



REPUBLIC OF KENYA



**Nguru & another v Ganza Limited & 2 others (Civil Case 1 of 2023)
[2024] KEHC 15692 (KLR) (5 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15692 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL CASE 1 OF 2023
FN MUCHEMI, J
DECEMBER 5, 2024**

BETWEEN

TABITHA NDUTA NGURU 1ST PLAINTIFF

JACQUELYNN PAULYNN AWINO OGWAN’G 2ND PLAINTIFF

AND

GANZA LIMITED 1ST DEFENDANT

VALLEY AUCTIONEERS 2ND DEFENDANT

ECO BANK LIMITED 3RD DEFENDANT

JUDGMENT

Brief Facts

1. The Plaintiffs instituted this suit vide a plaint dated 13th February 2018 seeking for orders of specific performance, permanent injunction and general damages for breach of contract.
2. The defendants in their statements of defence denied the claim.

The Plaintiffs’ Case

3. PW1, Jacquelynn Paulynn Awino Ogwan’g adopted her witness statement dated and filed on 4/4/2019. Her evidence precisely, was that she entered into a sale agreement on 6th May 2014 for the purchase a maisonette No. 8 on property registered as LR No. Kabete/Kibichiko/906, Kitsuru Gardens for a consideration of Kshs. 10 million. At the time of the execution of the sale agreement, the maisonettes on the suit property were yet to be constructed and the purchase was done on an off plan basis.



4. The witness testified that she paid the deposit of Kshs. 2 million upon execution of the agreement and further testified that on 7/6/2015, she received through her advocates, a deed of variation of the agreement of sale, setting a new purchase price of the maisonette No. 8 at Kshs. 8 million and a further deposit of Kshs. 1 million.
5. PW1 testified that she complied with the deed of variation and paid a further deposit of Kshs. 1 million to the 1st defendant. PW1 further testified that the balance of the purchase price was to be paid upon completion of the maisonette which was to be in the year 2015.
6. The witness stated that the 1st defendant has not started the project as agreed. She further stated that she came to learn that the suit land on which the maisonettes were to be built, was up for sale by public auction through an advertisement in the Daily Nation of 15/2/2018.
7. On cross examination, the witness testified that she and the 1st defendant signed the sale agreement whereas the 3rd defendant was not a party to the agreement or to the deed of variation. She further stated that she did not have a claim against the 3rd defendant except for the issue of advertisement of sale of the suit property by public auction.
8. The witness stated that she was not aware or privy to any dealings between the 1st and 3rd defendants regarding the financial facility granted to the 1st defendant by the 3rd defendant and that she came to learn of it following the advertisement for sale of the land by public auction.
9. PW1 further testified that the 1st defendant did not serve her with a notice to the effect of circumstances beyond the 1st defendant's control pursuant to Clause 12 of the agreement.
10. PW2, Tabitha Nduta Nguru, adopted her witness statement dated 20th January 2019 and filed on 4th April 2019 and testified that on 6/5/2014, she entered into a sale agreement with the 1st defendant for the purchase of a housing unit at Kitsuru Gardens at a consideration of Kshs. 10 million. She further testified that the units were to be built on property LR No. Kabete/Kibichiko/906 and were purchased on an off plan basis.
11. The witness further testified that she deposited Kshs. 2 million upon signing the agreement and that the balance of the purchase price as per the agreement was to be paid upon completion which was slated for the year 2017.
12. PW2 testified that the 1st defendant never began the off plan project and she therefore seeks that her deposit be refunded. The witness further stated that she joined the 2nd defendant as a party in the suit for advertising for sale by public auction, the land on which the housing units were to be constructed.
13. PW2 further testified that at the time of signing the agreement, the 1st defendant did not disclose that the property on which the houses were to be constructed was to be given as security for a loan to the bank.
14. Further evidence was to the effect that PW2 advocates wrote to the 1st defendant to refund her deposit when it became apparent that it was unable to meet its obligations in the agreement. This was after the 2nd defendant advertised the land on which the housing units were to be constructed for sale by public auction. for sale.
15. The witness further testified that the force majeure clause did not affect the contract because the 1st defendant failed to disclose his obligation with the bank. The witness stated that the 1st defendant did not disclose that the land on which the houses was to be built was charged to the bank as a security for a loan.



16. PW2 testified that the agreement was between the 1st defendant and herself. According to the witness, the 3rd defendant was not a party to the sale agreement.

The 1st Defendant's Case.

17. The 1st defendant led evidence through DW1, who was its accountant who had worked there for ten (10) years.
18. DW1 adopted his written statement dated 24th November 2021 and testified that the 1st defendant offered to sell maisonette Nos. 8 and 70, vide agreements for sale dated 10th March 2014 and 16th May 2014, to the 1st and 2nd plaintiffs respectively at a development project that was to be undertaken by the 1st defendant known as Kitsuru Gardens at a purchase price of Kshs. 10 million.
19. DW1 further testified that upon accepting the 1st defendant's offer and executing the agreements for sale, the plaintiffs unilaterally and without justifiable reason purported to rescind their respective agreements. The witness further stated that at all material times, the 1st defendant was willing to ensure the completion of the construction of the units.
20. It was the further testimony of DW2 that according to the agreements for sale, the completion date was defined as the date falling fourteen (14) working days after the issuance of the Architects Completion Certificate. As such, the delay of the completion was occasioned by the plaintiffs' rescission of the agreement. Further, DW1 testified that pursuant to Clause 2 of the agreements for sale expressly provides that the plaintiffs are not entitled to rescind or terminate the agreements on the basis of the construction of the unit. Additionally, Clause 2 of the agreements for sale expressly establishes that the plaintiffs had prior to execution of their respective agreements, carried out a survey of the units.
21. DW1 further testified that the plaintiffs were updated on the progress of the construction of the units at all material times. Thus, the witness testified that the 1st defendant discharged its obligations under the agreements for sale.
22. DW1 testified that the plaintiffs have no registered interest or overriding interest over the suit property to enable them to be included as party to the registered charge between the 3rd defendant and the 1st defendant.
23. DW1 went further to testify that the 1st defendant received the deposit of Kshs. 2 million and 3 million respectively from the plaintiffs being deposit for purchase of the units.
24. Further evidence of DW1 was that the 1st defendant took a construction loan from the 3rd defendant after the agreements for sale with the plaintiffs were signed.

The 3rd Defendant's Case

25. The 3rd Defendant led evidence through John Nzau Munga (DW2), who is Head of Recovery Department of the 3rd Defendant and he adopted his witness statement as his testimony.
26. It is the 3rd defendant's case that in 2015, it granted a financial facility to Homex Housing Limited (the borrower) of Kshs. 422 million which was secured by a charge dated 24th February 2015 over the 1st defendant's property known as LR No. Kabete/Kibikicho/906 and further by a debenture dated 24th February 2015 over the assets of the 1st defendant.
27. On 10th March 2016, the 3rd defendant disbursed Kshs. 221 million to account number 0060015024760901 belonging to the borrower held with them. DW2, testified that the 1st defendant



was required to repay the disbursed amount in 12 equal monthly instalments inclusive of interest and principal after a 12 months' moratorium on the principal amount after disbursement. The borrower was further required to service the interest monthly on the disbursed amount during the 12 months' moratorium period.

28. The witness testified that the borrower defaulted on repayment of the loan contrary to Clause 2 of the Charge and thus the entire disbursed amount under the charge became due and payable together with interest at default rates. DW2 stated that they issued a Statutory Notice dated 3rd February 2017 for exercise of statutory power of sale of the charged property after the expiry of three (3) months from the date of service of the notice for the recovery of the entire outstanding amount under the charge which was Kshs. 227,105,146.66/-. The witness further stated that they issued the borrower, the 1st defendant and their directors with a notice dated 3rd May 2017 notifying them of the exercise of the statutory power of sale over the charged property forty (40) days from the date of service of the notice. Upon expiry of the forty days, the witness testified that the 3rd defendant instructed the 2nd defendant auctioneers who issued the borrower, the 1st defendant and all the directors with the 45 days redemption notice dated 6th October 2017 for the debt due which was outstanding at the tune of Kshs. 248,561,804.19/- as at 24th August 2017. Additionally, the 2nd defendant issued the 1st defendant and the borrower with a notification of sale dated 6th October 2017, notifying them that the charged property would be sold on 14th December 2017 unless the outstanding debt amount was settled.
29. DW1 further testified that the borrower made some payments to the account after service with the statutory notice and the redemption notice but did not clear their indebtedness and as at 23rd October 2017, a sum of Kshs. 269,825,341.26/ remained due and owing. The witness further testified that the 3rd defendant has fully complied with the law and is truly owed by the borrower and its right to exercise its statutory power of sale has crystallized.
30. The witness further stated that the plaintiffs bought two maisonettes No. 8 and 70 from the 1st defendant through its agency in a transaction the 3rd defendant was no privity to and thus any claims by the plaintiffs ought to be against the 1st defendant. The witness testified that the 3rd defendant was not privity to the said sale nor did it have notice of the sale before executing the charge instrument with the 1st defendant. The witness stated that the 3rd defendant's rights cannot be defeated by the off sale plan sale, therefore the 3rd defendant ought to be allowed to exercise its statutory power of sale over the charged property.
31. On cross examination, DW1 testified that he was not familiar with the transactions between the plaintiffs and the 1st defendant. Further, the 1st defendant did not disclose to them the existence of agreements between himself and the plaintiffs.
32. Directions were issued that do file submissions to support their cases. The record shows that the plaintiffs and the 3rd defendant complied by filing submissions on 1st October 2024 and 15th November 2024 respectively. The 1st defendant did not adduce any evidence in this case.

Plaintiff's Submissions

33. The plaintiffs submit that there existed a contractual relationship between themselves and the 1st defendant and that the 1st defendant is in clear breach of its contractual obligation to construct and deliver the maisonettes as contracted. The plaintiffs further submit that the completion period provided in their contractual agreement was slated for on or before 15th August 2015. It was on that basis that the plaintiffs proceeded to make the respective payments to the 1st defendant.



34. The plaintiffs further submit that the additional stipulations on the completion process set out in the agreements for sale must be interpreted in the context of the initially agreed completion date of 15th August 2015. The plaintiffs argue that the terms of the agreements were not to be interpreted in isolation, but in conjunction with all the relevant documentation and the context pertaining to the transaction.
35. The plaintiffs rely on the case of William Muthee Muthami vs Bank of Baroda (2014) eKLR and submit that there was an offer, acceptance and consideration which was admitted by the 1st defendant. The letters of offer constituted the offer made to the plaintiffs, who on the basis of the representations made, including that on the completion date, accepted the offer made by the 1st defendant by executing the agreement and paid consideration in the form of payments of 20% of the purchase price to secure their units. The plaintiffs submit that the deposits were made prior to the execution of the formal agreements for sale.
36. The plaintiffs submit that the 1st defendant admitted at the hearing that it was not aware that the units have not been completed or that the construction of the units had commenced. Furthermore, the 1st defendant did not submit any evidence to show that he is able or willing to complete the construction and delivery of the said units.
37. The plaintiffs further submit that their counsel sent correspondence to the 1st defendant's counsel seeking clarification and updates on the status of the construction of the maisonettes, which correspondence was not responded to. Furthermore, the 1st plaintiff sent a completion notice dated 6th June 2017 to the 1st defendant's counsel which was also ignored.
38. The plaintiffs submit that as at the date of filing the suit in February 2018, the units in question had not been constructed or completed. Furthermore as at the date of hearing of the suit in the year 2024, 10 years later, the 1st defendant's witness acknowledged that they were not aware whether construction had commenced or completed.
39. The plaintiffs state that after filing the suit, the 1st defendant had ample time to remedy the situation and in some way engage them to salvage the unfolding unfortunate events, which they failed, refused or ignored to undertake. The plaintiffs thus argue that from the foregoing, it is clear that the 1st defendant was and is unwilling and unable to perform its contractual obligations and thus in clear breach of its contractual obligations. Having failed to construct and deliver up the houses in ten years, the plaintiffs argue that it could not be reasonably expected that the 1st defendant would be able to initiate and complete the project as envisaged. Relying on the case of Dormakaba Limited vs Architectural Supplies Kenya Limited (Civil Suit No. 136 of 2020) KEHC (KLR), the plaintiffs submit that the only way to remedy the 1st defendant's breach is to find the 1st defendant liable and grant them the prayers sought.
40. The plaintiffs submit that the 1st defendant ought to have sought their consent, concurrence or at least informed them of its intention to charge the suit property to the 3rd defendant by virtue of their interest in the said property as purchasers. The 3rd defendant admits to having advanced a financial facility to the 1st defendant in the sum of Kshs. 422 million which was secured by a charge over the suit property dated 24th February 2015 and further debenture over the 1st defendant's assets dated 24th February 2015 which claim the 1st defendant did not refute.
41. On examination of the facts, the plaintiffs submit that they entered into the sale agreements with the 1st defendant in the year 2014, whereupon they acquired beneficial interest in the property as purchasers of units to be constructed on the suit property. Further, the plaintiffs submit that it is evident that the 1st defendant subsequently proceeded to charge the said property to the 3rd defendant without informing



or procuring their consent thus exposing them to a loss of their investment upon the exercise of the statutory power of sale by the 3rd defendant.

42. The plaintiffs submit that it amounts to a material non-disclosure by the 1st defendant which exposed them to the possibility of their investment and prejudiced their enjoyment of their constitutionally protected right to property. Accordingly, the plaintiffs urge the court to make a finding that the 1st defendant ought to have procured their consent or at the very least informed them of its intent to charge the property to a 3rd party and award them damages for the non-disclosure.
43. The plaintiffs concede that they do not have a direct contractual relationship with the 3rd defendant. The plaintiffs submit that the 3rd defendant was included as a defendant at the filing of the suit arising from their purported exercise of their statutory power of sale against the suit property on which maisonettes No. 70 and 8 were to be constructed. Further, at the hearing of the suit, the plaintiffs were categorical that they have no interest in pursuing the construction of the maisonettes and are seeking to have their deposits refunded which releases the 3rd defendant from any claims by them.

3rd Defendant's Submissions

44. The 3rd defendant relies on the cases of National Bank of Kenya Ltd vs Pipe Plastic Samkolit (K) Ltd & Another [2001] eKLR; Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd [2017] eKLR and Agricultural Finance Corporation vs Lengetia Limited & Jack Mwangi [1985] eKLR and submits that an examination of the sale agreements reveals that the parties to the said agreements are the plaintiffs and the 1st defendant. The 3rd defendant argues that it does not appear anywhere in the said sale agreements.
45. The 3rd defendant further submits that during cross examination, both PW1 and PW2 confirmed to the court that it was neither a party to the sale agreements nor was it involved in any way in the sale and purchase transaction of maisonette numbers 8 and 70 erected on LR No. Kabete/Kibichiko/906. Furthermore, the plaintiffs conceded in their submissions that they do not have a direct relationship with the 3rd defendant. Thus, the 3rd defendant submits that the plaintiffs' claim only lies against the 1st defendant.
46. The 3rd defendant relies on Section 24 of the [Land Registration Act](#) and submits that it is only upon registration that a proprietor is vested or conferred upon absolute ownership of any piece of land together with all rights and privileges belonging or appurtenant thereto. The 3rd defendant argues that the plaintiffs have not produced in evidence a transfer of property or a certificate of title or certificate of lease evidencing ownership of the same.
47. The 3rd defendant further relies on Section 36(5) of the [Land Registration Act](#) and argues that it already has a registered interest over the suit property vide the legal charge registered at the lands registry. Furthermore, the sale agreements did not confer any title upon the plaintiffs in so far as the suit property is concerned. Relying on the case of Sagwe & Another vs Unity Court Limited & Another (Environment & Land Case E110 of 2022) [2022] KEELC 15637 (KLR), the 3rd defendant submits that the plaintiffs having no registered interest in the suit property, cannot seek to defeat the bank's right as chargee, which right was duly registered against the title.
48. Making reference to Section 25(1) of the [Land Registration Act](#), the 3rd defendant argues that its consent ought to have been obtained as chargee prior to the sale of the maisonettes erected on the suit property to the plaintiffs. Furthermore, the existence of a valid and registered legal charge supersedes the perceived rights of the plaintiffs.



49. The 3rd defendant further cites Section 87 and 88(1)(g) of the *Land Act* and Section 59 of the *Land Registration Act* and submits that it is implied that the chargor will not transfer or assign or lease any charged property without first obtaining the consent of the chargee. The 3rd defendant further argues that although the plaintiffs contend that they entered into the sale agreements before the charge was officially registered in its favour and that the suit property was free of any encumbrances, the sale agreements provide that the unit is sold subject to all restrictions, reservations, stipulations, conditions, caveats and other matters contained or implied in the title.
50. The 3rd defendant argues that it had an overriding interest in the suit property as it had advanced money on the strength of the suit property as security and offered by the 1st defendant. To support its contentions, the 3rd defendant relies on the cases of Paul Gatete Wangai & 13 Others vs Capital Realty Ltd & Housing Finance Co. Ltd (Environment & Land Case 123 of 2019) [2020] KEELC 933 (KLR); *Monica Waruguru Kamau & Cecilia Wangari Kihara vs Innercity Properties Limited, HFC Bank Limited & Joseph Gikonyo t/a Garam Investment Auctioneers (Civil Case E035 of 2020)* [2020] KEHC 9679 (KLR) and Innercity Properties Limited vs Housing Finance & Garam Investments Auctioneers; Josephine Mukuhi & Henry Nganga Waweru (Interested Parties) (Civil Case E030 of 2020) [2020] KEHC 9499 (KLR).
51. The 3rd defendant submits that it did not approve the sale agreements in respect of the maisonettes entered into between the plaintiffs and the 1st defendant. Furthermore, Clause 7 and 8 of the charge, the 3rd defendant is entitled to sue for the repayment of the secured obligations and enforce the payment thereof or exercise the statutory powers, rights and privileges conferred on the chargee by law in the event of default or breach of the charge, including the right to exercise its statutory power of sale over the charged property.
52. The 3rd defendant relies on the case of Maheshkumar Popatal Shah vs Highgrove Holdings Limited & Another [2020] eKLR and submits that since it was not privy to the contract between the plaintiffs and the 1st defendant, the plaintiffs are not entitled to any reliefs as against it. The 3rd defendant further submits that during cross examination, both plaintiffs confirmed to the court that their claims were against the 1st defendant and not it, thus the plaintiffs claim against it does not lie.

Issues for determination

53. The main issues for determination are:-
- a. Whether the plaintiffs proved their claim against the defendants on a balance of probabilities.
 - b. What remedies are available to the plaintiffs?

The Law

Whether the plaintiffs proved their claim against the defendants on a balance of probabilities

38. It is a principle of law that whoever lays a claim before the court against another has the burden to prove it. Sections 107 and 108 of the *Evidence Act* provide as follows:-

Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.



(108) the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

38. The burden of proof was discussed in the case of Muriungi Kanoru Jeremiah vs Stephen Ungu M'mwarabua [2015] eKLR where the court held as follows:-

As I have already stated, in law, the burden of proving the claim was the appellant's including the allegation that the respondent did not pay the sum claimed as agreed; i.e. into the account as provided....The trial magistrate was absolutely correct in so holding and did not shift any legal burden to the appellant...The appellant was obliged in law to prove that allegation; after the legal adage that he who asserts or alleges must prove.....In the circumstances of this case, the respondent bore no burden of proof whatsoever in relation to the debt claimed. By way of speaking, the shifting of burden of proof would have arisen had the trial court magistrate held that the respondent bore burden to prove that he deposited the sum of Kshs. 98,200/- the debt being claimed herein.

38. Similarly in the Halsbury's Laws of England, 4th edition, Volume 17 at paras 13 and 14:-

The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he had failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.

The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutes evidential burden. Therefore, while both the legal and evidential burdens initially rested upon the appellant, the evidential burden may shift in the course of trial, depending on the evidence adduced. As the weight of evidence given by either side during the trial varies, so will the evidential burden shift to the party who would fail without further evidence.

Whether the Plaintiffs proved their claim

38. The letters of offer and the agreements between the parties, it is not in dispute that there existed a contractual relationship between the each of the plaintiffs and the 1st defendant. Both parties produced in evidence the respective sale agreements, letters of offer and the deposit slips to support the fact that there existed a contractual relationship between the 1st defendant and the plaintiffs separately. The main bone of contention is whether the 1st defendant breached the contract.
38. The plaintiffs testified that the 1st defendant breached the contract for they failed to construct the housing units or to complete them despite the expiry of the completion date that fell in the year 2015. The 1st defendant testified that the completion date as per the sale agreements was defined as 14 working days after the issuance of the Architects Completion Certificate. The 1st defendant further stated that it discharged its obligations under the sale agreement and in fact it was the plaintiffs who breached the contract by rescinding the agreement.
38. The letters of offer dated 12th February 2014 and 10th March 2014 indicated the completion date as 31st August 2015. The sale agreements dated 10th March 2014 and 6th May 2014 provide that the



- completion date means the date falling 14 working days after the issuance of the Architects Completion Certificate. Further, the 1st defendant's witness testified that the units were completed but failed to produce any evidence to that effect.
38. The 3rd defendant further led evidence that it granted a loan facility to Homex Housing Limited, the borrower, of Kshs. 422 million which was secured by a charge dated 24th February 2015 over the 1st defendant's property known as Title Number Kabete/Kibikicho/906 and further by a debenture dated 24th February 2015 over the assets of the 1st defendant. The 3rd defendant further evidence testified that the borrower defaulted on its loan and after serving the requisite statutory notices, its statutory power of sale crystallized and therefore it ought not to be stopped from selling the suit property. The 1st defendant admitted that Homex Housing Limited obtained a loan facility from the 3rd defendant and charged the suit property where the units were to be built. Additionally, that was done after the 1st defendant had entered into a contract with the plaintiffs.
38. It is evident that the 1st defendant entered into the sale agreements with the plaintiffs before it charged the suit land known as LR. No. Kabete/Kibikicho/906 as collateral. A cursory look at the sale agreements dated 10th March 2014 and 6th May 2014 it is evident that the units were being sold free from any encumbrances as indicated in Clause 6. It is therefore evident that the 1st defendant by failing to disclose or notify the plaintiffs about its plan to use the land LR. NO Kabete/Kibicho/906 in which they had interest amounted to a breach of the terms agreements for sale. It was within the knowledge of the 1st defendant that if it defaulted on repayment of the loan, the plaintiffs would have been adversely affected in that the defendant would not deliver to the plaintiffs as per the agreement. The charge between the 1st and 3rd defendant was executed on 24th February 2015 whereas the agreement between the 2nd plaintiff and the 1st defendant was on 6th May 2014. The interest of the 2nd plaintiff on the land where her housing unit was to be constructed had already crystallised. As such, her consent ought to have been obtained by the 1st defendant before giving the land as security for the loan.
38. The plaintiffs conceded that they have no claim against the 3rd defendant. It is evident that the 1st defendant charged its suit land in respect of a loan obtained by Homex Housing Limited for a sum of Kshs. 422 million from the 3rd defendant. Therefore it is evident that the plaintiffs have not proved their case on a balance of probabilities as against the 2nd and 3rd defendants.
38. As for the 1st plaintiff, the agreement between the 1st defendant and herself was executed on 6th May 2014. Similarly, her consent ought to have been sought before the 1st and 3rd defendant executed the charge. It was the 1st defendant who had the responsibility of seeking the consent of the plaintiffs. The 3rd defendant as a stranger to the Sale agreements and may not have known that the 1st defendant had entered into any agreement with the plaintiffs. Even if the 3rd defendant became aware of such agreements, the terms were not known to him and as such the 3rd defendant was not privy to the said agreements.
38. The 1st defendant blames the plaintiffs for pulling out of the agreements before the housing units were constructed or completed, but it is not in dispute that the plaintiffs had waited for more than 3 years for the construction of the housing units which project had not taken off despite the plaintiffs having paid substantial funds as deposit of the purchase price. Although the 1st defendant said that the plaintiffs were kept updated on the progress of the project, no evidence was produced to that effect. Instead, it is the plaintiffs' advocates who kept writing to the 1st defendant asking for explanation of the delay. Furthermore, the outstanding loan that the 1st defendant owed to the 3rd defendant at the time the land was advertised for sale by public auction was over Ksh.240,000,000.



38. The charge was executed after the agreements of the plaintiffs for purchase of the off-plan units. However, the charge which was secured using the land LR. Kabete/Kibichiko 906 cannot be defeated by agreements for purchase of housing units to be constructed on the land, a fact which the plaintiffs are aware of. This is demonstrated by the fact that the plaintiff's prayer for specific performance and permanent injunction were abandoned, leaving only those of refund of the deposit paid and of breach of contract.
38. The plaintiffs adduced evidence of payment of the deposits paid to the 1st defendant being KSh.2,000,000 by the 1st plaintiff and KSh.3,000,000 by the 2nd plaintiff. It is noted that the 1st defendant never denied receipt of the monies paid.
38. As for the 3rd defendant, this court finds that the plaintiffs failed to prove their case against it to the standards required. No evidence was adduced against the 2nd defendant by the plaintiffs.
38. I am of the considered view that the plaintiffs have proved on the balance of probabilities that the 1st defendant breached the contract for sale and purchase of the off-plan housing units for which deposit was paid by the plaintiffs. The remedies available to the plaintiffs are for refund of the deposits paid and general damages for breach of contract.
38. Consequently, I enter Judgement in favour of the plaintiffs against the 1st defendant as follows:-
- (a) Refund of Deposits
 - 1st Plaintiff – KShs.2,000,000
 - 2nd plaintiff – KShs.3,000,000
 - (b) General Damages
 - 1st plaintiff – KShs.200,000
 - 2nd plaintiff – KShs.300,000
 - (c) Interests at court rates
 - (d) Costs of the suit to the plaintiffs and to the 3rd defendant.
38. It is hereby so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 5TH DAY OF DECEMBER 2024.

F. MUCHEMI

JUDGE

