REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 11 OF 2012

PATRICIA BINI.....PLAINTIFF

=VERSUS=

MELINA INVESTMENTS LTD.....1ST DEFENDANT

GIUSEPPINO VALSESI.....2ND DEFENDANT

PAOLA SASSO.....3RD DEFENDANT

ROBERTO SASSO.....4TH DEFENDANT

J U D G M E N T

Introduction:

1. This court was moved by way of a Plaint dated 1st February 2012. The Plaint was amended with the leave of the court vide an Amended Plaint dated 28th November 2013 and filed on 2nd December 2013.
2. In the Amended Plaint, the Plaintiff has averred that sometimes in the year 2010, the 2nd Defendant approached her and informed her that he was in the process of developing a residential tourist settlement on Chember Kibabamshe 402 (the suit property).
3. The Plaintiff has averred that the 2nd, 3rd, and 4th Defendants have always held that they had obtained all the necessary approvals; that as a result of the representation by the Defendants, they entered into a self-regulating sale agreement dated 23rd May, 2011 to purchase and or sub-lease a residential house known as unit number 402/16 and that the agreed cost was 150,000 Euros.
4. According to the Plaintiff's Plaint, she paid the Defendants 75,000 Euros leaving a balance of 75,000 Euros which was to be paid when all documents of titles and and ownership have been executed and registered in her name by and not beyond the 22nd December 2011.
5. The Plaintiff has averred that the Defendants have failed to comply with the agreement and that after taking the house, she has developed the house further and incurred about 30,222 Euros on extensions and incurred a further 120,923 Euros as a result of this matter.
6. The Plaintiff has particularised fraud as against the Defendants to include; holding out that there was a clean title to Chembe/Kibabamshe/402; not disclosing that there was a restriction on the land; pretending that they had all approvals for the developments and pretending that they could pass a good title to her.
7. In the Plaint, the Plaintiff is seeking for a refund of Euro 301,145 and in the alternative an order compelling the Defendants to comply with the terms of the agreement dated 23rd May 2011 and

for damages for fraud, inconvenience and loss of planning and for the costs of the suit.

8. In the Amended Defence and Counterclaim, the Defendants have stated that the 1st Defendant is the registered owner of Chember/Kibabamshe/402; that the 1st Defendant obtained all the consents and approvals to develop the suit property and that it was agreed that the Plaintiff would be given a unit known as Block 402/16 after completion of the purchase price being 150,000 Euros.
9. According to the Defendants' Defence, the 1st Defendant finalised the construction of the said unit on behalf of the Plaintiff who paid only 75,000 Euros and refused to execute the sale contract; that despite refusing to execute the sale contract and having a balance of 75,000 Euros, the Plaintiff took possession of the suit premises without the consent of the 1st Defendant and that the Plaintiff has since not paid the balance.
10. The Defendants have further averred that it was a term of the agreement that the Plaintiff was not supposed to carry out any structural alteration; that it is the Plaintiff who is in breach of the pre-sale contract and is a trespasser on the suit property and that the Plaintiff refused to sign and execute the sublease and the actual sub-lease contract.
11. The Defendants are seeking for the following declaratory orders in their counterclaim; a declaration that the Plaintiff has breached the pre-sale contract dated 23rd May 2011 and by her conduct rescinded the pre-sale contract; a declaration that the monies paid by the Plaintiff pursuant to the pre-sale contract are not recoverable from the 1st Defendant; a declaration that the Plaintiff as from 9th December 2011 is a trespasser; damages for breach of the pre-sale contract; damages for loss of mesne profits and rent from 9th December 2011 to the date of vacation and for an order of vacant possession.

The Plaintiff's case:

12. The Plaintiff, PW1, informed the court that after seeing an advertisement on the Internet about houses that were to be constructed and sold in Malindi by the 1st Defendant, she expressed her desire to purchase one of the houses.
13. According to PW1, she saw the advertisement while in Italy. It was her evidence that on 23rd May 2011, she entered into a written agreement with the 1st Defendant in respect to the house that she wished to purchased. The agreement was signed in Italy. It was the evidence of PW1 that while in Kenya, she met the 2nd and 4th Defendants who showed her suit property. It was her evidence that she also met the Defendants' advocate, Mr. Aboo, in the company of the 2nd and 4th Defendants in March 2012.
14. PW1 informed the court that initially, the house that she was to purchase was number 2 which number later changed to 16. It was her evidence that she was to pay to the 1st Defendant 150,000 Euros in installments. 30,000 Euros was to be paid as a deposit upon signing of the agreement and 45,000 Euros was to be paid upon completion of the construction of the common areas.
15. It was the evidence of PW1 that the balance of 75,000 Euros was to be paid after the completion of the construction of everything. That is, the house and the common areas.
16. The parties agreed on the date that each event was to take place. According to PW1, 45,000 Euros was to be paid on 30th November 2011 by which time the construction of the common areas would have been completed, which work according to her, has never been completed.
17. It was the evidence of PW1 that although the construction of the common areas had not been completed, she nevertheless paid the 45,000 Euros on 22nd November 2011 having already paid a deposit of 30,000 Euros on 23rd May 2011.
18. It is the Plaintiff's contention that the Defendants did not meet their part of the bargain because they have never finished constructing the common areas and also because the 1st Defendant does not have a title deed to the suit property.
19. PW1 stated that at the time of signing the pre-sale agreement, she was not told that there was an existing embargo on the suit property,which facts he came to learn about later.
20. PW1 informed the court that she was supposed to pay the balance of 75,000 Euros on 22nd December 2011 and only after being given title documents in respect of the house.
21. It was her evidence that when she came to Kenya on 17th December 2011, she found a guard at

the entrance with instructions not to allow her in.

22. It was the evidence of PW1 that by the time she was locked out of the house, her workers' tools and husband's medicine and clothes were all in the said house.
23. According to her, she was refused entry in the house because she had not paid Euro 45,000. She was further informed that the agreement that she had entered into with the Defendants had been rescinded.
24. PW1 informed the court that indeed the agreement that the parties had signed had a rescission clause.
25. The evidence of PW1 was that the agreement required the 1st Defendant to put up a second gate, staff quarters, private offices and the parking. All this was to be done by November 2011 which never happened.
26. PW1 informed the court that she has had to spend her money in finishing the house and furnishing it. It was her evidence that she also involved engineers to carry out research and has incurred costs on air tickets and legal fees due to the current dispute.
27. It was the evidence of PW1 that she reported to the police the threats that had been made by the 2nd and 3rd Defendants and that she signed the deed of payment because the Defendants told her that they would lock the house.
28. In cross-examination, PW1 informed the court that the Defendants showed her documents in respect to the suit property, including the Certificate of Lease before she signed the agreement of 23rd May 2011. However, she denied having been showed the approved development plans.
29. I was her evidence that she made the payments of 30,000 Euros while in Italy and that she did due diligence on the status of the suit property when she travelled to Kenya through Ms Muli advocate.
30. It was the evidence of PW1 in cross-examination that in December 2011, her advocate, Ms Muli, wrote to the Defendants' advocate, Mr. Aboo and requested to be given documents in respect to the suit property.
31. PW1 stated that after the pre-sale agreement, another agreement was to be signed in Kenya. According to her, she saw the house in June 2011 and that the only problem was that the common areas had not been completed; that she entered the house in December 2011 and that she took photographs of the uncompleted common areas.
32. PW1 stated that she contracted Mr. Mohammed Simba of Lions builders who did the reconstruction of the house. According to her, Lions builders commenced the reconstruction work in June 2011 although the Defendants were the ones who were supposed to re-do the roof at their own costs.
33. PW1 admitted that by June 2011, she had only paid 30,000 Euros towards the purchase price and that she was in possession of the house at that time. According to her, she ought to have completed payment of the entire purchase price as at 22nd December 2011.
34. According to PW1, the Defendants' advocate gave to her the draft lease agreement for signing which she passed to her advocate Ms Muli. She however did not sign the lease agreement on the advice of her advocate, and principally because the deadline of 22nd December 2012 had not been met by the Defendants. PW1 acknowledged signing a letter dated 20th December 2011 drafted by Mr. Michira advocate. However, she stated that she signed the letter of 20th December 2011 under duress.
35. When asked if she had the approval of the council to put up the extension on the suit property. PW1 stated that it was the Defendants who were to seek for the approval because they were in possession of the Title Deed.
36. PW1 informed the court that she is asking for a refund of Kshs.301, 145 being the amount she spent putting up the extra rooms and furnishing the house.
37. PW1 stated that she learnt about the embargo that had been imposed on the land when her advocate requested for documents from the Defendants' advocates.
38. The Plaintiff finally stated that she could not pay the balance of the purchase price until she sees the title documents.
39. In re-examination, PW1 stated that she re-did the house by adding one floor which had two rooms, and two bathrooms, an open shower that was outside the house, a veranda and a laundry room.
40. PW1 stated that she was given the keys to the house between May and June 2011, which was around the same time that she signed the pre-sale agreement.

41. Harison Musembi of Harbicors Technics, PW2, informed the court that he was a qualified civil engineer having obtained a Bachelor of Civil Engineering from Jomo Kenyatta University of Agriculture and Technology. It was his evidence that he is a registered Engineer with the Engineers Board of Kenya.
42. According to PW2, he was retained by the Plaintiff to check the works of the suit property and to confirm if the unit had been completed pursuant to the agreement of 23rd May 2011.
43. PW2 stated that when he visited the site on 10th May 2014, he found the site was still under construction.
44. PW2 informed the court that the Defendants breached the agreement because the Southern wall is incomplete, the second gate has not been done and the parking bay has not been fixed. Consequently, the Plaintiff could not have made the payments that she was required to pay due to the said breaches.
45. In cross-examination, PW2 stated that he is a structural engineer.
46. PW2 stated that when he visited the site, he did not carry with him the approved development plans of the house and that he based his findings on the translated agreement that was given to him.
47. PW2 informed the court that he saw more than one car park and a gate in the whole estate. It was his evidence that there was a road made of murram leading to the unit in question.
48. It was the evidence of PW2 that before one reaches the Plaintiff's unit, there are other units whose construction and landscaping was ongoing.
49. According to him, the works stipulated in clause 4 of the agreement had not been done and a completion certificate had not been issued.
50. The works officer from the Kilifi County, PW3, presented to court the evidence in respect to the developments on plot number 402.
51. According to PW3, the then Malindi Municipal Council received an application from the Defendants for the development of plot no. 402 on 12th March 2010 whereafter the council issued to the applicant with a PPA2 dated 20th August 2012.
52. It was his evidence that the Application was rejected at the first instance for want of an E.I.A report and the NEEMA approval. There was also no confirmation from the Ministry of Lands stipulating that the embargo that had been placed on the properties within that area had been lifted.
53. However, it was his evidence that, the plan was approved on 20th August 2012 by the Council after the Defendants met the above requirements. PW3 stated that the Defendants managed to get the NEEMA approvals on 24th June 2011 and a search from lands on 20th January 2012.
54. PW3 stated that an occupational licence is usually issued once the construction is completed and that the same is only given after a client applies for it and an inspection is done. Before an occupational certificate is given, a completion certificate must have been given by the Town Engineer.
55. According to PW3, there was no approval of the plans in the year 2011 when the agreement between the Plaintiff and Defendant was done.
56. In cross-examination, PW3 stated that the Defendant had approved plans for the year 2006 which was distinct from the one that was presented in the year 2010. PW3 however did not have the file for the year 2006.
57. In cross-examination, PW3 stated that it was possible for one to have various approvals, known as PPA2, on the same parcel of land with various developments.
58. PW3 stated that he was aware of the application for approval of developments on the suit property that was done in the year 2006. According to him there was an approval that was granted on 5th February 2008 to the Defendants. The witness could not however tell if the approval of 5th February, 2008 was in respect of the Plaintiff's house or not.
59. PW3 admitted that by the time the Defendants were seeking for approval to develop the suit property in the year 2010, there were already four buildings in existence.
60. PW4, a Civil Technician, produced in evidence his report of 13th November 2012. His evidence was to show the chronology of the ownership of the suit property from the year 2007 until 2010.
61. It was the evidence of PW4 that according to the Ministerial Task Force on Kilifi/Jimba and Chembe Kibabamshe dated June 2010, plot number 402 had a dispute.
62. It was his evidence that when he went to the Land Registry in Kilifi to conduct a search on the suit

property, he was given a copy of the newspaper showing that there was an embargo on plot number 402.

63. It was the evidence of PW4 that the Plaintiff could not have completed the sale because of the said embargo and the Ministerial Special Task Force Report dated June, 2010.

64. PW5 is an advocate of the High Court and working for the National Land Commission. According to PW5, the National Land Commission (NLC) is the Successor in title of the office of the Commissioner of Lands. PW5 informed the court that he was in possession of the entire file for plot no. 402.

65. It was the evidence of PW5 that in the year 2007, the Government placed a general embargo on land within Chembe Kibabamshe due to the complaints that had arisen from the indigenous people about allocation of the land.

66. According to PW5, the 1st Defendant, as the owner of the land, applied for change of user from residential to residential cum commercial. However, the change of user was not granted by the Commissioner of Land due to the embargo that was in place, which was later lifted.

67. As for the suit property, it was the evidence of PW5 that the embargo was lifted by the Commissioner of Lands on 9th February 2012 and that the 1st Defendant was allowed to transact on the land on 3rd April 2012.

68. According to PW5, no sub-lease could be registered as long as the embargo was in place.

69. PW5 informed the court in cross-examination that the initial grant in respect to the suit property was given in 1992 for residential purpose. It was his evidence that the 1st Defendant was registered as the proprietor of plot no. 402 on 6th September 2006 and a Certificate of Lease was issued to it.

70. According to PW5, the land was not encumbered by a Restriction. It was his evidence that in a layman's language, an embargo is a Restriction. However, he stated that an embargo is not a registrable instrument.

71. PW5 stated he did not have in his file the legal notice that created the embargo. He agreed in cross-examination that if the embargo was legal, it should have been registered against the suit property.

72. PW5 stated that the search that was on the file did not show that the embargo was ever registered or when it was lifted.

73. It was the evidence of PW5 that according to the letter of Hon. Mungaro, the suit property had been developed since the year 2006. It was his evidence that he did not have any correspondence on the file to show that the developments on the suit property were illegal.

74. PW5 finally stated that he did not see anything wrong with the Certificate of Lease and that the NLC did not have a problem with the proprietorship of the suit property.

75. The Kilifi District Land Registrar, PW6, informed the court that the suit property was initially allocated to Yusuf Gulemali and Samuel Kiaye who were then issued with a title deed. The title deed was then converted into a leasehold in 1986 and a Certificate of Lease was then issued. According to PW6, the 1st Defendant acquired an interest to the suit property and a Certificate of Lease was issued in its favour on 6th September 2006.

76. According to PW6, the Commissioner of Lands placed an embargo on the suit property, amongst others in 1986.

77. PW6 informed the court that due to the embargo, you could only transact on the land with the permission of the Commissioner of Lands. According to PW6, the embargo in respect to the suit property was lifted on 9th February 2012. it was his evidence that the suit property, being government land, the consent of the Commissioner of Lands was required before any sub-lease could be registered on the land.

78. In cross-examination, PW6 stated that the embargo was of a general nature covering land in Chembe Kibabamshe, Madeteni and Kilifi Jimba and not a specific one.

79. According to PW6, the suit property has never had a Restriction, which is a registrable interest.

The Defence case:

80. Giuseppino Valsesia, DW1, informed the court that he is a director in the 1st Defendant's company.

81. According to DW1, the 1st Defendant was registered as the proprietor of Chembe Kibabamshe/402 in the year 2006. It was the evidence of DW1 that according to the official search of 22nd February 2012, the suit property does not have an inhibition or restriction.
82. According to DW1, he entered into a pre-sale agreement with the Plaintiff on 23rd May 2011 in Italy in her house. It was the evidence of DW1 that the pre-sale agreement was not supposed to be the final contract as between the parties.
83. The pre-sale agreement, according to DW1, was signed when the house in issue had already been constructed.
84. It was his evidence that he was paid 30,000 Euros upon the signing of the pre-sale agreement (the agreement) and that 45,000 Euros was to be paid at the end of November 2011. The last payment was to be made as soon as the sub-lease in favour of the Plaintiff was signed,which was to be before 23rd December 2011. The purchase price was 150,000 Euros.
85. Prior to the signing of the agreement, it was the evidence of DW1 that the Plaintiff had seen the house which was complete. It was his evidence that the plan for the house had been approved by the municipal council of Malindi in the year 2008. According to DW1, the Plaintiff saw all the documents in respect to the house and that is why she entered into the pre-sale agreement of 23rd May 2011.
86. DW1 stated that the Plaintiff suggested to him about the changes she wanted to do at her own cost to the house which included adding 60 sqm of space on the 1st floor while the 1st Defendant was to re-do the roof. It is for that reason, according to DW1, that the second installment was to be made by 30th November 2011.
87. DW1 informed the court that Lion Builders proceeded with the alterations of the house as suggested by the Plaintiff although she did more than the agreed space of 60 sq M. Although the alteration was major, it was the evidence of DW1 that they still re-did the roof as earlier agreed upon.
88. It was the evidence of DW1 that although the construction of the other houses on the suit property was ongoing, the Plaintiff's house could be accessed by an already existing road. It was his evidence that they had also put up three servant quarters together with a gate.
89. DW1 informed the court that the dispute with the Plaintiff started when he asked her to pay the second installment as agreed which she refused to pay.
90. It was the evidence of DW1 that according to the agreement the balance of the purchase price was to be paid around 23rd December 2011 after which the sub-lease was to be signed.
91. According to DW1, the second installment of 45,000 Euros was paid on 23rd November 2011 although the money was received in the 1st Defendant's account in early January, 2012.
92. It was the evidence of DW1 that when his advocate demanded for the balance of the purchase price, the Plaintiff, through his advocate, agreed to execute the final agreement by 23rd December 2011 and agreed to pay the balance of the purchase price before the end of January, 2012. However, she only paid 45,000 Euros being the second instalment.
93. However, according to DW1, the execution of the sub-lease was only to be executed after the payment of the balance of the purchase price, which was 75,000 Euros. This fact was communicated to the Plaintiff in writing.
94. It was the evidence of DW1 that the Plaintiff never complained about the house or the common areas and that when he came from Italy on 15th January 2012, he found the Plaintiff was occupying the house with her family. Thereafter, he received a letter from the Plaintiff's advocate informing him that the Plaintiff will not pay the balance of the purchase price.
95. DW1 informed the court that he informed the Plaintiff about the issue of the embargo before the signing of the pre-sale agreement and that the said embargo was lifted by the Commissioner of Lands vide a letter dated 30th April 2012.
96. DW1 stated that the Plaintiff thereafter filed a complaint with the police in which she stated that he had defrauded her.
97. It was the evidence of DW1 that he was arrested by the police and remanded for four days in prison on allegation that he had defrauded the Plaintiff.
98. According to DW1, plot no. 402 has never had a problem and that he has only received 75,000 Euros from the Plaintiff. It was the evidence of DW1 that the Plaintiff was supposed to take

occupation of the house upon payment of the full purchase price although she took occupation of the house on 19th December 2011 without his permission.

99. DW1 stated that he met the Plaintiff in his advocate's office and gave her the sublease to sign which she refused. It was the evidence of DW1 that he has since had six subleases registered in respect to the other units.

100. According to DW1, the construction of houses on the suit property was done in phases. The first phase, which included the house in dispute, was done in the year 2008 and 2009 and was in respect of four houses.

101. In cross-examination, DW1 informed the court that it is the Plaintiff who is in breach of the agreement because she did not pay the amount she was supposed to pay.

102. It was the evidence of DW1 that it is not mandatory for one to have a completion certificate before a house can be said to be complete. According to DW1, everything, including the extension that the Plaintiff did, was finished by 30th November 2011.

103. Having altered the house, DW1 stated that it was the Plaintiff who was to obtain the Certificate of Completion and that he never misled her.

104. DW1 admitted that it is the Plaintiff who has furnished the house and that he locked the house in December 2011 to protect her furniture.

105. According to DW1, the Plaintiff went to the site in his company, together with Mr. Roberto and Paulo Sasso. That is when the pre-sale agreement was signed.

106. DW1 stated that although he was aware of the embargo on the land by the government, he knew that the sub-lease will be registered.

107. The Administrator of "Nyumba Baharini Village" DW2, informed the court that he is the one who collects condominium fees from the apartment owners. It was his evidence that although he has been demanding condominium fees from the Plaintiff, she has refused to pay up.

108. It was his evidence that he was appointed in the year 2011 to manage the condominium and that he is the one who determines what each apartment owner pays.

109. The evidence of DW4 was that his company, Lion Building Contractor Ltd, was contracted to carry out the extension of the house in dispute by the Plaintiff. According to DW4, he did the extensions and renovations of house number 2 which he completed by 30th September 2011.

110. Although he entered into a written contract with the Plaintiff, she has refused to pay him the balance of his fees.

111. The Defendant's conveyancing advocate, DW5, informed the court that he learnt from the Ministry of Lands that there was an existing embargo in respect of plot number 402, amongst others. It was his evidence that he was informed that for one to register any leases, there was a need of an exemption letter from the Chief Land Registrar.

112. DW5 stated that he was able to register the sub leases for the other apartment owners after the embargo in respect to the suit property was lifted by way of a letter in February 2012.

113. It was the evidence of DW5 that the 1st Defendant had given him a list of purchasers of various houses, including the Plaintiff, and that by way of a letter dated 7th December 2011, the Commissioner of Lands approved the change of user from residential to residential cum commercial and issued a new Certificate of Lease.

114. It was the evidence of DW5 that he sent copies of the agreement and the sublease to the Plaintiff on 24th January 2012 for signing but instead received a letter from the Plaintiff's advocate, asking why their client should sign the sub lease when it was at variance with the pre-sale agreement.

115. In cross-examination, DW5 stated that an embargo is not a registrable instrument and the same is challangeable in a court of law.

116. According to DW5, it was not true that he could not carry out transactions during the pendency of an embargo.

The Plaintiff's submissions:

117. The Plaintiff's advocate filed written submissions. The Plaintiff's advocate submitted that the obligation on the part of the Defendants in clause D and clause 4 of the pre-sale contract were important and had to be accomplished by 30th December 2011.

118. Counsel submitted that the Defendants never fulfilled part of their obligations by failing to finish

the works in the common areas as specified and that the suit premises is still a construction site to date.

119. Counsel submitted that the evidence before this court shows that the embargo that was placed on the suit property was a restriction and that during the said period of time no transaction or dealing could be allowed to take place neither could there be a clean Search Certificate during the existence of an embargo.

120. Consequently, it was submitted, there could not have been any property to offer for sale at the point in time that the Defendants purported to do so because no dealing could be allowed on the land due to the then existing embargo.

121. The Plaintiff's counsel submitted that the Plaintiff cannot be said to be a trespasser because according to clause "f" and "g", she was expected to take possession of the suit premises immediately upon signing the pre-sale contract. Counsel submitted that there was no way the Plaintiff was going to incur expenses by undertaking further developments without taking possession of the house.

122. Counsel submitted that the Plaintiff legally took possession of the suit premises and cannot be a trespasser just because she is saying that the Defendants breached the terms of the pre-sale contract.

123. The Plaintiff's counsel submitted that the Plaintiff did not perpetrate the arrest and charging of the 2nd and 4th Defendants in court. All she did, it was submitted, was to make a complaint to the police.

124. Counsel submitted that in any event, the Plaintiff cannot be held liable for the prosecution of the 2nd Defendant without joining the Inspector General of Police, the Attorney General and the Director of Public Prosecution in this suit.

125. According to counsel, the criminal case against the 2nd Defendant was withdrawn by the DPP because the embargo that had been placed on the suit property was subsequently lifted by the Ministry of Lands.

126. Counsel submitted that in order to justify damages arising out of malicious prosecution, a party has to prove serious malice on the part of the complainant. According to counsel, the Defendants were not acquitted but discharged.

127. In conclusion, counsel submitted that the Defendants should be held liable for the consequences of the breach of the pre-sale contract as provided under paragraph 7.

The Defendants' submissions:

128. The Defendants' advocate submitted that from the evidence on record, it is the Plaintiff who breached the pre-sale agreement of 23rd May 2011.

129. Counsel submitted that the preliminary pre-sale agreement was not the final agreement; that a further agreement containing the terms of the sale contract was to be executed in Kenya and thereafter a sublease was to be executed by the parties.

130. Counsel submitted that the Plaintiff took possession of the subject house in June 2011 and that the issue of the embargo was not subject of the preliminary pre-sale agreement.

131. Counsel submitted that if the Plaintiff was satisfied that the Defendants were in breach of any condition of the pre-sale agreement, she should have withdrawn from it pursuant to clause 7.

132. Counsel submitted that pursuant to clause 5(2) of the pre-sale agreement, the Plaintiff should have conducted due diligence in respect to the property that she was purchasing; that the photographs produced by PW2 are inadmissible in evidence and that the photographs do not show the date that they were taken.

133. The Defendants' counsel submitted that the pre-sale contract was subject to executing other documents by the Plaintiff and that without executing those documents, the allegations of fraud cannot arise and that the pre-sale contract in law does not create an interest in land. Counsel relied on the case of **Openda Vs Ahn (1984) KLR 208.**

134. On the issue of whether the suit property had an embargo, counsel submitted that the title to the suit property had no restriction and that the Defendants were not given any notice of the alleged embargo in respect to the suit property in terms of Section 17(1) of the Registered Land Act (repealed)

135. The Defendants' counsel submitted that after 9th December 2011 when the Plaintiff was served

with a notice to terminate the preliminary pre-sale contract, the Plaintiff became a trespasser on the suit premises. Counsel relied on the case of **Wamwea Vs-Catholic Diocese of Muranga registered Trustees (2003) KLR 389**.

136. In the circumstances, it was submitted, the Plaintiff should be ordered to pay to the Defendants general damages and damage for trespass. Counsel relied on the cases of **Eric Adome & Another Vs Pauline Kasumba Osebe & Another C.A No. 185 of 2011 and Kenya Hotel Properties Ltd Vs Willas den Investments Ltd (2009) KLR 126.**

137. Counsel submitted that considering that the Plaintiff has been in occupation of the suit premises since 9th December 2011 when a notice of termination of the pre-sale agreement was served on her, the Plaintiff should be ordered to pay damages of trespass of Kshs.10,000,000.

138. The Defendants' further submitted that the Plaintiff should be ordered to pay to the Defendants damages for slender because she admitted in her evidence of talking to other sub-tenants about the title of the suit property; that the Plaintiff reported the 2nd and 4th Defendants to the police and that on the basis of that complaint, the 2nd and 4th Defendants were arrested and charged in court. Counsel submitted that the Plaintiff should be awarded damages amounting to Kshs.2,000,000.

139. Having breached the pre-sale contract, it was submitted, the money paid by the Plaintiff is not recoverable from the Defendants. Counsel relied on the case of **Wachiago Vs Geral (1988) KLR 406 and African Safari Club Limited Vs Kenya Kazi Limited (1990) KLR 572.**

140. On the issue of whether the Plaintiff is entitled to a refund of 301,145, counsel submitted that the said figure has not been proven. The Plaintiff relied on the case of Subuni Vs Kenya Commercial Bank (2002) KLR 362 to buttress his argument.

141. The Defendants' advocate submitted that this court cannot grant to the Plaintiff the alternative prayer in her Plaint because it is not for the courts to re-write agreements for parties. The Plaintiff having failed to meet the deadlines in the pre-sale agreement, it was submitted, the court cannot change the said time lines.

142. It was submitted by the Defendants' advocate that the Plaintiff is not only a trespasser but has also no equitable and legal rights to be in possession of the suit property. Consequently, it was submitted, the continual stay of the Plaintiff in the suit property is unlawfull and she should be ordered to vacate the suit property.

Analysis and findings:

143. The Plaintiff's claim is that the Defendants are in breach of a "Preliminary sub-lease contract for a residential real estate" which was signed between the parties on 23rd May, 2011 in Italy. Consequently the Plaintiff is seeking for the cancellation of the agreement and for refund of 301,145 Euros. In the alternative, the Plaintiff is seeking for an order compelling the Defendants to comply with the terms of the preliminary agreement dated 23rd May 2011 whereafter she shall pay to the Defendants the balance of the purchase price of 75,000 Euros.

144. The Plaintiff is also claiming for general damages for fraud, inconvenience and loss of planning.

145. The Defendants have denied that they are the ones in breach of the said preliminary agreement. Other than seeking for the dismissal of the suit, the Defendants are also seeking for damages for trespass, damages for breach of the pre-sale agreement of 23rd May, 2011, damages for malicious prosecution and slander and for order of eviction.

146. The issues for determination that have arisen from the pleadings and the evidence in this matter are as follows:

(a) Who between the Plaintiff and the Defendant, if at all, breached the preliminary sublease agreement dated 23rd May, 2011?

(b) Did the Defendants commit a fraud in offering for sale the suit premises?

(c) Is the Plaintiff a trespasser in the suit premises?.

(d) Who is liable for damages, if at all?.

147. It is not in dispute that on 23rd May 2011,the Plaintiff and the 2nd Defendant, on behalf of the 1st Defendant, signed a "preliminary sub-lease contract" (hereinafter referred to as a preliminary agreement).
148. The evidence by the Plaintiff (PW1) was that before signing the said preliminary agreement, she had seen an advertisement on the internet about the proposal by the 1st Defendant to put up and sale residential houses on land known as Chembe/Kibabamshe 402.
149. The 2nd Defendant (DW1) informed the court that before the said preliminary agreement was signed in Italy, he had visited the suit property with the Plaintiff and showed her one of the completed units, which was then known as unit number 402/2 (the house) in the presence of Mr. Roberto and Paula Sasso.
150. In her statement that is handwritten and produced by DW1 as PEXB 15, the Plaintiff stated that she first saw the advertisement about the sale of the suit premises on the internet in October 2010.
151. The Plaintiff stated in that statement that she managed to contact DW1 who went to her house in Italy with a site plan for parcel of land Chembe-Kibabamshe/402.
152. After agreeing with DW1 that she first visits the site, PW1 stated in the said statement that she came to Kenya in the company of her husband in March 2011 and while in the company of DW1 and Roberto Sasso they went around the houses that had already been constructed, whereupon she selected one. She then went back to Italy and signed the preliminary agreement.
153. The translated version of the preliminary agreement was produced by both the Plaintiff and the 1st Defendant. For the purpose of this Judgment, I shall use the translated version produced by the Plaintiff.
154. The Preliminary agreement is titled as follows: PRELIMINARY SUB-LEASE CONTRACT FOR A RESIDENTIAL REAL ESTATE TO BE COMPLETED."
155. The said heading suggests that what the parties were signing was a preliminary agreement in respect to a real estate that was yet to be completed.
156. The said agreement was signed on 23rd May 2011 and is divided into three portions. The first portion describes the 1st Defendant and the Plaintiff, the second portion is what is referred to as an "Introduction Statement" while the third portion of the agreement is titled "the parties agreed and stipulated".
157. In the descriptive part, the 1st Defendant is referred to as the "promising vendor" while the Plaintiff is referred to as the "prospective buyer".
158. The second part, which is the "Introductory statement" has clauses (a) upto (h).
159. Clause (a) of the agreement states that Melina Investment Company Limited, the 1st Defendant, is the Lessee of Chembe/Kibabamseh 402 with effect from 6th September 2006. The clause further states that the land is to be used to construct "both touristic and residential premises with a goal of constructing a residential complex to be known as Nyumba Baharini Village comprising of 35 single and family villas".
160. Clause (b) states that Melina Investment Company had decided to reduce the initial property to realise the construction of 11 villas. According to that clause, the remaining piece of land with a surface area of 40% of the entire land was to be put up for sale or have some touristic residence erected on the same (exclusive of any commercial activity).
161. Clause (c) of the preliminary agreement states that Lion Building contractors has undertaken all the construction works in regard to walls, internal paths, makuti roof, sewerage and also drawn the contract for plumbing and electricity works.
162. Clause (d) states that Melina Investment commits itself to the prospective buyers of the single dwelling, to erect a bordering wall on the southern part of the residence, to create a second gate for trolleys and/or trucks as well as construct a private parking bay, condominium administration offices, maintenance and general tools offices and the housing for the staff working for the proprietors of the villas in the complex.
163. The said clauses therefore stated what the 1st Defendant needed to do to achieve its objectives viz-a-viz the Nyumba Baharini Village.
164. Clause (e) provides that the prospective buyer, in this case the Plaintiff, is interested in acquiring the unit marked 2, while clause (f) provides that the prospective buyer is interested in acquiring the property on "sub-lease terms for the remaining period from 1st March 1992 on condition that she is able on further 60 Sq M more or less covered on the first floor consisting of 2 bedrooms and

2 bathrooms with an access through."

165. Clause (g) on the other hand provides that all the expenses for the extensions will be on the part of the prospective buyer, whereas the expenses for the renovation of the roof in Makuti as well as the replacement of the sanitary ware, the taps and the sink in the kitchen was to be performed by the promising vendor.
166. The last part of the preliminary agreement has what is referred to as "the parties agree and stipulate."
167. Clause (1) of that part refers to seven (7) attached documents which include the "right to property, receipts confirming payment of rates for the property and the plan, planimetory, contractual condominium rules, plan for the dwelling area, capitulated and evidence of the payment of stamp duty."
168. According to clause (3), the subject villa was to be handed over "wholly completed and not in measures".
169. Clause 4 of the preliminary contract provides that that the payable amount for the villa and after "all work is done to the satisfaction of the concerned and as indicated in the introductory statement marked G is 150,000 Euros".
170. Under the same clause, the amount of 150,000 Euros was to be paid as follows:

"- Euro 30,000 as down payment through a banker's cheque upon signing this agreement.

Euro 45,000 as the first deposit at the end of all common works (fencing of each completed dwelling or to be completed, common parking bay, servant quarters, connection of electric power to the dwellings, plumbing and sewerage works, election of a local administrator and a contract for surveillance); all the above mentioned works SHALL have to be completely carried out by and not beyond the 30th day of (November) December 2011.

Euro 75,000 being the balance in settlement of the buying and contract to be effected by the month of December 2011 in Malindi."

171. Clause 5 provides that the drawing and signing of the transfer contract of the subject property was to be done by and not beyond the 22nd day of December year 2011.
172. The preliminary agreement had a forfeiture clause. Clause 7 gave the Plaintiff "the opportunity to withdraw from the contract in the event that the earlier common works hereabove indicated in "D" are not carried out as stated by the 30th day of November year 2011."
173. After the said withdrawal, the Plaintiff had the right to receive double the deposit that she had paid upon the signing of the contract and also the amount expended on the works carried out in relation to the extension which was capped by the agreement at 30,000 Euros. The Plaintiff was to be paid the said amount within 30 days from the date of rescission of the contract.
174. The Plaintiff, PW1, informed the court that after paying the deposit of 30,000 Euros, she came to Kenya on 17th December 2011 and found find the house had been locked by the 2nd Defendant. It was her evidence that by that time, she had taken possession of the house and had contracted Lion Builders to renovate the same.
175. According to PW1, she could not access her husband's medicine which was in the house and that the Defendants insisted that she must clear the balance of the purchase price before she could be allowed in the house.
176. The evidence of PW1 was that she declined to pay the second installment of 45,000 Euros and the balance of 75,000 because the Plaintiff had not completed the construction of the common areas as agreed. However, she went ahead and paid the second installment of 45,000 Euros sometimes in December 2011 notwithstanding the fact that the Defendant had not fenced each of the completed dwellings, the common parking bay and the servant quarters.
177. PW2, a civil engineer appointed by the Plaintiff prepared a report to show the status of the suit premises.
178. According to his report dated 27th December 2011, a section of the wall had been done but more than a half was pending; the main road from the gate leading to the village was not done; the street lights, garden lights and security lights were not complete and the parking was ready.

179. The same report noted that the condominium was to have a total of eleven (11) houses of which six, namely house numbers 2 (the Plaintiff's), 3, 4, 15 a and 15c were ready for habitation.
180. It is clear from the report of the said engineer that the works on the common areas were in progress. It is also not in dispute that other than the six houses which were ready for occupation, the construction of the other remaining units was ongoing.
181. In view of those facts, it would be difficult for this court to know the intention of the parties in so far as the completeness of the common areas was to look like before the Plaintiff could pay the second installment of 45,000 Euros.
182. I say so because the Plaintiff was aware that other than completing the common areas, the Defendants were still building more houses on the suit property. The site as it were was under construction as at the time she signed the pre-sale agreement. It therefore follows that things like the road, fencing of individual units, parking bays and landscaping were either incomplete or were not to the standards that the Plaintiff would have expected, at least until the site was not under construction.
183. If, as claimed by the Plaintiff, the common areas were not done as at 30th November 2011 as per the agreement, or were not done to her standards, then the Plaintiff should have invoked clause 7 of the preliminary agreement by rescinding the contract.
184. Upon rescission of the agreement under that clause, the Plaintiff was entitled to a refund of 90,000 Euros, which is double the amount of the deposit she had paid upon signing the contract plus 30,000 Euros being the amount the parties had agreed upon that she would expend on the extension of the house. The said amount was to be paid to the Plaintiff within 30 days from the date she rescinds the contract in writing. That is what the parties agreed upon.
185. "Rescission" has been defined in the Black Law Dictionary 9th Edition as follows:

"A party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach. Rescission is generally available as a remedy or defence for a non-defaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their pre-contractual position".

186. The Plaintiff, as I have stated, did not inform the Defendants in writing the breaches of the agreement that she thought they had committed even after they locked the suit premises on 17th December 2011, by which time she had taken possession, and even after the Defendants' advocate notified her in writing that the Defendants had rescinded the contract on 9th December 2011 because of her refusal to pay the balance of the purchase price.
187. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of **Rufale Vs Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592, Scrutton L.J.** held as follows:

"The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract."

188. In the case of **Attorney General of Belize et al Vs Belize Telecom Ltd & Anoter (2009), 1WLR 1980 at page 1993, citing Lord Person in Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973) I WLR 601 at 609**, held as follows:

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

189. The importance of interpreting contracts strictly was further reiterated in the case of C**urtis Vs Chemical Cleaning & Dyeing Co. Ltd (1951), ALL ER 631 in which Lord Denning** held as follows:

"If a party affected signs a written document, knowing it to be a contract which governs the

relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation."

190. Instead of rescinding the agreement, the Plaintiff went ahead to pay the second installment of 45,000 Euros but declined to pay the balance of the purchase price, which was 75,000 Euros. The payment of 45,000 Euros and the failure by the Plaintiff to rescind the agreement was an acknowledgment that she was satisfied with the condition of the common areas.
191. I have gone through the Plaintiff's documents and I have not come across any letter in which she sought to rescind the preliminary agreement dated 23rd May, 2011 notwithstanding the provision of clause 7. The rescinding of the agreement pursuant to the said provision was a condition precedent to the prayers for damages by the Plaintiff.
192. The other condition precedent that the Plaintiff was supposed to comply with before accusing the Defendants for being in breach of the preliminary agreement is the signing of the "transfer document".
193. According to clause 5 of the preliminary agreement produced by the Plaintiff, "the drawing and signing of the transfer contract of the subject property was to be done by and not beyond the 22nd day of December year 2011".
194. Although the second installment was to be paid by 30th November 2011, by which time the common areas stipulated in the agreement should have been completed, the Plaintiff refused and has continued to refuse to sign the sub-lease documents that were prepared and sent to her advocate by the Defendants' conveying advocate, DW5.
195. The refusal by the Plaintiff to execute a sale agreement and the sublease as per the preliminary agreement by 22nd December 2011, and the failure by her to invoke clause7, shows that she is the one who was in breach of the preliminary agreement.
196. I say so because notwithstanding her promise vide a letter dated 20th December 2011, which she says she signed under duress, agreeing to execute a sale agreement for the lease property by 23rd December 2011 and to pay Euros 75,000 before the end of January 2012, she did not do either of the two. Instead, she made a report to the police alleging that the 2nd and the 4th Defendants had received 75,000 Euros from her by false pretences. It is on the basis of her complaint to the police that the 2nd and 4th Defendants were arrested, charged and later on discharged under section 87 of the Criminal Procedure Act.
197. PW1 having admitted in her evidence that she refused to sign the agreement for the sublease and the sublease itself which would have entitled her to have a proprietary interest in the suit property, I find and hold that she was in breach of the preliminary agreement.
198. Indeed, the Plaintiff would have been in a good position to allege that the Defendants had not done the common areas as per the agreement had she signed the sale agreement or the sub-lease as per condition number 5 of the Preliminary agreement or if she had rescinded the agreement in writing. In the case of **Wachiengo Vs Gerald (1988) KLR 406, the Court of Appeal** held as follows:

"On the evidence there was a condition precedent to the contract between the parties that the appellant would deposit some Euros 20,000 on the respondents foreign bank account and this condition was not fulfilled by the Appellant. The high court Judge was right in his holding that there was a valid contract but that contract had become unenforceable by the Appellant because of his own failure to comply with an essential term thereof, namely the condition precedent."

199. Having failed or refused to sign the sale agreement or the the sublease, and having failed to rescind the preliminary agreement in writing, the Plaintiff cannot claim that it is the Defendants who are in breach of the preliminary agreement.
200. Indeed, on the same ground, the Plaintiff cannot enforce the said preliminary agreement by claiming at this stage that the 1st Defendants should be compelled to complete the construction of the common areas or transfer the suit premises to her on the basis of the preliminary.
201. I say so because, as held in the Wachiengo case (supra), one cannot enforce an agreement as against the other party when he/she has failed to comply with an essential term of the agreement.

202. In any event, the order of specific performance cannot issue in the instant case because the agreement that the Plaintiff is relying on is a pre-sale contract.
203. The Black's Law dictionary has defined a pre-sale agreement to be "the sale of real property (such as condominium units) before construction begun".
204. A pre-sale contract usually involves the payment of a deposit b ythe purchaser. The deposit under such an agreement is usually refundable if the developer does not complete the unit within the time frame and specification set out in the contract or as the parties may agree.
205. Although a pre-sale agreement may give rise to an order of specific performance, depending with how it has been drafted, the same must comply with the provisions of Section 3(3) of the Law of Contract Act for an order of specific performance to issue in matters to do with land. That is why the Plaintiff was to execute another sale agreement considering that the preliminary agreement of 23rd May 2011 does not meet the requirements of Section 3(3) of the Law of Contract Act, which she refused to do.
206. A contract that is unenforceable because it has not complied with the Law of Contract Act cannot be enforced by way of specific performance. The editors of **Chitly in Contract, 30th Edition, Volume 1 at paragraph 27-003** observed as follows:

"The jurisdiction to order specific performance is based on the existence of a valid, enforceable contract....it will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality....."

207. Having found that it is the Plaintiff who was in breach of the Preliminary agreement of 23rd May 2011 by failing to sign the transfer document by and not beyond 22nd day of December year 2011 and failing to make payment of 75,000 Euros "by the month of December 2011, and considering that the Plaintiff did not invoke the provisions of clause 7 of the agreement, I find and hold that this court cannot order the Defendants to comply with the terms of the agreement of 23rd May 2011.
208. The second issue that I am supposed to determine is whether the Defendants committed a fraud in offering for sale the suit premises.
209. In the amended Plaint, it was pleaded that the Defndants held out that there was a clean title to Chembe Kibabamshe/402; that the Defendants did not disclose that there was a restriction to the land; that the Defendants pretended that they had all approvals for the developments from all the necessary authorities and that the Defendants pretended that they had a good title to pass to the Plaintiff.
210. The Plaintiff, PW1, admitted in her evidence that she saw the Certificate of Lease for Chembe Kibabamshe/402 (the plot) before she signed the preliminary agreement.
211. However, It was her evidence that she later discovered that no transaction could be carried on the suit property because of an embargo that had been placed on the title by the Government.
212. PW4, a civil technician retained by the Plaintiff informed the court that during his investigations, he discovered that the suit property had an embargo which was only lifted in the year 2012. It was the evidence of PW4 that because of the said embargo and the recommendation of the Ministerial Task Force Report of June 2010, Defendants could not have sold to the Plaintiff the suit premises.
213. A representative of the National Land Commission testified as PW5. PW5 produced in court the entire "correspondence file" from the Commissioner of Land's office in respect to the plot.
214. It was the evidence of PW5 that there was a general embargo on land in the Chembe Kibabamshe area that was placed by the Government in the year 2007.
215. According to PW5, the embargo in respect to the suit property was lifted by the Commissioner of Lands on 9th February 2012. It was his evidence that the Plaintiff could only transact on the suit property after the lifting of the embargo and not before.
216. In cross-examination, PW5 stated that the register and the Certificate of Lease did not have any restriction and that he did not see anything wrong with the title document.
217. The file produced by PW5 shows that the 1st Defendant was registered as the proprietor of the suit property on 6th September 2006 having bought it for valuable consideration.
218. It was the evidence of PW5 that the embargo which was placed on the suit property was an administrative measure that had been undertaken by the Government and that the same is not a

registrable instrument.

219. The evidence of PW5 was supported by the evidence of the District Registrar, Kilifi, PW6, who produced the parcel file for the plot.

220. According to PW6, the land in question was registered as government land in 1986. The same was transferred and registered in favour of the 1st Defendant on 6th September 2006.

221. PW6 stated that a general embargo was placed on all the parcels of land in the Chembe/Kibabamshe area in 1986. It was his evidence that the suit plot was one of the plots that were affected by the embargo.

222. According to him, no transaction could be carried out during the pendency of the embargo. However, he confirmed that the said embargo has since been lifted and that the embargo was never registered on the title.

223. The correspondence file that was produced by PW5 at folio 23 shows a Certificate of official search that was conducted on 16th January 2008. the Certificate of official search shows that as at that date, the suit property was registered in favour of the 1st Defendant. The search also shows that the suit land did not have any inhibition, caution or restriction.

224. I have gone through the entire correspondence file that was produced by PW5 and I have not come across a gazette notice showing that the Commissioner of Lands had place an embargo on plot no. 402.

225. I have also not come across a letter or notice addressed to the 1st Defendant informing it that it could not transact on its land because of the embargo.

226. In his letter dated 22nd August 2006, the Chief Land Registrar informed the District Land Registrar that any dealings on the suit property should be done in accordance with the existing procedure, rules and regulations.

227. Having gone through the entire parcel file and the correspondence, produced by PW5 and 6, nothing in that letter, or the subsequent letters shows that the government registered a restriction or an embargo on the suit property. I find and hold that the so called general embargo that had been placed on all the properties in Chembe Kibabamshe area, without registering it, is of no legal consequence.

228. Indeed, PW5 amd DW5, who are both advocates, confirmed that an embargo cannot not legally restrict a registered proprietor to transact on his land.

229. Plot number 402 is wholly governed by the provisions of the Registered Land Act (repealed). The Act does not recognise the concept of placing an embargo by the Government on land. The concept is so alien and unlawful that I am surprised the registered proprietors of land who have been affected by it have never challenged it in a court of law.

230. Once land has been registered and a Certificate of Lease issued, the government, through the Registrar, can only restrain the owner from dealing with it by registering a Restriction.

231. A Restriction is a registrable instrument. Pursuant to the provisions of Section 136 (1) of the Registered Land Act (repealed), a Restriction can only be registered by the Registrar after hearing the people who are likely to be affected by it. That did not happen in the instant case.

232. In the absence of a Restriction duly registered, the 1st Defendant could deal with the suit property by selling it to the Plaintiff in the year 2011. The 1st Defendant only required the consent of the Commissioner of Lands to sell it pursuant to the provisions of Section 48 of the RLA (repealed) only because the Government is the head lessor and not because of the alleged embargo. Such a consent can only be requested by the registered proprietor after the sale agreement or transfer document has been executed, and not before. The Plaintiff in this matter never signed the sub lease or a sale agreement. Had she signed the sub lease, it would not have been legally rejected upon presentation for registration because the suit property did not have a restriction.

233. I say so because Section 53 of the repealed Act provides that so long as the lessee pays the rent and observes the conditions contained or implied in the lease, the lessee shall peacefully and quietly possess and enjoy the leased premises during the period of the lease without any lawful interruption from or by the lessor or any person rightfully claiming through him.

234. The so called embargo and the Task Force Report was an administrative fiat which did not meet the requirements of a fair administrative action pursuant to Article 47 of the Constitution. In the circumstances, I hold that the 1st Defendant did not commit fraud when it purported to sell to the

Plaintiff the suit property in the year 2011. The 1st Defendant's title was free of any encumbrances and it could therefore transact in it.

235. The evidence before me also shows that the construction of the house that the Plaintiff purported to purchase was approved by the Municipal Council of Malindi on 5th February 2008 vide PPA2.

236. The evidence of PW3 in this matter was irrelevant considering that he produced the file from the Municipal Council of Malindi for the year 2010 and not 2006. The file that should have been produced by PW3 was for the year 2006, which was the time when the 1st Defendant applied for the approval of the development of the first four houses on the suit property. One of the houses that the Council approved for development on 5th February, 2008 was the one that the Plaintiff purported to purchase. Before an occupational certificate in respect of the suit premises could be issued by the Council pursuant to clause 5 of Form PPA2 dated 5th February 2008, the Plaintiff proceeded to extend the house and took occupation of the same.

237. The Plaintiff cannot therefore blame the Defendants for failing to acquire an Occupational Certificate from then Municipal Council when she is the one who did the extensions and occupied the house before acquiring the Occupational Certificate.

238. The third issue that I am supposed to deal with is the payable damages, if at all. Other than a refund and in the alternative an order of specific performance, the Plaintiff is claiming for general damages for breach of the pre-sale agreement.

239. On the other hand, the Defendants are claiming for damages for trespass, general damages for breach of the pre-sale contract, damages for malicious prosecution and damages for loss of mesne profits and rent from 9th December 2011 to the date the Plaintiff gives vacant possession. The Defendants are also claiming for an order of vacant possession.

240. There has been a debate as to whether an award of general damages can be awarded for a breach of contract. In the case of **John Richard Okuku Oloo Vs South Nyanza Sugar Co. Ltd (2013) e KLR,** the Court of Appeal held as follows:

"Voughan Williams, L J goes on to state, and we fully agree, that the fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages for his breach of contract."

241. In the case of **Kenya Power & Lighting & Co. Ltd Vs Abel M. Momeyi Birundu (2015) e KLR**, the same court held as follows:

"Authorities are legion to the effect that general damages may not be awarded for breach of contract."

242. In my view, the word that should be avoided while considering damages for breach of contract is "general". All I can say, based on the above decisions of the Court of Appeal is that although damages are awardable for breach of contract, depending with the circumstances of each case, the said damages cannot be referred to as "general damages" because one needs to establish the damages he has suffered for breach of contract.

243. When one party alleges that the other party has breached a contract, the court, looking at the circumstances of each case, may award damages based on the loss that such a party has suffered due to the breach. That is the position that was taken by the **court in Hadley Vs Baxendale (154) 9. Exch 214 where Anderson P at page 354** stated as follows:

"Where two parties have made a contract which one of them has broken the damages which the other ought to receive should be such as may fairly and reasonably be considered either as arising naturally i.e according to the usual course of things, from such breach itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made a contract as the probable result of a breach of it."

244. The Plaintiff took possession of the suit premises towards the end of November 2011 and before she paid the second installment of 45,000 Euros. The said installment was paid by the Plaintiff after the Defendant locked the subject house. However, the Plaintiff declined to pay the balance

of the purchase price and to sign the sale agreement and the sub-lease after she was allowed in the house.

245. The Plaintiff's counsel submitted that because the Plaintiff was allowed by the Defendants to carry out renovations and extension of the suit premises pursuant to clause "g", the Defendants cannot suggest that the Plaintiff is a trespasser.

246. On the other hand, the Defendants' advocate submitted that a notice was given to the Plaintiff to vacate the suit premises on 9th December 2011 and that time was made of essence by the Plaintiff herself in the letter dated 20th December 2011.

247. The preliminary agreement produced in this court did not state when the Plaintiff was to take possession of the suit property. The preliminary agreement only allowed the Plaintiff to do some extensions on the house.

248. The preliminary agreement catered for what would happen if the agreement falls through, which was a refund of the money spent on the extension and double the deposit that had been paid by the Plaintiff.

249. The Plaintiff did not rescind the agreement pursuant to clause 7. Having not rescinded the agreement, it is implied that she was satisfied with the works on the common area and that is why she took possession of the said suit premises in November 2011.

250. By the time the Plaintiff took possession of the suit premises, the interest in the suit premises had not passed to her. In fact, she was still "a prospective purchaser" as per the agreement it is the 1st Defendant who was the legal owner as at the time the Plaintiff took possession of the house.

251. Section 27 of the Registered Land Act (repealed) provides that the registration of a person as the proprietor of land shall vest in that person the absolute ownership of the land together with all rights and privileges belonging or appurtenant thereto.

252. The same section states that rights of the proprietor cannot be defeated subject to the leases, charges and other encumbrances shown in the register and the overriding interests stipulated in Section 30 of the Act.

253. When the Plaintiff was allowed to carry out extensions and renovation on the suit premises by the Defendants before the signing of a sale agreement and the sublease, she was a licencee. The Registered Land Act (repealed) defines a licence as follows:

"Permission given by the proprietor of land or a lease which allows the licencee to do some act in relation to the land or the land comprised in the lease which would otherwise be a trespass, but does not include an easement or a profit."

254. The Plaintiff was merely a licencee when she was allowed on the suit property by the Defendants considering that the sublease had not been signed and registered in her favour.

255. On 9th December 2011, the 1st Defendant, through its advocate served the Plaintiff with a notice terminating the pre-sale contract. In the said letter, the Plaintiff was notified as follows:

" 9 you are hereby notified to move any of your movable within our client's premises immediately and never to step in our client's premises forever thereafter."

256. The Plaintiff's advocate responded to the said notice vide a letter dated 20th December 2011 and which was signed by the Plaintiff herself in the presence of her advocate.

257. In the letter, the Plaintiff agreed to execute a sale agreement for the leasehold by 23rd December 2011, to pay the residual of Euros 45,000 plus Euros 75,000.

258. The Plaintiff did not in the said letter, or in any other letter before or thereafter, allege that she could not proceed with the transaction because of the failure on the part of the Defendants to perform the agreement.

259. Although the Plaintiff told the court that she signed the letter of 20th December 2011 because she was afraid that the Defendants were likely to lock the house, she did not explain why she could not rescind the agreement all together pursuant to clause 7 of the agreement. That was the legal option that was available to her but not to refuse to pay the balance of the purchase price and continue holding on the 1st Defendant's house.

260. A trespasser is a person who intentionally goes to land in possession of another without lawful

authority.

261. Although the 1st Defendant initially allowed the Plaintiff in the suit premises, the said authority was withdrawn by way of a notice of termination of the preliminary sale agreement on 9th December 2011. From that day,the Plaintiff became a trespasser on the suit property.

262. In the case of **Wamwea Vs Catholic Dioceses of Murang'a Registered Trustees (2003) KLR 389**, it was held as follows:

"Once a party acquires legal title over a parcel of land, such a party is not only entitled to possession but also to the occupation of that land.....A party who refuses to give vacant possession becomes a trespasser notwithstanding that the party refused to take any compensation given if such refusal of compensation does not confer a legal interest in the land."

263. The Plaintiff in this matter had no right at all in occupying the suit premises after she was served with the notice of 9th December 2011.

264. The Defendants are therefore entitled to damages for trespass and for an order of eviction as pleaded in the counter-claim.

265. Where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. In the instant case, the Defendants can only be awarded damages for trespass and not mesne profits.

266. I say so because no specific sum was pleaded by the Defendants as to the payable mesne profits, which is defined as the profit of an estate received by a tenant in wrongful possession between the dates (see Black's Law Dictionary 9th edition).

267. Mesne profits must be pleaded and proved. In the case **Peter Mwangi Msuitia & Another Vs Samow Edin Osman (2014) e KLR, the Court of Appeal** held as follows:

"As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded..."

In the case of **Inverugie Investment Vs Hackett (Lord Lloyds (1995) 3 ALL ER 842** it was held as follows:

"Our understanding of the above persuasive authority is that once the learned Judge made the award under the subhead "mesne profits" there was no justification for him awarding a further Kshs.10 million under the subhead "trespass" since both mean one and the same thing....."

268. The above decision was followed by the Court of Appeal in the case of **Kenya Hotel Proprietors Ltd Vs Willesden Investments Ltd (2009) KLR 126**.

269. The Defendants are also claiming for damages for malicious prosecution.

270. The evidence of DW1 was that on the basis that the Defendants had no good title, which was not true, the Plaintiff reported the 2nd and 4th defendants to police and they were charged with various offences.

271. PW1, on the other hand, stated that he made a complaint to the police because the 2nd and 4th Defendants had threatened her.

272. The statement that the Plaintiff recorded with police was that after she purchased the suit property, she realised that all the documents in respect to the suit property were fake.

273. The Plaintiff was entitled to be apprehensive about the documents that the Defendants were holding. It would appear that the Plaintiff's fear was that due to the so called "embargo" that had been placed on the suit property, she was going to loose the money she had put in the suit property.

274. For one to succeed in a claim for malicious prosecution, he has to prove that the case was terminated in his favour; that the Defendant played an active role in the prosecution of the case; that the Defendant did not have a probable cause or reasonable grounds to support her complaint and that the Defendant initiated the case with an improper purpose.

275. Considering that it is the state that ordinarily investigates and prosecutes criminal cases, it

follows that the Director of Public Prosecution and the Inspector General has to be enjoined in such a suit. That is the position that was taken in the case of **Douglas Odhiambo Apel & Another Vs Telkom Kenya Limited eKLR** where it was held as follows:

"On the law of malicious prosecution, we do not doubt that the Judge directed himself properly in holding that the claim lay as against the Commissioner of Police and the Attorney General meant that the claim was essentially non suited."

276.In **David Kirimi Julius Vs Fredrick Mwenda (2009) e KLR**, it was held as follows:

"Police action cannot be attributable to the appellant who had no authority over them. There was no evidence to suggest that the arrest and prosecution of the respondents was brought without reasonable or probable cause."

277. In **Egbema Vs West Nile District Administration (1972) EA, Law Ag. VP** states as follows:

"**Is the Respondent also liable to damages in respect of the abortive prosecution. I did not think so. The decision whether or not to prosecute was made by the Uganda Police, who are not servant or agents of the respondents after investigations....."**

278.It was for the police to investigate the Plaintiff's complaint, which, as I have stated was reasonable in the circumstances.

279.It is the police who are to blame for not thoroughly investigating the said complaint considering that indeed the documents held by the 1st Defendant in respect to the suit property were genuine. The Plaintiff cannot be penalised for that. Consequently, the claim for damages for malicious prosecution and slander cannot succeed.

280.The Plaintiff is claiming for a refund of 301,145 Euros which she claims to have lost in the transaction. The said sum constitutes what is known as special damages.

281.Special damages are only payable if the Plaintiff proves that it is the Defendants who are in breach of the preliminary agreement. The said damages must also be pleaded and strictly proved.

282.**Millicent Perpetua Atieno Vas Louis Onyango Otieno (2013) e KLR**, the Court of Appeal quoted with approval Halsbury's Law of England, Volume 12, 4th Edition at paragraph 1183 the type and measure of damages recoverable by a purchaser upon breach by a seller of land.

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

283.I have already found that the Defendants did not breach the agreement date 23rd May 2011. My findings are premised on clause 7 of the said agreement in which the Plaintiff was required to inform the Defendants of any breach and to recall for double the deposit paid and 30,000 Euros. Those were the only damages that the Plaintiff was entitled to in the event of a breach by the Defendants. The Plaintiff did not produce a single letter showing that the Defendants had breached the agreement or that she had informed the Defendant of her intention to repudiate the agreement due to the breach.

284.Having failed to do so, it impliedly means that the Plaintiff was satisfied with the works in the common areas and cannot, in this suit, claim for the refund of the down payment of 75,000 Euros that she made or the money she expended on the property. Indeed part of the down payment is what was used by the Defendants to re-do the roof of the unit after the Plaintiff renovated the house, which was not the Defendants' intention in the first place.

285.A deposit in a sale of land transaction is a guarantee for the performance of the contract, which could be retained by the seller if the buyer defaults on his bargain without any regard to the question of actual loss or its amount.

286. The Plaintiff was handed over the suit premises "wholly completed" pursuant to clause 3 of the agreement. Having not rescinded the agreement, she should have completed the agreement by signing the sale agreement and the sub lease to avoid loosing the deposit. She never did that.

287. Other than the admitted amount of 75,000 Euros which was received by the 1st Defendant, the Plaintiff was required, after proving that it is the Defendants who were in breach of the pre-sale agreement, to prove that she indeed incurred a loss of 226,145 Euros.

288. No evidence was led to prove the said amount. The cash sale receipts, delivery notes and handwritten estimates that were produced by the Plaintiff were of no evidential value considering that the Plaintiff did not refer to them at all and the court is unable to determine which document was meant to prove which payment. There was no prove of the claim of 226,145 Euros.

289. Having found that this court cannot compel the Plaintiff to complete the pre-sale agreement considering that the Plaintiff neither invoked the provisions of clause 7 nor performed her part of the agreement, I find and hold that the Plaintiff has not proved her case on a balance of probabilities.

290. On the other hand, the Defendants have proved that the Plaintiff has been in possession of the suit property unlawfully since 9th December 2011, having failed to sign the sale agreement, the sub lease and to pay the balance of the purchase price. The Defendants have also proved that the Plaintiff has never paid any service charge for the condominium since she took possession of the suit premises in November 2011 despite receiving services provided in the condominium.

291. Considering that the suit premises is a high end storyed house fronting the sea which could generate rent in excess of Kshs.150,000 per month, and in view of the fact that the Plaintiff has been in unlawful occupation of the said house since 9th December 2011 and has never paid service charge for the entire period despite DW2 having demanded for the same from her, I assess the damages for trespass at Kshs.7,000,000.

292. Having found that the Plaintiff is in unlawful possession of the suit property it follows that she should vacate the said suit premises forthwith.

293. For the reasons I have given above, I dismiss the Plaintiff's Amended Plaint dated 28th November 2013 with costs and allow the Defendant's Amended Counter Claim dated 8th January 2014 in the following terms:

(a) The Plaintiff to pay to the Defendants Kshs.7,000,000 being damages for trespass with interest at court rates from the date of this Judgment until repayment in full.

(b) The Plaintiff to give vacant possession of the house she is occupying otherwise known as house number 402/16, situated within Chembe/Kibabamshe/402.

(c) The Plaintiff to pay to the Defendants the costs of the counter-claim.

Dated and delivered in Malindi this **8th** day of **May,** 2015.

O. A. Angote

Judge