with interest. He claimed that the Defendant demanded a further payment of Kshs. 7,500,000/= for the purchase of house number 7 despite failing to meet its obligations under the sale agreement. On its part, the Defendant claimed that it rescinded the sale agreement vide the letter dated 18/6/2015 and that it retained 10% of the purchase price in accordance with the terms of the sale agreement.

4. The Plaintiff gave particulars of breach of contract and fraud in its suit filed on October, 2013. He sought an order of injunction to restrain the Defendant from selling or transferring house number 7 Grash Gardens; a declaration that the letter of offer and sale agreement were obtained by fraud and should be set aside; a refund of Kshs. 17,250,000/= which he paid as a deposit towards the purchase price; the sum of Kshs. 12,000,000/= being loss of investment bargain in house number 7 Grash Gardens and interest on the sums claimed at the rate of 25% per annum from judgment until payment in full.

5. The Defendant denied the Plaintiff's claim. It pleaded in its defence filed on 26/11/2013 that the Plaintiff requested some changes to the original approved work plans and that the completion date expressed in the letter of offer was to be on the 30th day after the Defendant sent a letter from the project architect to the Plaintiff confirming that construction of the house was complete. The Defendant set out the salient features of the sale agreement and averred that any request for payment of deposit it made was in accordance with the agreement for sale and that the Plaintiff was aware that the purchase price he paid to the Defendant under the agreement would be utilised towards construction of the house and the estate and that any delay in payment by the Plaintiff would invariably delay the construction of the premises.

6. The Defendant averred that the Plaintiff did not rescind the contract in accordance with the agreement for sale but instead relied on unilateral grounds outside the contract. The Defendant maintained that it addressed the issues raised by the Plaintiff and denied that the Plaintiff was entitled to any refund of the purchase price as he demanded in the letter of 6/5/2013. It averred that the formal demand for Kshs. 7,500,000/= it made on 17/5/2013 was in accordance with clause 8.1.1 of the agreement for sale and that the Plaintiff was given 21 days to make that payment. The Defendant denied that the building plans were altered to the Plaintiff's detriment and maintained that it constructed the houses in accordance with the building plans. It denied the allegations of fraud and breach of contract particularised by the Plaintiff.

7. On the loss of Kshs. 17,250,000/= which the Plaintiff was claiming, it argued that the Plaintiff was entitled to a refund in accordance with clause 8.1.1.2 which provided that upon completion of construction the Defendant would sell the Suit Property and refund monies paid towards the purchase price without interest and less 10% being the forfeited sum. The Defendant pointed out that any increase in price would belong to the Defendant and that no interest was to be computed on the purchase price paid.

8. The case was set down for hearing on 26/3/2020. The hearing could not proceed on that date because of the scaling down of court sittings to avert the spread of Covid-19 in the country. The court fixed the case for hearing on 13/7/2020. On that date, Mr. Allen Gichuhi who appeared for the Defendant addressed the court on Mr. Ouma's telephone. He informed the court that he could not attend court because members of his staff had contracted Covid-19 and the others had to go into quarantine.
9. The Defendant filed an application seeking to strike out the suit on the grounds that disputes relating to breaches of contracts and allegations of fraud fell within the purview of the High Court pursuant to Article 165 of the Constitution. The Defendant also relied on the 1997 Practice Notes on the Classification of Commercial Matters which set commercial matters as including ordinary transactions between parties. The court directed parties to file and exchange submissions on the application for striking out. The matter came up for highlighting of submissions on 29/7/2020 and the court gave the ruling date of 22/9/2020. The ruling was not ready on 22/9/2020 because parties sent their submissions to the court late and the ruling was put off to 19/10/2020. The court could not deliver the ruling on 10/11/2020 because a copy of the application was not in the court file.
10. The court directed that the matter would be mentioned on 16/11/2020 to give a ruling date after the Defendant availed a copy of the application to the court. The Plaintiff's advocate offered to furnish a copy of the application to the court when the matter came up on 16/11/2020 and the court gave the ruling date of 3/12/2020. The court declined to strike out the suit in the ruling that it delivered on 3/12/2020. On delivery of the ruling, the Defendant's advocate sought a mention date in February 2021 to confirm whether by then the Defendant would have lodged its appeal against the decision of this court before the Court of Appeal. The Plaintiff's advocate asked the court to fix the suit for hearing. The court set down the suit for hearing on 16/2/2021.
11. When the case came up for hearing on 16/2/2021, the Defendant's advocate, Mr. Allen Gichuhi informed the court that he had filed an application on 29/1/2021 for stay of proceedings pending determination of the appeal, pursuant to which the court directed the Defendant to serve the application on the Plaintiff. Directions on the hearing of that application were to be given on 16/2/2021. Mr. Ouma, advocate for the Plaintiff informed the court that the application was served on them the day before the case was scheduled to come up for hearing. Mr. Ouma expressed concern that whenever this case was fixed for hearing, the Defendant filed applications to disrupt the hearing of the dispute.
12. Parties argued the application for stay of proceedings and the court gave its ruling and dismissed that application. Upon rendering its ruling, the Defendant's advocate, Mr. Gichuhi made an application for this court to recuse itself from hearing the matter on the ground that this court had refused to recognise the fact that there was a pending appeal before the Court of Appeal touching on the jurisdiction of this court to deal with the suit and that the court appeared biased against the Defendant. The Plaintiff's advocate opposed the application. The court heard the application for recusal and delivered its ruling, vide which it declined to recuse itself from hearing the case. Mr. Gichuhi advocate informed the court that he was going to walk out of court as he applied for 30 days' stay pending the filing of a formal application in the Court of Appeal against this court's refusal to stay the proceedings and to recuse itself from hearing the matter. The court declined to grant orders for stay of proceedings and directed that the hearing of the suit would proceed.
13. Philip Collins Jalang'o, the Plaintiff in this suit gave evidence. He produced emails and the correspondence he exchanged with Mr. Robert Kinyua in November 2011 regarding the project. He also produced an email from the Defendant's architect on the project description and the dimensions of the rooms. The Defendant's agent sent a letter to the Plaintiff's advocate attaching a site plan which showed that house number 7 which the Plaintiff was purchasing was set out in the middle of the development. He stated that he requested the architect to make some adjustments to the design of house number 7, which were agreed to the Defendant's directors.
14. Mr. Jalang'o stated that he sent the Defendant his payment plan for the purchase of house number 7 on 20/2/2012. He received a letter of offer which required him to pay a deposit of Kshs. 18,150,000/= being 55% of the purchase price upon execution of the letter of offer. He was to make further payment of 30% of the consideration within the 11th month of construction and the balance of 15% within 14 days of the registration of the lease in his favour. He executed the letter of offer and sent the Defendant Kshs. 14,600,000/= as a deposit on 9/3/2012. He paid an additional sum of Kshs. 1,800,000/= to the Defendant on 23/3/2012.
15. He stated that he visited the site on 6/4/2012 and realised that construction had not commenced yet the work plan indicated that the site clearance would commence on 9/3/2012. When he inquired as to why the project had not taken off, the directors of the Defendant requested him to give more money to buy materials. He paid Kshs. 450,000/= on 18/7/2021 and Kshs. 400,000/= on 3/8/2021 bringing the total sum he had paid towards the purchase price to Kshs. 17,250,000/=.
16. He signed a sale agreement on 31/8/2012 which was forwarded to Defendant's advocates for execution. The Defendant executed it on 10/10/2012 and had it duly stamped but refused to give the Plaintiff or his advocates a copy of that agreement. The sale agreement incorporated the terms of the letter of offer and more pertinently provided that the Defendant would construct 10 residential houses in the estate in strict compliance with the approved building plans and the brochure which the Plaintiff had inspected. Construction was to commence on 5/3/2012 and was expected to be completed in September 2013. The Plaintiff was to pay 20% of the balance of the purchase price within 5 months of the actual commencement of the construction date and a further 10% within 11 months of the date the actual construction commenced. The balance of Kshs. 4,950,000/= being the remaining 15% of the purchase price was to be paid on or before the completion date. The Defendant warranted that the title was free for many encumbrances and that house number 7 would be constructed in accordance with the approved building plans as to the design, measurements, finishing and location in the Defendant's development project known and Grash Gardens. If there was any delay in completing construction due to unforeseen or uncontrollable circumstances, the Defendant was to inform the Plaintiff in writing and the completion date would be extended in writing based on the period specified by the architect.
17. He stated that on 7/2/2013 Mr. Robert Kinyua demanded payment of the second deposit of 20% of the purchase price being Kshs. 6,600,000/=. The Plaintiff sought to know the actual stage of the project and was informed that the project had experienced massive delays because the Defendant had difficulties securing financing for the project. Mr. Kinyua informed the Plaintiff on 27/2/2013 that the Defendant had secured funding for the project and had charged the land to Housing Finance Company Limited to secure a loan of Kshs. 100,000,000/=, which the Plaintiff contended was contrary to the sale agreement.
18. The Plaintiff stated that he sought status updates on the project including photographs of the construction work already undertaken but

these were not supplied to him. He stated that he visited the site on 21/3/2013 and discovered that nothing substantial was going on. He sought a meeting with the Defendant's directors to get clarification on the project delay. In the meeting of 10/4/2013, the Plaintiff met the Defendant's selling agents representative, Mr. Job Kamau and raised concerns about the situation regarding house number 7 on the development, review of the project work plan, samples of the interior finishing, status updates of the project, failure to demolish all the structures at the site, the drainage system, the heating system and the expected date of finalisation of the show house. His advocate wrote to Mr. Gikonyo Gitonga, the Managing Director of CB Richard Ellis Limited on 11/4/2013 putting in writing the complaints he had raised in the meeting of 10/4/2013. Mr. Gitonga informed him that he had forwarded his complaint to the Defendant's directors. His advocate followed up on the issues on 17/4/2013.

19. On failing to receive any response from the Defendant on the issues he had raised, the Plaintiff's advocates rescinded the agreement on 23/4/2013 and demanded a refund of the sum of Kshs. 17,250,000/= which he had paid towards the purchase of the property. On 24/4/2013, the Defendant's advocates responded to the issues contained in the Plaintiff's letter of 11/4/2013. Upon perusing the document sent in the letter dated 24/4/2013 including the site plan, the Plaintiff noticed that there were fundamental alterations to the approved building plans which was the basis on which he had entered into the agreement with the Defendant. He noted fundamental alterations to the design and number of the houses to be constructed on the site, which had reduced from ten to eight. The location of house number 7 had also changed without the Plaintiff's consent. The ground floor plan for house number 7 had been altered and the size of the kitchen yard had been reduced. The size of the house had also been reduced by over 22m² and key project tasks on the work plan including a swimming pool, boundary wall and bio digester unit had been excluded. In addition, the main house would not be demolished as well as the flats and shops on the suit premises, yet these were expressly mentioned in the building plan. He noted failure to provide samples of the interior finishing for his approval, information on the type of heating system to be installed in the house, the general plan for the drainage system and regular updates on the progress of the project.

20. The Plaintiff's advocate reiterated his initial demand on 6/5/2013 for a refund of the monies the Plaintiff had paid towards the purchase of the house. He stated that on 9/5/2013 the Defendant's directors purported to add an appendix to the sale agreement without any notice or approval by the purchasers yet the sale agreement provided that any amendments had to be in writing and approved by the Plaintiff. He was informed on 24/6/2013 through an email that the Defendants had resolved to amend the agreement unilaterally without consulting him.

21. The Defendant's advocates demanded that the Plaintiff pay the second installment of the purchase price being 20% on 17/5/2013 without commencing the project in time. The Plaintiff did not pay that amount because according to him the Defendant had failed to abide by the terms of the sale agreement and he had rescinded the sale agreement prior to the Defendant's letter of 17/5/2013. The Defendant's advocates wrote to the Plaintiff's advocates on 18/6/2013 rescinding the sale agreement while retaining 10% of the purchase price. The Plaintiff contended that the Defendant's actions were fraudulent while maintaining that as at 25/6/2013 the Defendant had not done anything substantial on the site yet they were wrongfully demanding money from him and purported to retain 10% of the purchase price. The Plaintiff relied on the photographs taken of the site on 25/6/2013 showing that the project was yet to start.

22. The Plaintiff gave particulars of fraud on the part of the Defendant in failing to give him notice of the fundamental alteration of the design and the number of the houses to be built on the suit property; change of the location of house number 7 which he was purchasing; altering the building plans without notice to him; reducing the size of the house; failing to demolish the main house, the flats and the shops on the suit premises as indicated on the building plans; demanding payment of Kshs. 7,500,000/= from the Plaintiff without commencing the project in time; encumbering the suit land contrary to the terms of sale agreement; failing to perform its obligations under the sale agreement; rescinding the agreement and retaining 10% of the purchase price; and unjustly enriching itself to the tune of Kshs. 17,250,000/=. He gave particulars of loss and damage for this sum, loss of interest on that sum, loss of bargain of Kshs. 12,000,000 and loss of use of the property from the completion date of September 2013. He mentioned that he attempted to negotiate and settle the matter with the Defendant but the Defendant refused to resolve the issue rendering this suit necessary.

23. The Plaintiff stated that he was paid Kshs. 16,161,969/= by the Defendant on 7/10/2016 and was seeking the balance of the sum he had paid. He sought interest on the full amount he had paid together with interest on the outstanding sum.

24. The Plaintiff closed his case and the court directed parties to file submissions which were to be highlighted on 15/3/2021. On 15/3/2021, the advocate for the Defendant, Mr. Allen Gichuhi, informed the court that the Defendant would not be filing submissions because the Court of Appeal had directed parties to file submissions on the application for stay of the proceedings before this court. Mr. Gichuhi confirmed that no orders had been given by the court of appeal staying the proceedings before this court. The court gave the judgment date of 13/4/2021. The judgement was not ready on 13/4/2021 and the court gave a new date of 11/5/2021. The Defendant filed an application to arrest this court's judgement pending determination by the Court of Appeal of its application for stay of proceedings. Mr. Gichuhi informed the court that the Court of Appeal was expected to make its determination on the application for stay on 21/5/2021 and sought a date for the hearing of the application seeking to arrest this court's judgement after 21/5/2021. The court fixed the application dated 27/4/2021 seeking to arrest the judgment for hearing on 24/2021.

25. On 24/5/2021, Mr. Gichuhi informed the court that the court of appeal did not deliver its ruling on stay of proceedings on 21/5/2021 and indicated that it should be delivered on notice. The court gave a ruling date for 7/7/2021 and informed the parties that judgment will be delivered on that date if there will no orders staying the proceedings.

26. The Plaintiff filed submissions which the court considered. The Plaintiff submitted that he expressed interest in purchasing a house from the Defendant and was furnished the project description, sketch map, site plan, 3D images of the project and the approved building plans on 7/2/2012. That upon reviewing the plans he proposed some adjustments which the Defendant accepted and incorporated. The Defendant then offered the Plaintiff house no. 7 Grash Gardens for Kshs. 33,000,000/=:, which offer the Plaintiff accepted by executing the letter of offer. He submitted that he entered into an agreement dated 10/10/2012 which incorporated the terms of the letter of offer and outlined the duties, rights and obligations of both parties. The Plaintiff rehashed the sequence of events leading to the termination of the contract for sale.

27. The Plaintiff proposed issues for determination which can be summarised into four main issues. Firstly, whether there was a valid contract between the parties; secondly, which party breached the terms of the contract; thirdly, whether the Plaintiff and the Defendant were entitled to terminate the contract; and lastly what reliefs the court should grant? The Plaintiff pointed out that the validity of the sale contract

was not in contention since both parties executed the sale agreement. The Plaintiff maintained that the Defendant breached the terms of the offer and the sale agreement.

28. The Plaintiff submitted that the Defendant breached the terms of the contract by:

- a. altering the inspected and approved building plans after the execution of the sale agreement without notice to the Plaintiff or his approval;
- b. altering the design and numbers of the houses to be built on the suit property from 10 houses indicated in the initial building plans inspected by Plaintiff to 8 without any agreement, notice or concurrence from the Plaintiff.
- c. altering the location of house number 7 which the Plaintiff had bought and made payments towards its purchase without any notice, consultations and/or consent from the Plaintiff. He contended that from approved plans which he inspected, house number 7 was meant to be in the middle of the estate that the Defendant was developing.
- d. altering the ground floor plans for House Number 7 by reducing the size of the kitchen yard and excluding the external store.
- e. reducing the size of the house by over 22 Square metres.
- f. altering the project work plan and failing to include key project tasks on the work plan such as the swimming pool, boundary wall, and bio-digester unit.
- g. failing to demolish the main house, the flats and shops on the suit premises which were expressly mentioned in the building plans inspected by the Plaintiff.
- h. failing to provide samples of interior finishing for inspection and approval by the Plaintiff.
- i. failing to provide information on the type of heating system to be installed in the house despite my requested to by the Plaintiff.
- j. failing to provide information on the type of heating system to be installed in the house despite my requested to by the Plaintiff.
- k. failing to regularly update and notify the Plaintiff of the development and progress of the project.
- l. delay in commencing the construction as scheduled and completion date without any concurrence or approval of the Plaintiff herein; and
- m. demanding payment of the second instalment when no actual construction had begun.

29. The Plaintiff pointed out that the Project Site Plan had 10 houses with house no. 7 clearly identified and numbered in the centre of the estate. Further, that this was stated expressly in the letter of offer and the sale agreement. That without notice to the Plaintiff, the Defendant and its lawyers met and altered the house and the estate plan as evidenced by the email of 9/5/2013 from the Defendant's selling agents to the Defendant's Advocate, Mr. David Ileri, which was copied to Jackson and Ken Kanyarati stating that it had been agreed at a meeting held between Mrs. Kanyarati, Jackson Kanyarati myself and other persons that the flats currently existing at the site shall be demolished while Mrs. Kanyarati's house would remain. Amenities including water borehole, club house which would service the 8 units in Grash Gardens. These changes were to be put in writing and were to be attached to all sale agreements as an appendix. The Plaintiff pointed out that the Project Site Plan had 10 houses with house no. 7 clearly identified and numbered in the centre of the estate. Further, that this was stated expressly in the letter of offer and the sale agreement. That without notice to the Plaintiff, the Defendant and its lawyers met and altered the house and the estate plan as evidenced by the email of 9/5/2013 from the Defendant's selling agents to the Defendant's Advocate, Mr. David Ileri, which was copied to Jackson and Ken Kanyarati stating that it had been agreed at a meeting held between Mrs. Kanyarati, Jackson Kanyarati myself and other persons that the flats currently existing at the site shall be demolished while Mrs. Kanyarati's house would remain. Amenities including water borehole, club house which would service the 8 units in Grash Gardens. These changes were to be put in writing and were to be attached to all sale agreements as an appendix.

30. The Plaintiff added that the email was not copied to him and that the Defendant decided to modify the entire project, reduce the number of houses to 8 and to leave out the main house to form part of the estate and then unilaterally decided to include these amendments as an Appendix to all the sale agreements. That no addendum was ever prepared and shared with the Plaintiff.

31. The Plaintiff urged that the entire project as conceptualized in the estate plan, project description, site plan and floor plans was that all the existing structures on the land would be demolished to pave way for the construction of the 10 Houses. Hence by reducing the number of houses to 8 and retaining the main house, the Defendant fundamentally altered the design, structure, layout and concept of the entire project which required the concurrence of the Plaintiff and all the purchasers who had purchased houses in that estate. According to the Plaintiff, this had led to failure of execution of key project tasks such as construction of the swimming pool, boundary wall and bio-digester unit.

32. The Plaintiff further submitted that the alteration of the house plan changed the substratum of the agreement as it affected the layout and amenities that had drawn the Plaintiff to accept the letter of offer and sale agreement for Grash Gardens house no. 7. The Plaintiff added that the Defendant unilaterally changed the work plan without consultation; and that as evidence of bad faith and impunity, the Defendant did not even bother to share the revised approved plans, project description, work plans, and other changes with the Plaintiff. The Plaintiff submitted that the revised work plans omitted key project tasks including the swimming pool, boundary wall and bio-digester unit which were all in the Project Description and which ought to have been completed by the estimated completion date.

33. The Plaintiff submitted that the Defendant's mischief was further compounded by its silence and failure to provide updates to the Plaintiff on the work plan and its failure to furnish copies of all minutes of the site meetings relating to the development of Grash Gardens which would have confirmed the timelines for the entire construction period, the actual construction commencement date, the actual construction completion dates as well as all the related tasks. The Plaintiff invited the court to infer the Defendant's refusal to furnish the documents negatively against it.

34. The Plaintiff emphasised that clause 1.1 (g) and (h) of the agreement of sale stipulated the construction period, with the commencement being on or about May 2012 whereas the completion date was on or about September 2013. The Plaintiff submitted that the Defendant failed to commence construction within the prescribed timelines.

35. The Plaintiff submitted that he wrote to the Defendant's selling agents on 1/3/2013 and followed up on 11/3/2013 requesting for a status update including photographs of the work done and was informed that they would be sent to him. That he visited the site on 21/3/2013 and found an abandoned site with no development except a show house which also appeared to have stalled. He argued that the only thing that the Defendant was interested in was the payment of the next instalment of the purchase price as per clause 3.1 (b) of Kshs. 6,600,000 being 20% of the purchase price as demanded on 7/2/2013 and 1/3/2013. This was despite the Defendant's failure to furnish proof that the construction had commenced to enable the Plaintiff pay the second instalment of Kshs. 6,600,000, which was pegged on the actual commencement of the construction. He maintained that that payment was not due until proof of actual commencement of the project had been furnished and that the Defendant failed to furnish this when it was requested on 1/3/2013 until 17/4/2013.

36. The Plaintiff relied on the decision in **Millicent Perpetua Atieno v Louis Onyango Otieno [2013] eKLR** in which the Court of Appeal quoted **Halsbury's Laws of England, Volume 12, 4th Edition Paragraph 1183** on the type and measure of damages recoverable by a purchaser of land on breach by the seller. It states that where the vendor wrongfully refuses to complete, the measure of damages is the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. That the damages would include the return of the deposit paid by the purchaser with interest together with the expenses incurred in investigating the title and other expenses contemplated by the parties. Additionally, that where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, the purchaser would be entitled to damages for the loss of bargain.

37. The Plaintiff confirmed that the Defendant sold house number 7 and reimbursed him the sum of Kshs. 16,161,969/= on 7/10/2016 leaving a balance of Kshs. 1,088,037/=. He sought this sum plus the interest sought in the plaint plus costs. The Plaintiff submitted that he should be paid the sum of Kshs. 12,000,000/= being the loss of investment bargain with regard to house number 7 Grash Gardens in L.R. No. 12767/3 I.R. (53720) situated along Bogani East Road in Karen.

38. The Plaintiff relied on the decision in **Union Technology Kenya Limited v County Government of Nakuru [2019] eKLR** in which the court referred to the decision in **Kilimanjaro Construction v 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”.

39. The Plaintiff submitted that the foregoing authorities confirmed that having lost the opportunity of residing in a residential estate in his area of choice and having lost the opportunity to invest in any other residential estate, he was entitled to the loss of investment bargain as he sought in prayer (d) of the plaint. The Plaintiff invited the court to look at the email from the Defendant's selling agents of 4/7/2013 where it was indicated that they were asking for Kshs. 43,000,000/= for mortgage buyers and Kshs. 42,500,000/= for cash buyers for the houses the Plaintiff had intended to purchase. He urged that this was evidence that the value of the property at the date of repudiation was greater than the agreed purchase price hence entitling him to damages for loss of bargain of Kshs. 12,000,000/= being the difference between the purchase price of Kshs. 33,000,000/= and the market price at the date of repudiation.

40. The Plaintiff urged that he was equally entitled to interest on the whole deposit of Kshs. 17,250,000/= paid to the Defendant until 7/10/2016 and further interest on the balance due until payment in full. Further, that he was equally entitled to interest on the loss of bargain as prayed in prayer (e) of the plaint.

41. The main issues for determination are who between the Plaintiff and the Defendant breached the terms of the agreement of sale and what reliefs the court should grant. The court notes that the recitals to the sale agreement indicated that the Defendant would construct 10 houses on L.R. No. 12767/3 with gardens, swimming pool, parking areas and common amenities known as Grash Gardens. Further, that the purchaser had inspected and accepted the approved plans and was deemed to have notice of them. The Plaintiff's contention is that the Defendant altered the building plans and reduced the number of houses to eight instead of the ten stated in the sale agreement. The Plaintiff also contended that the Defendant altered the size and location of house number 7 which he was purchasing. In the court's view, those unilateral alterations by the Defendant without the Plaintiff's consent amounted to breaches of the sale agreement.

42. Clause 1.1 (g) of the agreement of sale gave the construction commencement date as on or about May 2012 and clause 1.1 (h) gave the anticipated completion date as on or about September 2013. According to the evidence which the Plaintiff gave and which was not controverted, construction had not commenced as at 21/3/2013 when the Plaintiff visited the site and discovered that nothing substantial was going on. The Plaintiff produced photographs taken of the site on 25/6/2013 showing that the project was yet to start. The Defendant breached the term relating to commencement of the construction stipulated in the sale agreement. Clause 8.2.1 and 8.2.2 of the agreement only allowed extension of the timelines for completion of transaction but not for the deferment of the construction commencement date stated in the agreement.

43. Clause 3 of the agreement on the purchase price indicated that the purchase price the Plaintiff paid to the Defendant would be utilised in the construction of the premises. The Plaintiff was required to make the second payment of Kshs. 6,600,000/= within five months of the actual construction date. The Defendant could only have demanded payment of this sum five months after the actual commencement of the construction of the premises and would have had to notify the Plaintiff of the actual date when the actual construction started and to provide evidence of this.

44. Clause 15.3 of the agreement did not contemplate that the premises would be encumbered more so because the agreement stated that the sale proceeds paid by the Plaintiff was what would be applied towards the construction of the estate. The Defendant breached the terms of the sale agreement. The Plaintiff was entitled to rescind the contract as he did.

45. The Plaintiff paid a deposit of Kshs. 17,250,000/= to the Defendant. He was entitled to the full refund of the purchase price he had paid. The Defendant refunded the Plaintiff Kshs. 16,161,969/= on 7/10/2016 leaving a balance of Kshs. 1,088,031. The selling price for the houses at Grash Gardens as at 4/7/2013 was Kshs. 43,000,000/= for mortgage buyers and Kshs. 42,500,000/= for cash buyers. The Plaintiff is entitled to damages for the loss of bargain based on the fact that the value of the suit property was greater at the time the Defendant repudiated the contract than the purchase price stipulated in the sale agreement.

46. The Plaintiff proved his case on a balance of probabilities. The court enters judgement in favour of the Plaintiff for Kshs. 1,088,037/= being the balance of the purchase price which the Defendant withheld, plus interest at court rates from the date of filing suit until payment in full. The Defendant will pay the Plaintiff interest on the sum of Kshs. 16,161,969/= at court rates to be calculated from the date of filing suit until 7/10/2016.

47. The Plaintiff is awarded damages of Kshs. 12,000,000/= being loss of investment bargain on the suit property, with interest at court rates from the date of this judgement until payment in full. The Plaintiff is also awarded the costs of the suit.

Delivered virtually at Nairobi this 29th day of July 2021.

K. BOR

JUDGE

In the presence of: -

Mr. Kenvine Ouma for the Plaintiff

Ms. W. Mathenge holding brief for Mr. Allen Gichuhi for the Defendant

Mr. V. Owuor- Court Assistant