



**Lapera Company Limited v B Concept Limited & 2 others (Environment & Land Case 42 of 2018) [2024] KEELC 61 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 61 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 42 OF 2018  
OA ANGOTE, J  
JANUARY 18, 2024**

**BETWEEN**

**LAPERA COMPANY LIMITED ..... PLAINTIFF**

**AND**

**B CONCEPT LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**B INVESTMENT LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RSM LAW LLP ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**Background**

1. Vide a Plaint dated 31<sup>st</sup> January, 2018, the Plaintiff seeks the following reliefs as against the Defendants jointly and severally;
  - i. A permanent injunction restraining the Defendants either by themselves or servants, agents or auctioneers or any of them or otherwise from entering upon, selling or otherwise disposing or in any other way dealing in the suit property without the express written consent or authority of the Plaintiff by transferring, leasing, charging or in any manner whatsoever interfering with the peaceful and quiet ownership or howsoever interfering with the Plaintiffs’ ownership of title and interest in all that property known as Land Reference Number 1159/30(Original Number 1159/94/2)Karen.
  - ii. A mandatory injunction directed at the 3<sup>rd</sup> Defendant requiring it to return to the Plaintiff all original completion documents including title to property known as L.R Number 1159/390(original number 1159/94/2) Karen.
  - iii. A declaration that any dealings with any parties in Land Reference Number 1159/390(Original Number 1159/94/2) by the Defendants is hereby declared null and void.



- iv. An order directed at the Defendants for the immediate restoration of the property Land Reference Number 1159/390(Original Number 1159/94/2) Karen in the names of the Plaintiff at the Defendants costs in case the same had been irregularly transferred and/or disposed to third parties prior to or after the filing of the suit.
  - v. A declaration that the 1<sup>st</sup> Defendant is in breach of contract entered into with the Plaintiff.
  - vi. General damages against the 1<sup>st</sup> Defendant for breach of contract.
  - vii. Interest on all sums outstanding against the 1<sup>st</sup> Defendant for breach of contract.
  - viii. Interest on all sums outstanding against the 1<sup>st</sup> Defendant at commercial/contract rates from the date of the breach till payment until full.
  - ix. Costs of the suit.
2. It is the Plaintiff's case that it is the registered proprietor of all that parcel of land known as L.R 209 1159/390(Original Number 1159/94/2) (hereinafter the suit property) situate in Karen, Nairobi and that on or about 28<sup>th</sup> June, 2017, it entered into an agreement with the 1<sup>st</sup> Defendant for the sale of the suit property.
  3. The Plaintiff averred in the Plaint that among the terms of the agreement were that the agreement would be completed within 90 days, with an additional 60 days making in total the consolidated period for completion one hundred and fifty days (150) days, which was on or about the 28<sup>th</sup> November, 2017; that the suit property would be registered in the name of the 2<sup>nd</sup> Defendant as the 1<sup>st</sup> Defendant's nominee and that the deposit paid would be forfeited in case of failure to complete the Agreement.
  4. According to the Plaintiff, in compliance with the terms of the Agreement, the 1<sup>st</sup> Defendant on 28<sup>th</sup> June, 2017 deposited the sum of Kshs 7, 500,000/= being 10% of the purchase price to be held by his Advocate as a stakeholder and that this signaled the commencement of the contractual obligations between themselves.
  5. It is the Plaintiff's case that it thereafter instructed its Advocates to prepare the completion documents for onward transmission to the 3<sup>rd</sup> Defendant, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' Advocates and that the documents were prepared and a transfer executed by the Plaintiff for registration in favour of the 2<sup>nd</sup> Defendant.
  6. The Plaintiff asserts that it duly complied with its contractual obligations and supplied the Defendants with all the completion documents; that the documents were formally received by the 3<sup>rd</sup> Defendant on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on 21<sup>st</sup> November, 2017 and that as at the date of completion being 28<sup>th</sup> November, 2017, the 1<sup>st</sup> Defendant had yet to complete paying the balance of the purchase price, breaching the contract.
  7. The Plaintiff avers that after the Defendants' breach aforesaid, it duly served them with a 21 day completion notice as per the terms of the Agreement, which notice lapsed on 4<sup>th</sup> January, 2018; that vide letters dated 19<sup>th</sup> December, 2017 and 22<sup>nd</sup> December, 2017, the 1<sup>st</sup> Defendant admitted having failed to perform its obligations under the contract seeking indulgence up to 31<sup>st</sup> January, 2018 to make the payments and that it accepted to indulge the 1<sup>st</sup> Defendant and to re-engage it in the contract by sending it an addendum to the Agreement for execution.
  8. The Plaintiff states that despite having forwarded the addendum as aforesaid, the 1<sup>st</sup> Defendant refused to sign the same; that the 1<sup>st</sup> Defendant has further failed and/or refused to pay the balance of the



purchase price being Kshs 67,500,000 and that the Defendants have been served with notices and demands requiring them to return the completion documents but have refused to do so.

9. On 18<sup>th</sup> July, 2018, the Plaintiff filed a notice of withdrawal of suit against the 3<sup>rd</sup> Defendant.
10. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed a Defence and Counterclaim in which they averred that sometime in late May, 2017, the 1<sup>st</sup> Defendant was desirous of purchasing a parcel of land and to that end identified the Plaintiff's land being L.R No 1159/390(Original No 1159/94/2); that the parties began negotiations culminating in an Agreement for sale which was finalized in late June, 2017 and that on 28<sup>th</sup> June, 2017, the 1<sup>st</sup> Defendant deposited the sum of Kshs 7,500,000 as per the terms of the Agreement.
11. It was averred by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants that on 3<sup>rd</sup> July, 2017, the 1<sup>st</sup> Defendant's Director executed the Agreement for sale which was undated and forwarded the same to the Plaintiff and that the Plaintiff returned the Agreement on 13<sup>th</sup> October, 2017 vide a letter dated 10<sup>th</sup> October, 2017.
12. According to the Defendants, the terms of the Agreement, pertinent to the matter at hand include: the total purchase price of the property was Kshs 75,000,000/= and a deposit of Kshs 7, 500,000/= was payable before execution of the Agreement, to be held on stakeholder basis by the Plaintiff's Advocates; the balance of the purchase price would be paid upon successful registration of the transfer in favour of the purchaser and the vendor would give the purchaser 21 days' notice to complete and if the purchaser did not comply, the vendor could proceed to rescind the agreement and the 10% percent of the purchase price would be forfeited in the event of rescission by the vendor.
13. It is the Defendants' case that the Agreement is void ab initio as it is alleged to have been executed by the Plaintiff's Director, one David Querol, who was not in Kenya at the time the Advocate purported to witness his signature; that on 21<sup>st</sup> November, 2017, the Defendants received part of the completion documents ahead of the time contemplated in the undated agreement and that on 6<sup>th</sup> December, 2017, the Plaintiff supplied them with the outstanding completion documents.
14. According to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, on 14<sup>th</sup> December, 2017, the Plaintiff purported to serve them a notice of completion dated 11<sup>th</sup> December, 2017 for payment of the balance of the purchase price by 19<sup>th</sup> December, 2017, a period of 4 days against the contractual period of 21 days and which was further untenable as the balance of the purchase price could only be paid after registration of the transfer.
15. The Defendants state that vide a letter dated 19<sup>th</sup> December, 2017, they contested the operational date of the agreement and the notice to complete; that on 8<sup>th</sup> January, 2018, the Plaintiff wrote an email indicating that they expected the transaction to be concluded on 31<sup>st</sup> January, 2018 and forwarded an addendum prepared by themselves without any input from the Defendants and that they did not sign the agreement as it was one sided, imperious and implied that the Defendants were on the wrong.
16. It was averred by the Defendants that vide a letter dated 17<sup>th</sup> January, 2018, the Plaintiff purported to maintain the cancellation of the Agreement for sale and withdrawal of the addendum; that before they could respond to the aforesaid letter, the Plaintiff filed a suit in the High Court being HCCC No 30 of 2018 asking similar reliefs as herein and that the Plaintiff's suit should be dismissed.
17. Vide a Counterclaim, the 1<sup>st</sup> Defendant alleged illegality and breach by the Plaintiff. As regards illegality, it was stated that David Querol was not in Kenya at the time of the execution of the Agreement and the attestation by the Advocate was not made in his presence and that the Plaintiff is in breach of the Agreement.



18. The 1<sup>st</sup> Defendant avers that as a result of the illegality and the breach aforesaid, it has suffered loss and damage having been deprived the use and benefit of the deposited sum of Kshs 7,500,000 and that the aforesaid sum is refundable as a result of the illegality/breach by the Plaintiff.
19. The Defendants seek the following reliefs in the Counter claim:
  - i. That this Court do find and declare that;
    - a. The purported Agreement is null, void and unenforceable against the Defendants.
    - b. In the premises, this suit as against the Defendants is incompetent, bad in law, unmaintainable and does not lie and should therefore stand dismissed with costs payable to the Defendant.
  - ii. That the Plaintiffs suit against the Defendants be dismissed with costs to the Defendants for such a period of time and at such rate as the Court may determine.
  - iii. That the 1<sup>st</sup> Defendant be refunded the deposit of Kshs 7,500,000/= as Counterclaimed together with interest at the rate of 5% per annum above the Central Bank of Kenya rates from 28<sup>th</sup> June, 2018 until payment in full.
  - iv. That the 1<sup>st</sup> Defendant be awarded costs of the Counterclaim.
  - v. That any such other or further relief as this Honourable Court may deem appropriate to be made.”

### **Hearing and Evidence**

20. The matter proceeded for hearing on 2<sup>nd</sup> October, 2019. PW1 was David Querol Perez, the Director of the Plaintiff company. He adopted his witness statements dated 31<sup>st</sup> January, 2018 and 05<sup>th</sup> November, 2018 as his evidence in chief and produced the documents annexed to the supporting affidavit as exhibits.
21. It was his testimony that he entered into an agreement with the Defendants in respect of the sale of the suit property for the sum of Ksh 75,000,000; that the deposit to be paid was Ksh 7.5 million which sum was paid by the 1<sup>st</sup> Defendant and that when the deposit was made, he instructed his Advocate to prepare completion documents.
22. PW1 informed the court that the 1<sup>st</sup> Defendant informed him that they were in the process of incorporating a nominee company for the purchase; that on 5<sup>th</sup> September, 2017, they received communication that the nominee company had been incorporated; that the completion documents were received on 21<sup>st</sup> November, 2017 and that the completion date is at clause 5.1 of the Agreement.
23. It was PW1’s evidence that the Plaintiff discharged its obligations upon the delivery of the completion documents; that he nonetheless did not receive the balance of the purchase price; that on 14<sup>th</sup> December, 2017, the Defendants’ Advocates received the completion notice and that on 8<sup>th</sup> January, 2018, they received a request from the Defendants’ Advocate seeking extension of time for making payments.
24. PW1 stated that he is aware that there was an addendum which was forwarded to the 1<sup>st</sup> Defendant but was never signed; that he was never paid the balance of the purchase price; that the notice of cancellation of the agreement and the addendum were received by the Defendants on 17<sup>th</sup> January, 2018; that he met the special conditions contained in clause 7.1; that clause 7.2.3 provided that the purchaser was



- to forfeit 10% paid in case of breach and that he seeks the return of the completion documents if the property cannot be purchased.
25. In cross-examination, PW1 conceded that the Agreement was undated; that the Agreement indicates that the Law Society Conditions of sale are applicable; that the deposit was to be kept by his Advocate as a stakeholder; that they received the agreement for execution vide a letter dated 3<sup>rd</sup> July, 2017 and that he signed the Agreement on 12<sup>th</sup> October, 2017.
  26. It was the evidence of PW1 that the balance of the purchase price could only be paid upon registration of transfer and if the court finds that the completion date was 12<sup>th</sup> October, 2017, then the notice to complete was premature; that the addendum altered the dates; that his Advocate reinstated cancellation of the Agreement when the Addendum was not signed by the Defendants and that he filed a suit at the commercial Division of the High Court on 28<sup>th</sup> January, 2018.
  27. According to PW1, the date of the agreement is when the deposit was made; that the Defendants asked them to hold on as the 2<sup>nd</sup> Defendant was being incorporated; that this was communicated via email on 21<sup>st</sup> November, 2017; that the Defendants informed them that the capital gains document was missing and that they supplied the missing document and did not receive any complaint regarding any other missing document.
  28. It was the evidence of PW1 that the cancellation notice was issued on 12<sup>th</sup> January, 2018 and that he had no intention of remaining with the contract for ever and that there was no court order preventing any party from registering the transfer. The Defendants did not testify.

### **Submissions**

29. The Plaintiff's Counsel submitted that the Agreement between the Plaintiff and the 1<sup>st</sup> Defendant was valid and enforceable; that the 1<sup>st</sup> Defendant accepted to purchase the suit property and made a commitment by paying a deposit of Kshs. 7,500,000 being 10% of the purchase price and that the 1<sup>st</sup> Defendant formally executed an agreement which formed the basis of the contractual relations between the Plaintiff and itself.
30. It was submitted that as the Plaintiff had discharged its obligations under the contract, the onus shifted to the 1<sup>st</sup> Defendant to comply by paying the balance of the purchase price; that the Defendants cannot claim to have been prevented from completion herein by litigation as this suit was instituted after about 5 months after the lapse of the completion and after it was clear that the 1<sup>st</sup> Defendant was not in a position to perform its obligations.
31. It was submitted that whereas as a general legal principle letters indicated "without prejudice" are not admissible in evidence being considered privileged, there are exceptions to the rule and that this exception was cited by the court in *Mumias Sugar Co. Limited and Another vs Beatrice Akinyi Omondi* [2016] eKLR.
32. The Defendants' Advocates submitted that the Defendants' failure to testify does not mean that the Plaintiffs' case has been proved on a balance of probabilities; that in this instance, in determining whether the Plaintiff has established its case, the Court must answer the following questions, to wit; what was the date of the agreement; when was the completion date; when was the balance of the purchase price payable and which party terminated the Agreement.
33. It was submitted that as a general principle, Courts cannot rewrite contracts for parties; that as affirmed by the Court in *Savings Loan Kenya vs Mayfair Holdings Limited* [2012] eKLR, the intention of parties to an agreement should be ascertained from the document as it is deemed to set out the



parties intentions and that the Agreement being undated, by virtue of clause 3.1.1 of the Law Society Conditions of sale, 2015, the date of the Agreement is the date the last party signed it being the 12<sup>th</sup> October, 2017.

34. Counsel submitted that pursuant to schedule 11 of the Agreement, the completion date was 90 days from the date of the execution of the agreement which was on 10<sup>th</sup> January, 2018 and that considering the foregoing, it is apparent that the submission of the completion documents by the Plaintiff on 21<sup>st</sup> November, 2017 and the 6<sup>th</sup> December, 2017 and expecting immediate payment was premature.
35. According to Counsel, Clause 3.2.1 of the Agreement was clear that the balance of the purchase price was payable upon successful registration of the transfer in favour of the purchaser; that subsequently, the notice to complete dated 11<sup>th</sup> December, 2017 was irregular; that the Plaintiff vide the letter dated 12<sup>th</sup> January, 2018 cancelled the agreement and withdrew the addendum; that the Plaintiff further went ahead and filed a suit at the High Court Commercial Division and that it is apparent that the it is the Plaintiff who terminated the Agreement.

### **Analysis and Determination**

36. Having carefully considered the pleadings, testimonies and submissions herein, the issues that arise for determination are;
  - i. Whether the Plaintiff has established its case on a balance of probabilities
  - ii. What are the appropriate orders to issue?
37. It is the Plaintiff's case that it entered into an agreement with the 1<sup>st</sup> Defendant for the sale and purchase of the suit property on 28<sup>th</sup> June, 2017; that pursuant to the terms of the contract, completion thereof was to be undertaken within 90 days and that whereas it completed its part of the Agreement by submitting to the Defendants completion documents, the 1<sup>st</sup> Defendant failed to complete payment of the purchase price.
38. According to the Plaintiff, the 1<sup>st</sup> Defendant thereafter sought extension of the time within which to pay the balance which the it acceded to and drafted an addendum to the Contract in that regard and that even after the extension aforesaid, the 1<sup>st</sup> Defendant refused to execute the addendum and failed to make the requisite payments.
39. The Plaintiff adduced into evidence the certificate of title in respect of the property; the Agreement for sale between itself and the 1<sup>st</sup> Defendant; the e-mail dated 5<sup>th</sup> September, 2017 from the 1<sup>st</sup> Defendant naming the 2<sup>nd</sup> Defendant as the company incorporated to have title to the suit property registered in its favour and the letter dated 20<sup>th</sup> November, 2017 forwarding the completion documents as per schedule of deeds dated 17<sup>th</sup> November, 2017.
40. The Plaintiff also adduced in evidence the notice to complete dated 11<sup>th</sup> December, 2017, email dated 8<sup>th</sup> January, 2018 extending the completion period to 31<sup>st</sup> January, 2018; addendum to the agreement; letters of notice of cancellation of agreement for sale and withdrawal of addendum dated the 12<sup>th</sup> January, 2018 and 18<sup>th</sup> January, 2018.
41. The production of the letter dated 19<sup>th</sup> December, 2017 was objected to on the basis that the same was a "without prejudice" correspondence. The Court agreed with this objection and expunged the same from the record.
42. On their part, the Defendants maintain that they were not in breach of the agreement, which agreement was in any event void as the Plaintiff's Director was not in the Country at the time he



purportedly executed it; that the completion notice issued by the Plaintiff was premature and irregular and that it is the Plaintiff who breached the Agreement.

43. Nonetheless, it is noted that despite their Statement of Defence and Counterclaim advancing the narration aforesaid, the Defendants did not participate in the trial. As a result, thereof, they failed to prosecute their Counterclaim, which stands dismissed. Further, they failed to substantiate the allegations made in their Defence and produce any evidence to counter the Plaintiff's testimony and evidence.
44. Ultimately, the Defence on record remains mere allegations, whereas the Plaintiff's testimony and evidence stands uncontroverted and unchallenged.
45. The above notwithstanding, it is settled that uncontroverted evidence is not automatic evidence. The burden on the Plaintiff to prove his case is in no way lessened because the Defendants did not adduce any evidence. This was succinctly expressed by the Court of Appeal in *Charterhouse Bank Limited (Under Statutory Management) vs Frank N. Kamau* [2016] eKLR cited by the Defendants where the Court stated as follows:

“The suggestion, however, implicit...that in all and sundry civil cases the failure by the defendant to adduce evidence in support of his defence means that the plaintiff's case is proved on a balance of probabilities cannot possibly be correct...While the defendant's failure to testify has fatal consequences for the counterclaim because the onus is on him to prove it on a balance of probabilities, it does not necessarily have the same consequence for the defence where the onus is on the plaintiff to prove his claim on a balance of probabilities.

The *Evidence Act* is clear enough upon whom the burden of proof lies. [see Section 107 and 109].”

46. Indeed, the elementary principle of law that he who alleges must prove remains steadfast. The same is set out under Section 107(1)(2) of the *Evidence Act*, Cap 80 which provides as follows:

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

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

47. And Sections 109 and 112 of the same Act which state as follows;

“109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.”

48. In discussing the standard of proof in civil liability claims in this jurisdiction, the Court of Appeal in *Mumbi M'Nabea vs David M. Wachira* [2016] eKLR stated as follows:

“In our jurisdiction, the standard of proof in civil liability claims is that of the balance of probabilities. This means that the Court will assess the oral, documentary and real evidence



advanced by each party and decide which case is more probable. To put it another way, on the evidence, which occurrence of the event was more likely to happen than not.

...The position was re-affirmed by the Court of Appeal in *Maria Ciabaitaru M'mairanyi & Others v. Blue Shield Insurance Company Limited -Civil Appeal No. 101 of 2000* [2005] 1 EA 280 where it was held that:

“Whereas under section 107 of the *Evidence Act*, (which deals with the evidentiary burden of proof), the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue, section 109 of the same Act recognises that the burden of proof as to any particular fact may be cast on the person who wishes the Court to believe in its existence.”

49. With respect to the burden of proof, the learned Judges of Appeal in the case of *Palace Investments Limited vs Geoffrey Kariuki Mwenda & another* [2015] eKLR, posited thus:

“Denning J, in *Miller –vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say:-

“That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not.

This, burden on a balance or preponderance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept where both parties... are equally (un) convincing, the party bearing the burden of proof will loose because the requisite standard will not have been attained.”

50. The court will be guided by the aforesaid principles noting that there is no contest regarding the validity of the adduced evidence by the Plaintiff.

51. At the onset, it is undisputed that the Plaintiff and the 1<sup>st</sup> Defendant entered into an Agreement for the sale of the suit property. While the Defendants alleged contractual invalidity, this allegation is unsubstantiated. Having considered the Agreement, it meets the requirements of Section 3(3) of the *Law of Contract Act*, to wit, the contract is in writing, executed by the parties and duly attested.

52. The main issue regards whether there was breach of the Agreement by the 1<sup>st</sup> Defendant. Black’s Law Dictionary 8<sup>th</sup> Edition at Page 200 defines breach of contract as;

“Violation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance. A breach may be one by non-performance, or by repudiation, or both. Every breach gives rise to a claim for damages, and may give rise to other remedies. Even if the injured party sustains no pecuniary loss or is unable to show such loss with sufficient certainty, he has at least a claim for nominal damages. If a court chooses to ignore a trifling departure, there is no breach and no claim arises.”

53. The manner in which a written document, whether an agreement, contract and/or deed is to be interpreted, has been the subject of several decisions. It is now accepted that written contracts being self-contained can only be construed and interpreted on the basis of the contents therein. This was



expressed by the Court of Appeal in *Fidelity Commercial Bank Limited vs Kenya Grange Vehicle Industries Limited* [2017] eKLR thus:

“This is what sometimes is called the principle of four corners of an instrument, which insists that a document's meaning should be derived from the document itself, without reference to anything outside of the document (extrinsic evidence), such as the circumstances surrounding its writing or the history of the party or parties signing it...”

54. Equally, the Court of Appeal in the case of *Pius Kimaiyo Langat vs Co-operative Bank of Kenya Ltd* (2017) eKLR stated thus;

“We are alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved.”

55. The Plaintiff's claim of breach of contract is founded on the assertion that the 1<sup>st</sup> Defendant did not pay the balance of the purchase price within the contractually stipulated timelines, being the completion date. To begin with, it is noted that the parties are in agreement that the completion date as set out in the Contract was as set out in Clause 2 under the schedule, to wit;

“Ninety days from the date of execution of this Agreement or any other date agreed by the parties.”

56. Having considered the Agreement, the Court notes that it is indeed undated. Neither the cover page nor page 1 sets out its date. Similarly, the execution page has no indication as to when the parties signed the agreement. So what was the Agreement's effective date?

57. According to the Plaintiff, the Agreement's operative date was 28<sup>th</sup> June, 2017 being the date the 1<sup>st</sup> Defendant made a deposit of the purchase price and as such, the 90 days lapsed on 28<sup>th</sup> November, 2017. In the Defence, the 1<sup>st</sup> Defendant maintains that the Agreement's operative date was 12<sup>th</sup> October, 2017 being the date on which PW1, signed the same on behalf of the Plaintiff and the 90 days would have lapsed on 10<sup>th</sup> January, 2018.

58. The definition section of the Agreement provides that “Deposit” means the amount in the schedule which has been deposited with the Vendors Advocate prior to the execution of this Agreement. It follows therefore that the date of the deposit cannot be taken to be the date of execution for purposes of completion. It was a condition precedent to the execution.

59. Under Clause 4.2 of the Sale Agreement, the parties subjected the sale transaction to the Law Society Conditions of Sale (2015 Edition) in so far as the provisions were not inconsistent with the conditions of the Agreement. It therefore follows that where there is a lapse, regard should be had to the provisions of the conditions aforesaid. Clause 3.1 deals with formation of a contract and provides as follows;

“3. Unless otherwise specified by the Parties in writing the Agreement is made on  
1.1. the date of signing and the Party signing the Agreement last or their advocate shall insert the date.

3. If the Parties have not specified a date and the Agreement is made by  
1.2. exchanging duplicate copies or counterparts by post, the Agreement is made when the last copy or counterpart is posted.”



60. The 1<sup>st</sup> Defendant indicated that its Director executed the Agreement on 3<sup>rd</sup> June, 2017. This has not been disputed by the Plaintiff who only asserts that the operative date was 28<sup>th</sup> June, 2017, being the date of the payment of the deposit. PW1 conceded on cross-examination that he signed the agreement on 12<sup>th</sup> October, 2017. Consequently, it is the finding of the Court, guided by clause 3.1.1 of the Law Society Conditions of Sale, that the agreement's operative date was 12<sup>th</sup> October, 2017, being the date the Plaintiff's Director signed the Agreement.
61. This being so, the completion date would be on 11<sup>th</sup> January, 2018. The completion notice dated 11<sup>th</sup> December, 2017 served on the Defendants on 14<sup>th</sup> December, 2017 was therefore premature.
62. The completion notice having been served prematurely, it follows that there was no basis for the negotiations that ensued. Nonetheless, the addendum, which would have formed the basis of any changes to the terms of the Agreement was not executed and is not binding. Ultimately, it is the finding of the Court that the Defendant did not breach the contract as alleged, the completion notice having been issued by the Plaintiff prematurely.
63. Consequently, it is the finding of the court that the Plaintiff has not proved its case on a balance of probabilities. In the same vein, the Defendants did not prove their Counter claim, having failed to adduce evidence.
64. For those reasons, both the Plaintiff's suit and the Defendants' counter claim are dismissed. Each party to bear its own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18<sup>TH</sup> DAY OF JANUARY, 2024**

**O. A. ANGO**

**JUDGE**

In the presence

Mr. Malebe for Defendants

Mr. Odhiwa for Onyango for Plaintiff

Court Assistant - Tracy

