Ringsview Apartments Limited v Vishnu Builders Company Ltd & another (Environment and Land Case Civil Suit 782 of 2014) [2024] KEELC 727 (KLR) (19 February 2024) (Ruling)

Neutral citation: [2024] KEELC 727 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE CIVIL SUIT 782 OF 2014

SO OKONG'O, J

FEBRUARY 19, 2024

BETWEEN

RINGSVIEW APARTMENTS LIMITED ..... PLAINTIFF

AND

VISHNU BUILDERS COMPANY LTD ..... 1ST DEFENDANT

VIJAY MORJARIA ..... 2ND DEFENDANT

RULING

Background

1. In its amended plaint dated 17th March 2015, the Plaintiff sought the following reliefs against the 1st and 2nd Defendants;

    a. A mandatory injunction compelling the Defendants to forthwith return the keys to the residential apartments on LR No. 4858/11 commonly referred to as Ringsview Apartments (hereinafter referred to only as "the suit property");

    b. A permanent injunction restraining the Defendants from selling, disposing of, transferring and/or accessing residential apartments on the suit property;

    c. A permanent injunction restraining the Defendants jointly and severally from barricading and/or dealing with or in any way interfering with the possession and quiet enjoyment of the residential apartments on the suit property;

    d. Kshs. 140,000,000/- from the 1st Defendant;

    e. Kshs. 112,150,000/- from the 2nd Defendant;

    f. A declaration that the leases for apartment numbers C1, A4 and B4 on the suit property were fraudulently registered through blackmail;

g. An order for cancellation of the leases registered in respect of apartment numbers C1, A4 and B4 on the suit property;

h. Interest on (d) and (e) above, and

i. Costs and interest thereon.

2. The Plaintiff's case against the Defendants is set out in detail in the judgment of this court delivered on 9th February 2023. The Plaintiff averred among others that the 2nd Defendant owed the Plaintiff a sum of Kshs. 112,150,000/- made up as follows;

Apartments A9, A10, B6 and B5.....Kshs.18,500,000/-

Apartments B4 and B3.....Kshs. 29,000,000/-

Apartments C1 and C4.....Kshs.10,500,000/-

Buyers funds.....Kshs. 11,500,000/-

Interest at Bank.....Kshs. 14,000,000/-

Funds paid to Vijay-Cash.....Kshs. 9,750,000/-

Funds owed on C7.....Kshs. 8,000,000/-

Funds owed on C10.....Kshs. 3,000,000/-

Swimming pool built and demolished.....Kshs. 5,000,000/-

Legal costs, caveats and sales agreements.....Kshs. 2,900,000/-

Total Kshs. 112,150,000/-

3. The Defendants filed a joint statement of defence and counter-claim on 28th August 2014. The full details of the Defendants' case are set out in the judgment of this court that I have referred to. The 2nd Defendant averred in part that the Plaintiff had denied him quiet and peaceful possession of apartments B3, B4, B5, B6, A4, A11, A12, C1, C9 and C11 on the suit property in breach of the sale agreements and sub-leases that he entered into with the Plaintiff. The 2nd Defendant averred that he had suffered loss and damage as a result of the said breach. The 2nd Defendant averred in the alternative that the Plaintiff had failed to deliver possession of the said apartments as a result of which he had suffered a loss of rent that he would have earned between 30th March 2012 and 31st July 2014 amounting to a total of Kshs. 17,700,000/-. The 2nd Defendant averred that he had also suffered a loss of profit from each of the apartments for which he was holding the Plaintiff liable. The 2nd Defendant averred that the Plaintiff was also liable to him in damages in the sum of Kshs. 4,400,000/- for failure to install solar systems and intercom on the apartments. The 2nd Defendant averred further that the Plaintiff was also liable for the additional extra works done by the owners of the apartments in the sum of Kshs. 33,848,236/-.

4. In their counter-claim, the 1st and 2nd Defendants sought judgment against the Plaintiff for;

1. A mandatory injunction compelling the Plaintiff to forthwith return possession of the site to the 1st Defendant;

2. A mandatory injunction compelling the Plaintiff to give access and quiet and peaceful vacant possession of apartment numbers B3, B4, B5, B6, A4, A11, A12, C1, C9 and C11 to the 2nd Defendant;

3. A permanent injunction restraining the Plaintiff from interfering or stopping or barricading the 2nd Defendant and/or dealing in any way with apartment numbers B3, B4, B5, B6, A4, A11, A12, C1, C9 and C11 on the suit property or transferring or disposing of the said apartments;

4. An order that the sum of Kshs. 21,895,218/- held as retention money by the Plaintiff be deposited in a joint account of the advocates on record or as the court may direct within a specified time;

5. Kshs. 25,895,102/- to the 1st Defendant as claimed in paragraph 20(b) and (d) of the counter-claim;

6. Kshs. 17,700,000/-, 4,400,000/- and Kshs. 33,848,236/- to the 2nd Defendant as claimed in paragraphs 23(b), (d) and (e) of the counter-claim;

7. Damages for loss of opportunity, profit or market value for each apartment;

8. Interest at commercial rates, and

9. Costs.

5. The suit involved several documents and was heard over several months. After the hearing, the court delivered a judgment on 9th February 2023. In the judgment, the court framed among others, the following issues for determination in the suit and the counter-claim;

1. Whether the 2nd Defendant caused apartments C1, A4 and B4 to be registered in his name fraudulently without paying for the same;

2. Whether the Plaintiff was entitled to the sum of Kshs. 18,500,000/- from the 2nd Defendant in respect of apartments A9, A10, B6 and B5;

3. Whether the Plaintiff was entitled to the sum of Kshs. 29,000,000/- from the 2nd Defendant in respect of apartments B4 and B3;

4. Whether the Plaintiff was entitled to the sum of Kshs. 10,500,000/- from the 2nd Defendant in respect of apartments C1 and C4;

5. Whether the Plaintiff was entitled to the sum of Kshs. 8,000,000/- from the 2nd Defendant being the balance of the purchase price for apartment C7;

6. Whether the Plaintiff was entitled to the sum of Kshs. 3,000,000/- being the balance of the purchase price for apartment C10;

7. Whether the Plaintiff was entitled to the other reliefs sought in the plaint;

8. Whether the Plaintiff had denied the 2nd Defendant quiet access and peaceful possession of apartments B3, B4, B5, B6, A4, A11, A12, C1, C9 and C11 in breach of the sale agreements and sub-leases between the Plaintiff and the 2nd Defendant in respect of the said apartments;

9. Whether the 2nd Defendant has suffered a loss to the tune of Kshs. 17,700,000/- as a result of the said acts by the Plaintiff in relation to the said apartments and Block D, and

10. Whether the Defendants were entitled to the other reliefs sought in the counter-claim.

6. The court made the following findings on the foregoing issues;

Whether the 2nd Defendant caused apartments C1, A4 and B4 to be registered in his name fraudulently without paying for the same.

7. The court found that in the agreement dated 16th December 2013 between the Plaintiff, the 2nd Defendant and Mr. and Mrs. Wangethi, the parties had agreed that there was an outstanding sum of Kshs. 2,500,000/- due and payable to the Plaintiff in respect of apartments C1 and A4, and a sum of Kshs. 500,000/- due and payable to the Plaintiff on account of apartments B6, A11, A12 and B4. The court found upon considering the agreements dated 16th April 2013 and 16th December 2013 that the 2nd Defendant paid a sum of Kshs. 22,000,000/- as a deposit for apartments C1 and A4 and that as at 16th December 2013 there was a sum of Kshs. 2,500,000/- only due to the Plaintiff in respect of apartments C1 and A4. The court was not persuaded that the leases dated 20th November 2013 in respect of apartments C1 and A4 were fraudulent.

8. With regard to apartment B4, the court found that there was in deed changes in the numbering of apartments caused by an additional floor that was added to the building on the suit property. The court however found no evidence that apartment B2 changed to B4 or that apartment B2 was swapped for apartment B4. The court found that apartments B2 and B4 were separate apartments and that the 2nd Defendant lawfully purchased apartment B4 from the Plaintiff and that there was an outstanding amount of Kshs. 125,000/-(1/4 of Kshs. 500,000/-) to be paid by the 2nd Defendant to cover the amount due on that apartment. See pages 90, 91, 93 and 94 of the judgment.

Whether the Plaintiff was entitled to the sum of Kshs. 18,500,000/- from the 2nd Defendant in respect of apartments A9, A10, B5 and B6.

9. Upon considering the evidence that was adduced by the parties, the court found that the Plaintiff sold to Hitesh Morjaria and the 2nd Defendant apartments A9, A10 and B5 (A12, A11 and B6) on 18th April 2011 following an offer that was made by the Plaintiff to Hitesh Morjaria and the 2nd Defendant on 2nd March 2011. The court agreed with the 2nd Defendant that numbers for apartments A9, A10 and B5 changed to A12, A11 and B6 respectively. The court found that having regard to the terms of the agreement between the parties dated 16th December 2013, only a sum of Kshs. 375,000/-(3/4 of Kshs. 500,000/-) remained due and payable by the 2nd Defendant and Hitesh Morjaria to the Plaintiff in respect of apartments A9(A12), A10(A11) and B5(B6).

10. The court found further that apart from apartment B5 that was sold to Hitesh Morjaria and the 2nd Defendant that changed to apartment B6 referred to above in respect of which the court had found that there was a total sum of Kshs. 375,000/- (for apartments A9(A12), A10(A11), B5(B6)) due and owing to the Plaintiff, there was no other apartment B5 sold to Hitesh Morjaria and the 2nd Defendant for Kshs. 11,000,000/- and in respect of which a sum of Kshs. 9,000,000/- was paid leaving a balance of Kshs. 6,000,000/-. The court found that if such an apartment existed, it could only be apartment B4 that the 2nd Defendant and Hitesh Morjaria purchased on 27th December 2011.The court noted that the 2nd defendant had contended that apart from apartment B2 that he allegedly swapped for apartment B4, the 2nd defendant and Hitesh Morjaria had also purchased an apartment originally numbered B4 whose number changed to B5. The court was of the view that it was this apartment B4 that the Plaintiff had referred to as apartment B5. The court found that there was only a sum of Kshs. 125,000/-(1/4 of Kshs. 500,000/-) due and payable on account of apartment B5(B4). The court noted further that the sum of Kshs. 6,000,000/- that was being claimed by the Plaintiff as the balance due under this apartment B5(former B4) was not mentioned in the settlement agreement dated 16th December 2013 as due and payable to the Plaintiff. See pages 94, 95, 96 and 97 of the judgment.

Whether the Plaintiff was entitled to the sum of Kshs. 29,000,000/- from the 2nd Defendant in respect of apartments B3 and B4.

11. The court found on the evidence that was before it that apartment B3 was sold by the Plaintiff to Mitesh Nitinbhai Thakkar and Payal Mitesh Thakkar at a consideration of Kshs. 14,500,000/- and that the Plaintiff was paid the said sum of Kshs. 14,500,000/- in full on or about 30th October 2012. The court found that there was no payment due to the Plaintiff in respect of apartment B3.

12. For apartment B4, the court reiterated that apartment B2 and B4 were separate and distinct apartments and that the number for apartment B4 was changed to apartment B5. The court found that since there was no relationship between apartment B2 and apartment B4, the 2nd Defendant and Hitesh Morjaria were bound by the agreement dated 27th December 2011 between them and the Plaintiff to pay the consideration of Kshs. 9,000,000/- in respect of apartment B4. The court found that the Plaintiff was not entitled to the sum of Kshs. 29,000,000/- that it claimed as due in respect of apartments B3 and B4. The court found that the Plaintiff was not entitled to any payment for apartment B3 while for apartment B4, the amount due to the Plaintiff was Kshs. 125,000/- (¼ of Kshs. 500,000/-). See pages 97, 98, 99, and 100 of the judgment.

Whether the Plaintiff was entitled to the sum of Kshs. 10,500,000/- from the 2nd Defendant in respect of apartments C1 and C4.

13. The court found that the 2nd Defendant had paid a sum of Kshs. 22,000,000/- as a deposit for apartments C1 and A4 and that as at 16th December 2013 there was only a sum of Kshs. 2,500,000/- due and payable to the Plaintiff in respect of the two apartments. The court found no basis for the Plaintiff's claim for Kshs. 10,500,000/- in respect of these apartments. See page 101 of the judgment.

Whether the Plaintiff was entitled to the sum of Kshs. 8,000,000/- from the 2nd Defendant being the balance of the purchase price for apartment C7.

14. The court found that there was a consensus that there was no basis for the Plaintiff's claim for Kshs. 8,000,000/- in respect of apartment C7. See pages 102 and 103 of the judgment.

Whether the Plaintiff was entitled to the sum of Kshs. 3,000,000/- being the balance of the purchase price for apartment C10.

15. The court found that the Plaintiff had not made any submissions in respect of this claim while the Defendants had only mentioned apartment C10 in passing. However, the court noted that in the settlement agreement between the parties dated 16th December 2013 there was an outstanding amount of Kshs. 3,000,000/- due and payable by the 2nd Defendant to the Plaintiff in respect of this apartment. The court found that the Plaintiff was entitled to that amount in the circumstances. See pages 103 and 104 of the judgment.

Whether the Plaintiff was entitled to the other reliefs sought in the plaint.

16. The court found that since the 1st Defendant's services had been lawfully terminated, it was supposed to handover the site to the Plaintiff together with whatever was on site save for its equipment and machinery and that the 1st and 2nd Defendants had no right to barricade the entry to the apartments and to take away the keys of the apartments save for those keys that may have been handed over to the 2nd Defendant for those apartments that were purchased by the 2nd Defendant and his associates

and for which payment had been made or in respect of which they were entitled to be in possession pursuant to the various agreements of sale between the parties.

17. The court found that the Plaintiff was entitled to a mandatory injunction compelling the Defendants to return the keys for the apartments on the suit property save for those apartments the court had held to have been purchased and paid for by the 2nd Defendant and his associates and those that the 2nd Defendant and his associates were entitled to remain in possession pursuant to the terms of the agreements of sale between the parties. The court found further that the Plaintiff was also entitled to an injunction to restrain the Defendants from selling, transferring or charging the apartments on the suit property save for the apartments the court had held to have been purchased and paid for by the 2nd Defendant and his associates. The court found further that the Plaintiff was also entitled to an injunction to restrain the Defendants from interfering with the Plaintiff's possession of the said apartments save for the apartments purchased and paid for by the 2nd Defendant and his associates.

18. The court found further that the Plaintiff was entitled to a total sum of Kshs. 6,000,000/- made up as follows; Kshs. 375,000/- being the balance of the purchase price for apartments A9(A12), A10(A11) and B5(B6), Kshs. 125,000/- being the balance of the purchase price for apartment B4, Kshs. 2,500,000/- being the balance of the purchase price for apartments C1 and A4 and Kshs. 3,000,000/- being the balance of the purchase price for apartment C10. See pages 105, 106, 107, and 108 of the judgment.

Whether the Plaintiff had denied the 2nd Defendant quiet access and peaceful possession of apartments B3, B4, B6, A4, A11, A12, C1, C9 and C11 in breach of the sale agreements and sub-leases between the Plaintiff and the 2nd Defendant in respect of the said apartments.

19. The court found that apartments A9(A12), A10(A11), B5(B6), B4(B5), C1, A4 and C10 had not been paid for in full by the 2nd Defendant and his associates while apartments B3, C7(C11) and C9 had been paid for in full. The court found that the 2nd Defendant was not entitled to quiet possession of apartments A9(A12), A10(A11), B5(B6), B4(B5), C1, A4 and C10 which he had not paid for in full. The court found that the only apartment in respect of which the 2nd Defendant was entitled to quiet possession was apartment B3. See pages 111 and 112 of the judgment.

Whether the 2nd Defendant had suffered loss to the tune of Kshs. 17,700,000/- which the Plaintiff was liable for as a result of the said acts of the Plaintiff in relation to apartments B3, B4, B6, A4, A11, A12, C1, C9 and C11and Block D.

20. The court found that the 2nd Defendant had no claim over Block D. With regard to the apartments referred to above, the court found that the only loss that the 2nd Defendant could claim was in respect of apartment B3 in respect of which the 2nd defendant had claimed a sum of Kshs. 1,360,000/- as damages. The court found that since the 2nd Defendant's associates had paid for the property in full, the Plaintiff had no reasonable cause for denying them quiet possession thereof. The court found that the 2nd Defendant's associates having been kept out of the property for several years were entitled to damages. The court awarded to the 2nd Defendants a sum of Kshs. 1,360,000/- as damages for loss of use of the property. See page 112 of the judgment.

Whether the Defendants were entitled to the other reliefs sought in the counter-claim.

21. The court found that the 1st Defendant was not entitled to go back to the site of the project that had been completed as there was nothing left for it to do. For an order compelling the Plaintiff to give the 2nd Defendant access and peaceful vacant possession of apartments B3, B4, B5, B6, A4, A11,

A12, C1, C9 and C11, the court found that since the 2nd Defendant had not paid for apartments A9(A12), A10(A11), B5(B6), B4(B5), C1 and A4 in full and had abandoned his claim in respect of apartments C9 and C11, the 2nd Defendant was not entitled to possession of the said apartments A9(A12), A10(A11), B5(B6), B4(B5), C1 and A4 until he cleared the outstanding balances save where the contracts between the parties provided to the contrary. The court found that the only apartment whose possession the 2nd Defendant was entitled to was apartments B3.

22. The court found however that the 2nd Defendant was entitled to an injunction to restrain the Plaintiff from selling, charging or disposing of apartments A9(A12), A10(A11), B5(B6), B4(B5), C1 and A4 in respect of which he had entered into sale agreements with the Plaintiff and made payments on account of the purchase price. With regard to the retention money, the court found that since no justification has been given by the Plaintiff for the continued holding of the same, the same should be released by the Plaintiff to the 1st Defendant. See pages 113 and 114 of the judgment.

23. In the final analysis, the court made the following final orders in the matter;

    1. The 1st Defendant shall return forthwith all the keys to the residential apartments on LR No. 4858/11 known as Ringsview Apartments if the same are still in its possession save as otherwise indicated in this judgment;

    2. The 2nd Defendant is restrained from charging, selling, disposing of or transferring apartments A12(A9), A11(A10), B6(B5), B4(B5), C1, A4 and C10 on LR No. 4858/11 known as Ringsview Apartments until the 2nd Defendant and his associates clear the outstanding balances due to the Plaintiff on the same as determined by the court in this judgment;

    3. An injunction is issued restraining the Defendants jointly and severally from dealing with or in any other way interfering with the possession and quiet enjoyment of the residential apartments on LR No. 4858/11 known as Ringsview Apartments save for those apartments that were purchased by the 2nd Defendant and his associates for which payments have been made in full or are in the process of being made in full in terms of this judgment.

    4. Kshs. 375,000/- is awarded to the Plaintiff against the 2nd Defendant being the balance of the purchase price due on apartments A9(A12), A10(A11) and B5(B6).

    5. Kshs. 125,000/- is awarded to the Plaintiff against the 2nd Defendant being the balance of the purchase price due on apartment B4(B5).

    6. Kshs. 2,500,000/ is awarded to the Plaintiff against the 2nd Defendant being the balance of the purchase price due on apartments C1 and A4.

    7. Kshs. 3,000,000/- is awarded to the Plaintiff against the 2nd Defendant being the balance of the purchase price due on apartment C10.

    8. The Plaintiff shall give to the 2nd Defendant and his associates access to and quiet vacant possession of apartments B3 forthwith and apartments A12(A9), A11(A10), B6(B5), B4(B5), C1, A4 and C10 as soon as the 2nd Defendant and his associates pay the balances of the purchase price due in respect thereof in terms of orders 4, 5, 6 and 7 above.

    9. An injunction is issued restraining the Plaintiff from charging, selling, transferring or dealing in any other manner with apartments B3 and, with apartments A12(A9), A11(A10), B6(B5), B4(B5), C1, A4 and C10 for a period of 45 days from the date hereof within which the 2nd Defendant and his associates shall pay the balance of the purchase price due in respect thereof in terms of orders 4, 5, 6 and 7 above.

10. Kshs. 21,895,218/- is awarded to the 1st Defendant against the Plaintiff being the retention money.

11. Kshs. 19,338,552/- is awarded to the 1st Defendant against the Plaintiff being the sum due and owing by the Plaintiff to the 1st Defendant on the contract dated 26th July 2011.

12. Kshs. 1,360,000/- is awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment B3.

13. The payments referred to in orders 4, 5, 6, 7, 10, 11 and 12 above shall be made within 45 days from the date hereof.

14. Interest shall accrue on the amounts awarded to all the parties herein at court rates at the expiry of 45 days from the date hereof until payment in full.

15. Each party shall bear its own costs of the suit and the counter-claim.

Notice of Appeal

24. The Plaintiff was dissatisfied with various parts of the said judgment and filed a Notice of Appeal dated 22nd February 2023. The Defendants filed a Notice of Address of Service on 2nd March 2023.

The application before the court

25. What is now before me is a Notice of Motion application dated 16th March 2023 by the 2nd Defendant. In the application brought under Sections 1A, 1B, 3A and 80 of the *Civil Procedure Act*, Order 45 Rule 1 and Order 51 of the *Civil Procedure Rules*, the 2nd Defendant sought the following orders;

    1. That the court be pleased to issue an injunction restraining the Plaintiff from selling, transferring, charging, mortgaging, leasing, letting or otherwise disposing of apartment No. B4 on LR No. 4858/11 known as Ringsview Apartments (the suit property) pending the hearing and determination of the application.

    2. That the judgment of the court delivered on 9th February 2023 be reviewed and the following orders made;

        a. A declaration that apartments B4 and B5 are distinct/separate apartments;

        b. A declaration that the 2nd Defendant does not owe the Plaintiff the sum of Kshs. 3,000,000/- in relation to apartment C10;

        c. Order No. 5 of the judgment be amended by deleting B5 and that the order shall read; Kshs. 125,000/- is awarded to the Plaintiff against the 2nd Defendant being the balance of the purchase price due on apartment B4;

        d. Order No. 7 of the judgment be deleted in its entirety;

        e. Order No.8 of the judgment be amended by deleting C10;

        f. Order No.9 of the judgment be amended by deleting C10;

        g. Order No. 12 of the judgment be amended by deleting “Kshs. 1,360,000/”- and replacing it with Kshs. 11,220,000/-. The order shall read; Kshs. 11,220,000/- is awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment B3;

h. Kshs. 11,220,000/- be awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment B4;

i. Kshs. 12,800,000/- be awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment B6;

j. Kshs. 12,800,000/- be awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment A11;

k. Kshs. 12,800,000/- be awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment A12;

l. Kshs. 9,945,000/- be awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment C1; and

m. Kshs. 9,945,000/- be awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment A4.

3. That the costs of the application be provided for.

26. The application was brought on several grounds set out on the face thereof and on the affidavit of the 2nd Defendant sworn on 16th March 2023. The 2nd Defendant averred that there were errors on the face of the judgment delivered on 9th February 2023. The 2nd Defendant averred that final orders of the court numbers 5 and 7 had errors on the face thereof. The 2nd Defendant averred that whereas apartments B4 and B5 were different, the court held that they were the same. The 2nd Defendant averred that at page 93 of the judgment, the court made a finding that apartments B2 and B4 were separate and that apartment B2 was not swapped for apartment B4. The 2nd Defendant averred that the court also made a finding that the 2nd Defendant purchased apartment B4 from the Plaintiff and that there was an outstanding sum of Kshs. 125,000/- in respect thereof. The 2nd Defendant averred that at page 97 the court erroneously concluded that the Plaintiff did not sell to the 2nd Defendant apartment B5 and that rather apartment B4 and B5 were one and the same. The 2nd Defendant averred that the court thereafter ordered (Order No.5) that the 2nd Defendant do pay the Plaintiff Kshs. 125,000/- for apartment B4(B5). The 2nd Defendant averred that apartment B4 and apartment B5 were separate and the 2nd Defendant had availed to the court a lease agreement dated 3rd May 2013 for apartment B5 registered in his name. The 2nd Defendant averred that he had fully paid for apartment B5. The 2nd Defendant averred further that in any event, whether or not apartment B4 and B5 were one and the same was not in issue before the court for determination. The 2nd Defendant averred that the effect of the court's findings and orders was that the court awarded the Plaintiff apartment B5 which was paid for by the 2nd Defendant and had the same registered in his name, and made no orders in respect of apartment B4 in respect of which the 2nd Defendant owed Kshs. 125,000/-. The 2nd Defendant averred that according to the agreement dated 16th December 2013, the apartments that were in dispute were apartments C10, B2, B4, B6, A11 and A12 only. The 2nd Defendant averred that apartment B5 was not part of the said agreement. The 2nd Defendant averred that as at the time the parties entered into that agreement, the apartment numbers had already changed and as such the agreement bore new numbers.

27. With respect to apartment C10, the 2nd Defendant averred that at the time of determination of the suit, the agreement dated 16th December 2013 had been overtaken by events. The 2nd Defendant averred that the apartment was purchased by one, Franco who paid the balance of the purchase price in the sum of Kshs. 3,000,000/- directly to the Plaintiff and had since been issued with a lease by the Plaintiff. The 2nd Defendant averred that the said Franco had occupied the apartment since 2014 and that the 2nd

Defendant owed no money to the Plaintiff in respect of the apartment. The 2nd Defendant averred that in any event, the apartment was not bought by the 2nd Defendant or any of his associates and as such he was not representing the purchaser in the suit. The 2nd Defendant averred further that the Plaintiff did not prove that the said amount was owed to it.

28. The 2nd Defendant averred that the court found that apartments B3, A12(A9), A11(A10), B6(B5), B4, C1 and A4 belonged to the 2nd Defendants and his associates. The 2nd Defendant averred that the 2nd Defendant and his associates were denied access to and possession of the apartments for close to 11 years. The 2nd Defendant averred that the 2nd Defendant and his associates had suffered losses and as such were entitled to compensation. The 2nd Defendant averred that the agreements of sale that he and his associates entered into with the Plaintiff provided in clause 10.2(iv) that failure by the Plaintiff to complete the project entitled the purchasers to damages payable monthly which varied depending on the apartment. The 2nd Defendant averred that the court only awarded damages for apartment B3 in the sum of Kshs. 1,360,000/- which was also erroneous. The 2nd Defendant averred that the sum of Kshs. 1,360,000/- was the damages payable as at the time of filing suit. The 2nd Defendant averred since he had not been in occupation of the apartment from the time of filing suit to the time of judgment, the 2nd Defendant was entitled to Kshs. 11,220,000/- as damages for 132 months. The 2nd Defendant averred that he was also entitled to compensation for loss of use of apartments A12(A9), A11(A10), B6(B5), B4, C1 and A4 which the court erroneously concluded that he was not entitled to. The 2nd Defendant gave a tabulation of the damages payable for the said apartments as at the date of delivery of judgment. The total amount came to Kshs. 80,730,000/-.

29. The 2nd Defendant averred further that the Plaintiff did not pray for any injunctive order in respect of apartment C10. The 2nd Defendant averred that in the final orders numbers 8 and 9, the court granted orders in respect of the apartment which was erroneous. The 2nd Defendant averred that it was in the interest of justice that the orders sought be granted.

Opposition to the application

30. The application was opposed by the Plaintiff through a replying affidavit sworn by Dr. Benjamin Mbira Gikonyo on 4th May 2023. The Plaintiff averred that it was dissatisfied with most parts of the judgment delivered on 9th February 2023 and had filed a notice of its intention to appeal against the same to the Court of Appeal. With regard to the order of injunction sought by the 2nd Defendant in relation to apartment B4, the Plaintiff averred that the court having delivered judgment was functus officio. The Plaintiff averred that in any event, the court had in its judgment restrained the Plaintiff from dealing with the apartment on certain conditions. The Plaintiff averred further that it had appealed against the order granting the apartment to the 2nd Defendant and his associates since no payment was received in respect thereof. The Plaintiff averred further that since the court had made a finding that apartment B4 changed to B5 and there was a sum of Kshs. 9,000,000/- due and payable to the Plaintiff in respect thereof, no injunction could issue in favour of the 2nd Defendant.

31. With regard to apartment B5, the Plaintiff averred that it had claimed a sum of Kshs. 6,000,000/- in respect thereof from the 2nd Defendant. The Plaintiff averred that the court had in its judgment found that only a sum of Kshs. 125,000/- was due to the Plaintiff. The Plaintiff averred that it had appealed against the decision of the court with regard to that apartment. The Plaintiff averred that the 2nd Defendant's proposal to pay the balance due on apartment B5 for apartment B4 was not acceptable since the balance due on apartment B4 was Kshs. 9,000,000/- and not Kshs. 125,000/-. The Plaintiff averred that allowing the 2nd Defendant's application would amount to sitting on appeal against the court's own judgment.

32. The Plaintiff averred that an applicant for review must satisfy the conditions set in Order 45 Rule 1 of the *Civil Procedure Rules*. The Plaintiff averred that the court was functus officio and that a review order could not be granted since the application required in depth evaluation of the pleadings and proceedings of the trial court. The Plaintiff averred that the 2nd Defendant had not placed before the court any new evidence or material that was not available to him at the trial or identified any error on the face of the record. The Plaintiff averred that the application was an appeal disguised as an application for review. The Plaintiff averred that although the uncertainty in the identity of the apartments was apparent on the face of the record as a result of the court having given the apartments two numbers, the error could only be corrected through an appeal but not review.

33. The Plaintiff averred that it was appealing against the court's finding that some apartments had changed numbers as no evidence was presented to the court to support the finding. The Plaintiff averred that it was also disputing the 2nd Defendant's claim that Franco had paid to it a sum of Kshs. 3,000,000/- directly on account of apartment C10. The Plaintiff averred that an earlier finding by the court that the sum of Kshs. 3,000,000/- that was received by the 2nd Defendant from Mr. Franco for the balance due on apartment C10 was not remitted to the Plaintiff was never challenged on appeal. The Plaintiff averred that to grant the review sought by the 2nd Defendant in respect of that apartment would be tantamount to sitting on appeal against the said earlier finding by the court. The Plaintiff averred that the said sum of Kshs. 3,000,000/- was due to it in respect of apartment C10.

34. The Plaintiff averred further that it was aggrieved by the court's findings on the balances due on the various apartments. The Plaintiff averred that it had appealed against the said findings and as such the orders sought by the 2nd Defendant in relation thereto could not be granted. The Plaintiff averred further that the issue of damages for loss of use depended on various factors and as such it could not form a subject of review but an appeal. The Plaintiff averred further that the claim for loss of use of the apartments was unsustainable since the parties had recorded a consent whereby they agreed to maintain the status quo in relation to possession and registration of the disputed apartments.

35. The Plaintiff averred that the alleged errors on the face of the record were grounds of appeal since the 2nd Defendant was disputing the trial court's application of the law to the facts and the court's appreciation of the evidence that was presented before it. The court was urged to dismiss the application with costs as lacking in merit. The Plaintiff cited several authorities in its affidavit which I have considered.

Analysis and Determination

36. The application was argued by way of written submissions. The 2nd Defendant filed submissions dated 27th June 2023 while the Plaintiff filed submissions dated 7th July 2023. I have considered the 2nd Defendant's application together with the supporting affidavit. I have also considered the replying affidavit filed by the Plaintiff in opposition to the application and the submissions by the advocates for the parties. I commend the advocates for both parties for the industry that went into the preparation of the submissions. My failure to refer to some of the cases cited does not mean that they were not useful. In my view, nothing turns on the limb of the 2nd Defendant's application seeking injunction since the injunction was being sought pending the hearing and determination of the application herein. Since the ruling is on the application, the order of injunction that was granted in the interim period is spent.

37. The court's power to review its orders and decrees is provided for in Section 80 of the *Civil Procedure Act* under which the 2nd Defendant's application was brought as follows:

> " Any person who considers himself aggrieved –

a. By a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred, or

b. By a decree or order from which no appeal is allowed by this Act.

May apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."

38. Order 45 of the *Civil Procedure Rules* also invoked by the 2nd Defendant lists specific grounds upon which an application for review can be made as follows:

a. Where there is a new and important matter or evidence which after exercise of due diligence was not within the knowledge of an applicant at the time the decree was passed.

b. Where there is a mistake or error apparent on the face of the record.

c. For any other sufficient reason

39. In *Francis Origo & another v Jacob Kumali Mungala*, Eldoret CA No. 149 of 2001, [2005]eKLR the Court of Appeal stated as follows on review:

> " ...it is clear that an applicant has to show that there has been discovery of new and important matter or evidence which after due diligence, was not within his knowledge or could not be produced at that time or he must show that there is some mistake or error apparent on the face of the record or that there was any other sufficient reason. And most importantly, the applicant must make the application for review without unreasonable delay."

40. Similarly, in *Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints*, Nairobi C.A 132 of 2014, [2016] eKLR, the court set the conditions for review as follows:

> " To qualify for a review there are stringent requirements to be met. For instance the applicant must demonstrate that as a matter of right he can appeal but has not exercised that option; that no appeal lies from the decree with which he is dissatisfied; or that he has discovered a new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced when the order was made; or that there is a mistake or error apparent on the face of the record; or that there are sufficient reasons to warrant the review. It is also a requirement that the application for review must be brought without unreasonable delay."
>
> "Sufficient reason" was defined in *Attorney General v Law Society of Kenya & another* [2017] eKLR as follows:
>
> > "Sufficient cause or good cause in law means:
> >
> > ...the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused. See *Black's Law Dictionary*, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

41. In *John Kamau Ruhangi v Kenya Reinsurance Corporation*, Civil Appeal No. 208 of 2006, [2012]eKLR the court stated as follows:

> " It is important to bear in mind that Order 44 Rule 1 of the *Civil Procedure Rules* sets out the purview of the review jurisdiction. A point outside that purview is not a ground for review. A point which may be a good ground of appeal like an erroneous view of law or evidence is also not a ground for review. That a court reached an erroneous conclusion because it proceeded on an incorrect exposition of the law or misconstrued a statute or other provision of law is no ground for review. All these are grounds of appeal."

42. The 2nd Defendant's application was brought on the grounds of the existence of apparent errors on the face of the judgment. In *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR cited by the Plaintiff, the court stated as follows;

> " 13. The starting point is that a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review. See, *National Bank of Kenya v Ndungu Njau* [1996] KLR 469(CAK)
>
> 14. In *Nyamogo & Nyamogo v Kogo* [2001] eKLR discussing what constitutes an error on the face of the record, the court rendered itself as follows:-
>
> > An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of un definitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal."

43. In the same case, the court stated that:

> 30. The principles which can be culled out from the above-noted authorities are:-
>
> i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.

ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.

iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.

iv An erroneous order/decision cannot be corrected in the guise of exercise of power of review.

v A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.

vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.

vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

44. I will consider the orders sought to be reviewed by the 2nd Defendant serially. Before I do that, I wish to state that all the apartment numbers referred to in the judgment delivered on 9th February 2023 were picked from the parties' pleadings, evidence tendered before the court and the submissions made by the parties. I must admit that I also found the multiple numbering of the apartments confusing. It did not help matters that the parties did not agree on the issue of whether the numbering of the apartments had changed or not. The result was that while one of the parties referred to what it considered as old and new numbers of the apartments, the other party referred to one set of numbers. Upon considering the issue, I came to the conclusion based on evidence on record that the numbering of some of the apartments had changed. I therefore had a duty to reconcile the apartment numbers in the judgment to make sense of the evidence tendered and submissions made. I was also forced to use double numbers (old and new) in my analysis of the evidence and submissions, and final orders to ensure that there was

clarity in the judgment. To understand how and why the court came to use double numbers for the apartments, one would need to go through the court's analysis of the evidence and submissions rather than jumping straight to the final orders. Having made that clarification, I will now consider the review orders sought by the 2nd Defendant in the manner in which they are set out in the application.

Whether a declaration should be made that apartments B4 and B5 are distinct/separate apartments;

45. From the evidence that was placed before the court, the 2nd Defendant and Hitesh Mojaria purchased Duplex Apartments Numbers B5, A10 and A9 from the Plaintiff through a single agreement of sale dated 18th April 2011. The numbering of these apartments changed to B6, A11 and A12 respectively. The apartments were purchased at Kshs. 10,000,000/-, 10,500,000/- and 11,000,000/- respectively. See pages 31, 32 and 33 of the judgment. Apart from this Duplex apartment B5 whose number changed to B6, I did not come across any evidence showing that the 2nd Defendant purchased any other apartment B5. See pages 96 and 97 of the judgment.

46. With regard to apartment B4, according to the evidence that was adduced by the 2nd Defendant, there were in existence two apartments with number B4 that his associates and he purchased. The 2nd Defendant had contended that he purchased apartment B2 from James Wathigo and swapped the same with apartment B4 which was owned by Mr. and Mrs. Maina. This was the first apartment B4. The 2nd Defendant contended that apart from this apartment B4 that he acquired from Mr. and Mrs. Maina through swapping of his apartment B2, together with Hitesh Morjaria, they had also acquired another apartment B4 from the Plaintiff through a sale agreement dated 27th December 2011. He told the court that this apartment B4 was not related to apartment B2 and that its number changed to B5. See the 2nd Defendant's evidence at pages 31, 32 and 33 of the judgment.

47. Upon consideration of the evidence, the court made a finding that the 2nd Defendant did not swap apartment B2 for apartment B4 and that the two apartments were separate and distinct having been purchased by the 2nd Defendant as such. See pages 93 and 100 of the judgment.

48. From the foregoing, it is clear that the court had made a finding that the 2nd Defendant purchased apartment B5 whose number changed to B6 in respect of which a sum of Kshs. 375,000/- which was to cover the balances due for apartments A9(A12), A10(A11) and B5(B6) was due. See page 96 of the judgment. The court also made a finding that the 2nd Defendant purchased apartment B4 in respect of which there was an outstanding sum of Kshs. 125,000/-. See pages 93 and 94 of the judgment.

49. The court did not make a finding in the judgment that apartments B4 and B5 referred to above were the same apartment. This misunderstanding and confusion in my view came about when the court was considering the Plaintiff's claim for Kshs. 18,500,000/- that it claimed as the balance of the purchase price for apartments A9, A10, B6 and B5. See paragraph 19 of the amended plaint and pages 94 to 97 of the judgment. The Plaintiff had claimed that it was paid a sum of Kshs. 9,000,000/- as purchase price for apartment B5 leaving a balance of Kshs. 6,000,000/-. The Plaintiff contended further that it was paid Kshs. 9,000,000/- for apartment B6 leaving a balance of Kshs. 6,000,000/-. With regard to this claim by the Plaintiff, the court found that a sum of Kshs. 375,000/- only was due to the Plaintiff on account of apartments A9(A12), A10(A11) and B5(B6). See page 96 of the judgment.

50. With regard to the Plaintiff's claim regarding apartment B5, the court found that apart from apartment B5 whose number changed to B6 referred to in the preceding paragraphs, there was no evidence of the existence of another apartment B5 that was sold to the 2nd Defendant and his associates for Kshs. 11,000,000/- in respect of which a sum of Kshs. 9,000,000/- was paid leaving a balance of Kshs. 6,000,000/- payable. The court stated that "if there was such an apartment", it could only have been the apartment that the 2nd Defendant had referred to as apartment B4 purchased on 27th December

2011 by the 2nd Defendant and his associate and whose number changed to B5. The court stated that "it appeared" that it was this apartment B4 that changed to B5 that the Plaintiff was referring to as apartment B5 in its claim for Kshs.18,500,000/- against the 2nd Defendant. The court stated that for this apartment B4 which the Plaintiff had referred to as apartment B5, it had already made a finding that only a sum of Kshs. 125,000/- was due and payable to the Plaintiff. The court rejected the Plaintiff's claim for Kshs. 6,000,000/- in respect of this apartment B4(B5). See page 97 of the judgment.

51. It is clear from the foregoing that the court did not make a finding that apartment B4 and apartment B5 were the same apartment. The court simply stated that apart from apartment B5 which changed its number to B6 there was no other apartment B5 and that what the Plaintiff was referring to was apartment B4 purchased by the 2nd Defendant and his associate through the agreement dated 27th December 2011 in respect of which only a sum of Kshs. 125,000/- was due and payable.

52. Due to the foregoing, this court clarifies that apartments B4 and B5 are distinct and separate apartments.

Whether a declaration should be made that the 2nd Defendant does not owe the Plaintiff the sum of Kshs. 3,000,000/- in relation to apartment C10;

53. The Plaintiff had claimed in the amended plaint a sum of Kshs. 3,000,000/- from the 2nd Defendant as the balance of the purchase price for apartment C10. In his defence, the 2nd Defendant denied the claim and said no more. In evidence and submissions, not much was said about this apartment or claim by the parties. The court noted however that in the agreement dated 16th December 2013 between the 2nd Defendant, the Plaintiff and Mr. and Mrs. Wangethi, the parties agreed that there was an outstanding sum of Kshs. 3,000,000/- due to the Plaintiff on this apartment. On that evidence, the court awarded the Plaintiff against the 2nd Defendant the said sum of Kshs. 3,000,000/-. The 2nd Defendant has now claimed that the said sum of Kshs. 3,000,000/- had been paid to the Plaintiff by Mr. Franco. This evidence was not placed before the court during the trial. No evidence of such payment has also been produced in these proceedings. The issue raised by the 2nd Defendant that he was not representing Mr. Franco in the suit should have been raised at the trial. In any event, the 2nd Defendant appears to have represented the said Mr. Franco in the agreement dated 16th December 2013. I find no basis for reviewing this order and the same is refused.

Whether Order No. 5 of the judgment should be amended by deleting B5 and that the order shall read; Kshs. 125,000/- is awarded to the Plaintiff against the 2nd Defendant being the balance of the purchase price due on apartment B4;

54. The court had made a finding that only a sum of Kshs. 125,000/- was due to the Plaintiff in respect of apartment B4 which as I have mentioned earlier was in my view erroneously referred to by the Plaintiff as apartment B5. I wish to clarify that the sum of Kshs. 125, 000/- referred to in Order No. 5 is in respect of what the court had found to be due to the Plaintiff for apartment B4. I believe that this clarification is sufficient. It is not necessary to delete reference to B5 in the order as it has been explained in the body of the judgment.

*** Whether Order No. 7 of the judgment should be deleted in its entirety**

55. I dealt with this issue earlier while considering the 2nd Defendant's prayer for a declaration that he did not owe the Plaintiff a sum of Kshs. 3,000,000/- in respect of apartment C10. For the reasons given in the earlier prayer for a declaration that was rejected, there is no basis for reviewing this order.

Whether Order No.8 of the judgment should be amended by deleting C10;

56. I dealt with this issue earlier while considering the 2nd Defendant's prayer for a declaration that he did not owe the Plaintiff a sum of Kshs. 3,000,000/- in respect of apartment C10. For the reasons given in the earlier prayer for a declaration that was rejected, there is no basis for reviewing this order.

Whether Order No.9 of the judgment should be amended by deleting C10;

57. I dealt with this issue earlier while considering the 2nd Defendant's prayer for a declaration that he did not owe the Plaintiff a sum of Kshs. 3,000,000/- in respect of apartment C10. For the reasons given in the earlier prayer for a declaration that was rejected, there is no basis for reviewing this order.

Whether Order No. 12 of the judgment should be amended by deleting "Kshs. 1,360,000/"- and replacing it with Kshs. 11,220,000/- so that the order reads; Kshs. 11,220,000/- is awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment B3;

58. In his counter-claim, the 2nd Defendant claimed a sum of Kshs. 1,360,000/- as loss and damage suffered as a result of the Plaintiff's failure to hand over possession of apartment B3 to him. The claim was indicated as arising between 30th June 2012 and 31st July 2014. The 2nd Defendant did not claim loss and damage from 31st July 2014 until the date of judgment. The court awarded the 2nd Defendant the claimed sum of Kshs. 1,360,000/-. The 2nd Defendant has now called upon the court to review the award and adjust it to Kshs. 11,220,000/- which he claimed to be his loss and damage up to the date of judgment. This claim should have been pleaded in the counter-claim and proved at the trial. The court cannot through review make an award that was not sought in the pleadings. There is no basis for the review sought and the same is rejected.

Whether Kshs. 11,220,000/- should be awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment B4;

59. The 2nd Defendant had claimed damages for loss of use of apartment B4 in his counter-claim. The court considered the claim and rejected it as it found that the 2nd Defendant had not paid for this apartment in full. This court's refusal to make an award of damages in respect of this apartment can only be reviewed on appeal but not through an application for review. The review sought is refused.

Whether Kshs. 12,800,000/- should be awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment B6;

60. The 2nd Defendant had claimed damages for loss of use of apartment B6 in his counter-claim. The court considered the claim and rejected it as it found that the 2nd Defendant had not paid for this apartment in full. This court's refusal to make an award of damages in respect of this apartment can only be reviewed on appeal but not through an application for review. The review sought is refused.

Whether Kshs. 12,800,000/- should be awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment A11;

61. The 2nd Defendant had claimed damages for loss of use of apartment A11 in his counter-claim. The court considered the claim and rejected it as it found that the 2nd Defendant had not paid for this apartment in full. This court's refusal to make an award of damages in respect of this apartment can only be reviewed on appeal but not through an application for review. The review sought is refused.

Whether Kshs. 12,800,000/- should be awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment A12;

62. The 2nd Defendant had claimed damages for loss of use of apartment A12 in his counter-claim. The court considered the claim and rejected it as it found that the 2nd Defendant had not paid for this apartment in full. This court's refusal to make an award of damages in respect of this apartment can only be reviewed on appeal but not through an application for review. The review sought is refused.

Whether Kshs. 9,945,000/- should be awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment C1;

63. The 2nd Defendant had claimed damages for loss of use of apartment C1 in his counter-claim. The court considered the claim and rejected it as it found that the 2nd Defendant had not paid for this apartment in full. This court's refusal to make an award of damages in respect of this apartment can only be reviewed on appeal but not through an application for review. The review sought is refused.

Whether Kshs. 9,945,000/- should be awarded to the 2nd Defendant against the Plaintiff as damages for loss of use of apartment A4.

64. The 2nd Defendant had claimed damages for loss of use of apartment A4 in his counter-claim. The court considered the claim and rejected it as it found that the 2nd Defendant had not paid for this apartment in full. This court's refusal to make an award of damages in respect of this apartment can only be reviewed on appeal but not through an application for review. The review sought is refused.

Conclusion

65. For the reasons given, the 2nd Defendant's application is allowed in part in terms of the orders given in the ruling. Each party shall bear its costs of the application.

DELIVERED AND DATED AT KISUMU ON THIS 19TH DAY OF FEBRUARY 2024

S.OKONG'O

JUDGE

Judgment Delivered Virtually Through Microsoft Teams Video Conferencing Platform In The Presence Of:

Ms. Ngonde for the Plaintiff

Ms. Muyoka h/b for Dr. Mutubwa for the 2nd Defendant

Ms. J.Omondi-Court Assistant