REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 142 OF 2017

JAMES GICHUHI MUTERO.....1ST PLAINTIFF

JOAN WAIRIMU MUTERO.....2ND PLAINTIFF

-VERSUS-

LOLLDAIGA COUNTRY HOMES & RESORT LIMITED.....1ST DEFENDANT

THE DIRECTORS OF LOLLDAIGA COUNTRY HOMES AND GOLF RESORT

LIMITED.....2nd DEFENDANT

JUDGEMENT

1. The Plaintiffs herein, vide an amended plaint of the 16th (no month indicated) 2017 and filed on the 16th October 2017 against the Defendants, sought for judgment against the Defendants jointly and severally for:

a. Rescission of the contract between the Plaintiffs and the Defendants

b. Refund of the purchase price paid by the Plaintiffs to the Defendants being a total sum of Ksh 2,500,000/=

c. Loss of bargain

d. Damages for breach of contract

e. Cost of the suit

f. Interest on(b) above

2. Alongside the original Plaint, the Plaintiffs s also filed a Notice of Motion under Certificate of Urgency dated the 29th August 2017 seeking that they be granted leave to have this suit advertised in the local dailies. This application was not prosecuted

3. On the 3rd November 2017, the Plaintiffs s sought for interlocutory judgment against the Defendant s who had failed to enter appearance and file their defence. The matter was subsequently fixed for directions for the 13th December, 2017 with a Notice to issue wherein on that date, there was no appearance by the Defendants despite service having been effected. Counsel for the Plaintiffs thus sought for a date for formal proof since the Defendant s had not entered appearance despite service. The matter was fixed for formal proof for the 24th October, 2018 with notice to issue to the Defendants.

4. On the 24th October, 2018 when the matter came up for formal proof, there being no appearance by the Defendants, the same was adjourned to the 17th January 2019.

5. On the 16th January 2019, the Defendants filed their notice of appointment of Advocate but when the matter was called out for formal proof on the17th January 2019, again there was no appearance by the Defendant s despite service having been effected.

6. The matter was further adjourned to the 14th February 2019 when on this day, Counsel , Mr. King'ori who was holding brief for Mr. Jomo

Advocate for the Defendants informed the court that his instructions were to apply for an adjournment to enable Counsel for the Defendants Mr. Njomo Advocate offer a settlement. The application was opposed by Plaintiffs for reasons that Interlocutory judgment had already been entered against the Defendants and further that the offer that had been communicated to the Plaintiffs was not acceptable and that the Plaintiffs wanted a refund of their money.

7. The court gave parties some time to discuss terms of the settlement. The Defendants sought for 30 days so that parties could record a consent, with a rider that if the parties would not have reached a settlement after 30 days, then the matter would be set down for hearing. The court obliged them and set the matter for mention for the 26th March, 2019 on which day the court was informed that parties had failed to agree and that the matter be set down for hearing by way of formal proof which was set for the 18th July, 2019.

8. On the 18th July, 2019, when the matter came up for hearing of the formal proof, there was no appearance by either the Defendants or their Counsel. The matter proceeded for hearing wherein Counsel for the Plaintiffs sought to have the 1st Plaintiff's evidence taken on behalf of the 2nd Plaintiff since the Plaintiffs were a couple.

9. Counsel also submitted that they were aware of the pecuniary jurisdiction of the court wherein they had tried filing this matter at the commercial court which declined as it was a matter that touched on land. That the Magistrates courts had also declined to have the matter heard in their court.

Plaintiffs' case.

10. The 1st Plaintiff testified on his behalf and on behalf of his wife the 2nd Plaintiff herein (who was present in court) to the effect that towards the end of the year 2012, the 1st Defendant had advertised for the sale of residential plots on a golf course in Nanyuki. Plots which they (1st Defendant) would develop. That he go interested and sought the 2nd Defendants herein whom he talked to with an intent of buying two plots.

11. On the 8th October, 2012, he had been offered 1(one) plot measuring 1 acre at Kshs.1,000,000/-.This was going to be plot No. 10 on their physical plan.

12. That the 1st Defendant had subsequently issued them with an acceptance letter dated 8th October, 2012, which letter had set out the names of the vendor, the purchasers as well as the description of the property as 1 acre on land reference No. Nanyuki/Marura Block 4/05 Kimuri located in Nanyuki.

13. That the letter had set out both the purchase price as Kshs.1,000,000/- as well as the legal implications and other costs, the mode of payment which required a deposit of Kshs.500,000/- wherein the balance of Kshs.500,000/- was to be paid on or before 90 days.

14. That he had executed the terms of the letter for offer to the effect that he had paid the deposit as per the offer letter wherein he had been issued with a receipt dated 17th October, 2012 by the 1st Defendants' Advocate.

15. The witness produced the letter of offer as Pf Exh. 1 and upon the court having compared the original letter to the copy, accepted the copy and returned the original letter to the Plaintiffs for safe keeping.

16. The 1st Plaintiffs also produced the receipt dated 17th October, 2012 from Kimondo Gachoka Advocates, for ksh 500,000/=, as Pf Exh 2 and proceeded to testify that subsequent to the payment of the deposit, parties had signed an agreement of lease, to plot 10, dated the 20th May, 2013, which plot was later changed to No. 20. He produced the copy of the lease as Pf Exh. 3.

17. That subsequently, the Plaintiffs had entered into a second agreement with the 1st Defendant to purchase another plot measuring ½ acre within the same project. This was plot No. 2 on Nanyuki/Marura Block 4/04/Kimuri .

18. That the purchase price for the 2nd plot was Kshs.1,500,000/- which was to be paid in instalments starting with a deposit of Kshs.150,000/- and subsequent payments of Kshs.150,000/- on execution of agreement to lease. The other instalments were to be paid until the total amount was paid in full. That he had paid the deposit of Kshs.150,000/- vide a receipt dated 4th December, 2012 while the 1st instalment of Kshs.150,000/- was paid vide a receipt dated 22nd January, 2013.

19. The Plaintiffs produced the receipts for the payments as Pf Exh 4(a-b) and the lease to the 2nd plot dated 13th June, 2013 as Pf Exh. 5.

20. The Plaintiffs testified that they had made payments by instalments for the 2nd plot as follows:

i. Kshs.200,000/- via a receipt dated the 17th July, 2013, and a copy of the cheque herein produced as Pf Exh 6(a-b).

ii. Kshs.300,000/- via a receipt dated 19th April, 2013 herein produced as Pf Exh 7.

iii. Kshs.700,000/- via a receipt dated on the 22nd August, 2013 herein produced as Pf Exh 8, all the payments totaled to Kshs.1,500,000/-.

21. That in regard to the 1st plot, he produced a receipt dated 11th February, 2013 for the amount of Kshs.500,000/- as Pf Exh 9, which

marked the completion of the payment.

22. That in total, he had paid Kshs.2,500,000/- in full and final payment of both plots and his expectation was that all the executed documents pertaining to the lease as well as the lease certificate, would have been submitted to his Counsel, which was not the case.

23. That following this state of affairs, his Advocate had issued a notice of rescission on 25th May, 2015 in accordance to the stipulated clause of their agreement with the 1st Defendant, notice which was not responded to.

24. Subsequently his Advocate had written a letter dated 28th July, 2015, herein produced as Pf Exh 10, giving the 1st Defendant notice of 14 days upon which to refund their money failure to which recovery proceedings would be commenced against the 1st Defendant without further notice. There was still no response to the notice.

25. That vide a letter dated the 13th August, 2015 herein produced as Pf Exh 11, the Defendants' Counsel had written to their Counsel referring to the letter of 28th July, 2015 and informing their Advocate that they awaited further instructions.

26. That he had then approached his present Counsel who had then written a demand letter to the 1st Defendant on 22nd June, 2017 herein produced as Pf Exh 12, demanding an immediate refund of Kshs.2,500,000/- failure to which they would commence legal proceedings.

27. That much later, there had been an email dated 3rd August, 2017, herein produced as Pf Exh 13, from the 1st Defendant wherein they had under taken to pay the amount demanded from them within a period of 6 months pursuant to a proposed payment plan from them wherein their Advocate accepted their proposal provided their plan was sensible. They however did not honor their pledge with the result that the present suit was lodged.

28. That after they had appointed Counsel, on the 14th February, 2019, and while the matter was pending in court, the Defendants had sought for time to enable parties negotiate a settlement. That subsequently a meeting had been scheduled between the Plaintiffs' Counsel and the Directors of the 1st Defendant. That vide a letter dated the 6th March, 2019, herein produced as Pf Exh 14, Counsel had written to the Defendants reminding them of their request for an out of court settlement which had been a reason for adjourning the matter on 14th February, 2019. There was no response.

29. The witness testified that at no time had the Defendants provided any progress report. All that they had been doing was to make verbal promises that the project would take off. That it had been 7 years down the line, there had been no progress made nor any indication on when the Defendants would proceed with the project.

30. At the closure of his case, the 1st Plaintiff had stated that they no longer had any interest in the suit land and sought for -

i. The contract be rescinded.

ii. A refund of the purchase price of Kshs.2,500,000/-.

iii. Loss of bargain and damages of breach of contract.

iv. Costs of the suit and interest of the purchase price and the costs of the suit.

31. When examined by the court, the Plaintiff responded that he had conducted his due diligence, where he had visited the suit land. Thereafter he had given their conveyancing lawyer the responsibility to go through the documents to verify the ownership of the parcel of land. That although she had not got back to them, they had trusted her judgment. That the Defendants had not given reasons why they did not want to refund them their money but at one time, they had informed him that they had no money.

32. The Plaintiffs filed his submissions on the 13th August 2019.

Plaintiffs' submission.

33. After summarizing the evidence adduced in court, the Plaintiffs framed their issues for determination as follows;

i. Whether the Defendants are the right parties to be sued and if yes, why they were sued separately.

ii. Should the judgment against the Defendants be jointly and severally?

iii. loss of bargain

iv. damages of breach of contract.

v. costs of the suit

34. On the first issue of determination, the Plaintiffs relied on the provisions of Order 1 Rule 3 of the Civil Procedure Rules as well as on the

decided case of **Godfrey Otieno Onyango (suing on behalf of Ronald Onyango) & 2 Others vs Chrispin Oduor Oduo & 8 Others [2014] eKLR** to submit that the case determined the basis for suing the 1st and 2nd Defendants. That the Plaintiffs had a right to relief based on a breach of contractual terms by the Defendants in two transactions involving the sale and purchase of plot No. 02 and 10 and therefore based on the law, the Defendants were properly sued for the determination as to the sale and purchase that they did not honor.

35. That the Defendants were sued separately to ensure that the ends of justice was achieved especially where the Plaintiffs was not sure of the right Defendant against whom redress was to be obtained, which was provided for under the provisions of Order 1 Rule 7 of the Civil Procedure Rules, so that a determination may be made as to which of the two Defendants was liable and to what extent.

36. The Plaintiffs also submitted that since it was well established common law principles that a Limited Company incorporated in accordance with the laws of a country, is capable of being sued and suing, that it had been within the law for them to sue the Defendants herein as they lifting the veil based on 2nd Defendant's contribution to deceiving he Plaintiffs and failing to perform their duties.

37. On the second issue for determination, to whether the judgment against the Defendants be jointly and severally, the Plaintiffs submitted that it all depended on their contribution in the acts complained of. That the 1st Defendant was the company which entered into the lease contract with the Plaintiffs whereas the 2nd Defendant were its directors who had personally misled the Plaintiffs with the belief that the 1st Defendant would meet their part of bargain and complete the transaction. Both Defendants however jointly declined to give any information to the Plaintiffs and make good the terms of the contract.

38. That on the third issue of whether they had suffered loss of bargain, it was the Plaintiffs' submission and while relying of the definition of Damages according to the Black Law Dictionary the 9th Edition, that they had suffered loss of bargain as a result of the breach of contract by the Defendant s which in turn had interfered with their plans for the two plots. That they had invested their funds into the plots for economic gain having relied on the information that they were given by the Defendants which information included, that the plots were situated on prime land, within Nanyuki, that the project included a golf club wherein the Plaintiffs would automatically become members and that other facilities were to be constructed that would greatly enhance the value of their purchase, which information informed and enticed the Plaintiffs to make the purchases. They placed their reliance on the decided case of **Peter Umbuku Muyaka vs Henry Sitati Mmbasu [2018] eKLR**.

39. While relying on the decided case of **Kenya Tourist Development Corporation vs Sundowner Lodge Ltd [2018] eKLR** which cited the case of **Victoria Laundry (Windsor) Ltd vs Neman Industries Ltd: Coulson & Co Ltd (Third Parties)[1949] 2 KB 528,** the Plaintiffs submitted that in their amended plaint, they had sought for damages for breach of contract occasioned by the Defendants. That an award for such damages was at the discretion of the court which discretion is to be guided by judicial pronouncements following the proximity or almost equal similarity of the facts in the loss incurred by parties on a case to case basis. That the governing principles of damages was to put the party whose rights had been violated in the same position as far as money can so as if his right had been observed. The Plaintiffs also relied on the decided case of **Delilah Kerubo Otiso vs Ramesh Chander Ndingra [2018] eKLR** to buttress their submissions.

40. Their further submission was that they had suffered disorientation and emotional distress by virtue of the Defendants' misrepresentation and fraud in the sale of the two plots wherein they had thought that the transaction would give them returns. They had in turn completed their end of transaction where they had paid ksh 2,500,000/= to the Defendants so as to better their life. The Plaintiffs prayed for the refund of the Ksh 2,500,000/= with interest at the rate of 5% as per the agreement to the lease with effect from the year 2013 until payment in full,

41. They also sought for general damages of Ksh 10,000,000/= with interest at the court rate from the date of judgment till payment in full. For the breach of contract and costs of the suit with interest thereon at the court rates from the date of filing the suit.

42. The Plaintiffs sought for orders as prayed in their amended suit.

Analyses and Determination.

43. Upon consideration of the Plaintiff's evidence, his submissions as well as the documents produced in evidence and the authorities herein cited, and further without losing sight of the fact that the Defendants having been served neither entered their appearance nor filed their defence wherein an interlocutory judgment was entered against them, I find the issues arising herein for determination as follows;

i. Whether the 1st and 2nd Defendants were improperly sued

ii. Whether there was a valid lease agreement between the Plaintiffs and the Defendants.

iii. Whether there was a breach of the lease agreement by the Defendants

iv. Whether the Plaintiffs are entitled to the remedies sought.

44. On the 1st issue for determination, it is clear from the provisions of Order 1, rule 3 of the Civil Procedure Rules that:-

> "All persons may be joined as Defendant s against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise." Emphasis supplied

45. In essence, the joining of a Defendant to a suit is not limited to the said Defendant being a party to a contract. The cause of action can arise from acts or transactions related to the said contract. In view of the above, I am not convinced that the Defendants have been improperly

enjoined to this suit. In any case, Order 1 rule 9 of the Civil Procedure Rules provides that no suit shall be defeated by reason of the misjoinder or non-joinder of parties, and that the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.

46. Further, based on the evidence herein adduced in court as stated herein above, it is clear that according to the lease agreements to plot 10, on Nanyuki/Marura Block 4/05/Kimuri dated the 20th May 2013, herein produced as Pf Exh. 3 and lease agreement for plot No. 2 on Nanyuki/Marura Block 4/04/Kimuri dated the 13th June, 2013 produced as Pf Exh. 5, entered into by the parties to the suit, Lolldaiga County Homes and Gold Resort, the 1st Defendant herein described itself as a Limited Liability Company whereas the 2nd Defendants executed the same as Directors of the 1st Defendant. This fact has not been controverted or challenged

47. In the case of George Williams Omondi & Another Vs…Co-operative Bank of Kenya Ltd & 2 Others [2016]e KLR, the Court cited the case of H M B Kayondo vs Somani Amirali, Kampala HCCS No.183 of 1994, where it was held that;

> "There is no doubt that a Company duly registered is a legal entity distinct from the subscribers or those who formed it. Once a company is legally incorporated it must be treated like any other independent person with its rights and liabilities, appropriate to itself. The company is at law a different person altogether from the subscribers to the memorandum; and though it may be that after incorporation the business is precisely the same as before, and the same persons are managers, and the same hands receive the profits, the Company is not, in law, the agent of the subscribers or trustees for them. Nor are the subscribers as members like any shape or form except to the extent and the incidence of incorporated is the same whether the shares in the company are in the hands of one man or many... Courts are in general precluded from treating a company as the alias, agent, trustee or nominee of its members, but they will nevertheless do so if corporate personality is being blatantly used as a cloak for fraud or improper conduct and this is what is meant by lifting the veil of incorporation...Since the Defendant was the sole proprietor of his company, he knew or ought to have known that the company did not have funds to meet the cheques on due dates. To permit the Defendant to hide behind corporate personality will amount to allowing him to escape the consequences of his breach of fiduciary trust placed in him by the Plaintiffs ...Accordingly, the corporate veil is lifted and the Defendant held personally liable." [Emphasis added]."

48. Ringera, J (as he then was) in **Ultimate Laboratories vs. Tasha Bioservice Limited Nairobi H.C.C.C No. 1287 of 2000,** stated on lifting of the corporate veil that:

> "However, that fundamental principle of incorporation may be disregarded, lifted, or pierced in exceptional circumstances both under express statutory provisions (of which Section 323 of the Companies Act is but one example only) and under judicial interpretation or intervention. As regards the latter, English authorities establish the broad principles that the corporate veil will be lifted by the courts if, among other situations, corporate personality is being used as a mask for fraud or improper conduct (See the cases of GILFORD MOTOR CO. VS. HORNE [1933] Ch. 935 and JONES VS. HIPMAN [1962] 1W.L.R. 832)."

49. The Plaintiffs herein testified and proved through documentary evidence that that they had invested a total of Ksh 2,500,000/ into the 1st Defendant Company after misrepresentation of the 2nd Defendants, who were directors of the 1st Defendant Company, that they were selling residential plots on a golf course in Nanyuki. Plots which they (1st Defendants) would develop into an Estate with modern amenities within reasonable time (see clause 8.6 of the lease agreement) and that the 1st Defendant would meet their part of bargain and complete the transaction. Both Defendants however jointly declined to either make good the terms of the contract or give any information to the Plaintiffs wherein the estate has still not been developed almost 6 years down the line.

50. On the second issue as to whether the lease agreements were valid or not, I have looked at whether they met the requirements of a contract as per the provisions of **Section 3(3)** of the **Contract Act** which provides as follows;

> **3(3)No suit shall be brought upon a contract for the disposition of an interest in land unless—**
>
> **(a) the contract upon which the suit is founded—**
>
> **(i) is in writing;**
>
> **(ii) is signed by all the parties thereto; and**
>
> **(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:**
>
> **Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.**

51. Considering both the lease agreements herein were in writing, contained the names of the parties, the description of the property, the lease premium, and the conditions thereto and were signed by the parties herein. I find that they conformed to the requisite of a valid contract as per the law herein above and were therefore valid lease agreements, enforceable by the parties.

52. On the third issue for determination as to whether there was a breach of the lease agreements by the Defendants, I find that a party cannot run away from the terms of its agreement. It has often been stated that the Court's function is to enforce contracts that the parties enter into. The court cannot rewrite the party's agreements.

53. In the case of **Shah -vs- Guilders International Bank Ltd [2003]KLR** the Court in considering the terms of the parties contract stated that;-

> "The parties executed the same willingly and they are therefore bound by it."

54. In **Aiman vs Muchoki (1984) KLR. 353** the Court of Appeal held;

> "In the field of the civil law, it is of utmost importance that the courts uphold the rights of parties to commercial transaction. It is the firm tradition of common law court to do so and if the tradition is departed from the nation will suffer".

55. A look at the parties' lease agreements which were almost identical save for variation in terms of the lease premium and some costs, the same were clear. Clause 2, lay down the lease premium, the amount of the initial deposit as well as the mode of payment of the lease premium upon execution of the lease.

56. Clause 3.2 of the lease agreement was to the effect that

> ……..upon proof of payment of the full purchase price…..the lessor's Advocate shall hand over to the lessees' Advocate the following documents……

57. Clause 6 stipulated the handing over of vacant possession of the suit plot upon payment of the purchase price, any apportionment and charges payable under the terms as the parties may agree.

58. Clause 10.5 of the lease agreement stipulated as follows

> In the event that the lessor shall be in breach, the lessee shall elect to rescind this agreement, the lessee shall give the lessor written notice (rescission Notice) thereof and the Lessor shall pay back monies received towards the aggregate purchase price to the lessee within 45 days of receipt of the rescission Notice and this agreement shall thenceforth become null and void and neither party shall have any further claim against the other.

59. It is clear therefore from both the oral and documentary evidence adduced in court that the Defendants herein were in breach of the lease agreements and therefore the Plaintiffs were entitled to rescind the same upon issuance of Notice.

60. The Court having gone through the Agreements for lease and having found that the same were valid and enforceable it would therefore mean that the parties are bound by the terms of the contract. See the case of **Total Kenya Ltd...Vs...Joseph Ojiem, Nairobi HCCC No.1243 of 1999**, where the Court held that:-

> **"Parties to a contract that they have entered into voluntarily are bound by its terms and conditions....."**

61. As already found and held by this Court, there was a valid lease agreements by the parties that were duly signed. Further, that the said agreements had not been vitiated by any factors nor has there been any allegations or form of illegality that has been alluded to, the matter having not been defended, and also having carefully considered the available evidence and the exhibits thereto together with the written submissions, I find that the Plaintiffs herein have discharged their duty of proof on a balance of probabilities that indeed the there was a breach of the lease agreement by the Defendants.

62. Having held as above the last issue for determination is whether the Plaintiffs are entitled to the remedies so sought. The facts of the suit were fairly straightforward and undisputed. In the year 2013, parties herein executed a lease agreement for the lease of the two plots upon which the Defendants were to develop into an estate with a golf course, club house, sports facilities, perimeter wall parking areas, lighting and roads providing access to and from the plots and private developed sites. The Plaintiffs had paid a sum of Ksh 2,500,000/- to the Defendants, monies which had been acknowledged. Thereafter, the 2nd Defendants did not give a progress report on the development of the project and have not shown or demonstrated that they were ready, able and willing to complete their part of the bargain. Instead they have engaged the Plaintiffs in a game of hide and seek where they have been issuing false promises whenever they are accosted by the Plaintiffs.

63. Clause 10.5 of the lease agreement stipulated as follows

> In the event that the lessor shall be in breach, the lessee shall elect to rescind this agreement, the lessee shall give the lessor written notice (rescission Notice) thereof and the Lessor shall pay back monies received towards the aggregate purchase price to the lessee within 45 days of receipt of the rescission Notice and this agreement shall thenceforth become null and void and neither party shall have any further claim against the other.

64. Black's Law Dictionary, Ninth Edition defines ***"rescission"*** as,

> "A party's unilateral unmaking of a contract, for a legally sufficient reason such as the other party's material breach or a judgment rescinding the contract……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 precontractual positions."

65. Pursuant to this definition and the fact that **parties to a contract that they have entered into voluntarily are bound by its terms and conditions.** In the instant case, when the Defendant s failed to honor their contractual obligations, there is no doubt that the Plaintiffs s were

at liberty at any time to rescind the agreement, by notifying or communicating such rescission to the Defendant s which they did. In so doing, the Defendant s would in turn have had to return the amounts paid to them in part performance of the contract, so as to return the parties to the position they would have been prior to entering into the agreement which they failed to do. Since the Defendant s were notified of the cancellation of the agreement but no effort was made to refund any part of the initial payment, both the agreements between the parties herein stand rescinded.

66. On the issue of loss of bargain and damages for breach of contract, as a general rule general damages are not recoverable in cases of alleged breach of contract-see Court of Appeal decision in **Kenya Tourism Development Corporation vs Sundowner Lodge Ltd 2018 eKLR.** The reason for such was explained by the court in the case of **Consolata Anyango Ouma vs. South Nyanza Sugar Co. Ltd (2015)eKLR** as follows:

> **"The next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for breach of contract is, subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd v Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 [2009]eKLR, Kenya Breweries Ltd v Natex Distributors Ltd Milimani HCCC No. 704 of 2000 [2004]eKLR). The measure of damages is in accordance with the rule established in the case of Hadley v Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Chartered Bank Limited v Intercom Services Ltd & Others NRB CA Civil Appeal No. 37 of 2003 [2004]eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see Coast Bus Service Ltd v Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92 (UR) and Charles C. Sande v Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR)".**

67. I find that the loss of bargain and general damages sought for by the Plaintiffs s herein were neither quantified nor proved but that is not to say that as claimants who did not prove that they suffered loss are not entitled to some damages, though nominal. Anson's Law of Contract, 28th Edition at pg 589 and 590, the same provides as follows:-

> **" Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal".**

68. Grabbe JA. in the case of ***Kanji Naran Patel versus Noor Essa and another [1965]EA484*** at page 487 paragraph G-I had this to say:-

> "Nominal damage is a technical phrase which means that you have negatived anything like real damage, but that you are affirming by your nominal damages that there is an infraction of a legal right which, though it gives you no right to any real damages at all, yet gives you a right to the verdict or judgment because your legal right has been infringed. But the term nominal damage does not mean small damages. The extent to which a person has a right to recover what is called by the compendious phrase damages but may also be represented as compensation for the use of something that belongs to him, depends upon a variety of circumstances and it certainly does not in the smallest degree suggest that because they are small, they are necessarily nominal damages.

69. In the case of Beumont versus Great head [1846] 2C.B. 494, Maule, J. [1846] 2C.B. at P.499) spoke of nominal damages as a sum that may be spoken of but that has not existence in point of quantity" and as a "mere peg on which to hang costs."

70. The Halsbury's Laws of England, Third Edition vol. II, defines nominal damages as follows:

> **" Where a Plaintiffs whose rights have been infringed has not in fact sustained any actual damage therefrom , or fails to prove that he has; or although the Plaintiffs has sustained actual damage, the damage arises not from the Defendant 's wrongful act, but from the conduct of the Plaintiffs himself; or the Plaintiffs is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are called nominal… Thus in actions for breach of contract nominal damages are recoverable although no actual damage can be proved".**

71. In **Kinakie Co-operative Society vs Green Hotel (1988) KLR 242**, the court of Appeal held that where damages are at large and cannot be quantified, the court may have to assess damages upon some conventional yardstick. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not he cannot have more than nominal damages – See also **Nyamogo & Nyamogo Advocates vs Barclays Bank of Kenya Limited (2015) eKLR.**

72. In this case the Defendants entered into a lease agreement with the Plaintiffs herein wherein they later breached the contract and refused to refund the purchase price. Although the Plaintiffs at paragraph 33 of their submissions sought for ksh 7,500,000/= as the loss of bargain and Ksh 10,000,000/= as general damages (paragraph 42), I am afraid that they did not provide any proof that they had expended the said amounts claimed. And this line of submission is rejected.

73. With regard to interest payable, Section 26 of the Civil Procedure Act cap 21 Laws of Kenya provides:

> Where and in so far as a decree is for the payment of money, the court may in the decree order interest at such rate as the court may deem reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on such principal sum for any period before the institution of the suit with further interest at such rate as the court

deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

74. In conclusion, I find that the Plaintiffs have proved their case on a balance of probabilities as against the Defendants and are herein entitled to the following orders;

i. The contract between the Plaintiffs and the Defendants herein stands rescinded.

ii. The Defendants shall refund the purchase price paid by the Plaintiffs to them being a total sum of Ksh 2,500,000/=

iii. Interest on (ii) above

iv. Nominal damages of Ksh, 1,500,000/= for breach of contract.

v. Costs of the suit and interests on the damages awarded from the date of this judgment.

Dated and delivered at Nyeri this 24th day of October 2019.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE