Leebarn Builders Limited v Kenya Bankers' Savings and Credit Cooperative Society Limited (Environment & Land Case 371 of 2012) [2024] KEELC 1480 (KLR) (12 March 2024) (Judgment)

Neutral citation: [2024] KEELC 1480 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 371 OF 2012

LN MBUGUA, J

MARCH 12, 2024

BETWEEN

LEEBARN BUILDERS LIMITED .... PLAINTIFF

AND

KENYA BANKERS' SAVINGS AND CREDIT COOPERATIVE SOCIETY LIMITED .... DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint dated 27.6.2012. It avers that it was contracted by the Defendant vide a Memorandum of Agreement dated 26.7 2007 (herein referred to as MOA) to build 284 housing units in 2 phases comprising of maisonettes, apartments, a nursery school, shops and a club house for purchase by Defendant's members.
2. It contends that phase 1 of the project entailed the construction of 145 housing units at a cost of ksh.551,600,000/= on LR 209/13294/2, whereas phase 2 would entail the construction of 139 units on LR 209/13294/1 which was to be undertaken at a construction sum pegged on a bill of quantities.
3. It avers that at all times preceding the signing of the MOA, the plaintiff was the registered proprietor of parcel LR 209/13294/2 and that in pursuance of the terms of the MOA, it purchased the adjoining parcel being LR 209/13294/1 for the anticipated construction of phase 2 project.
4. The plaintiff has pleaded that it did complete construction of phase 1 of the project, but a dispute relating to the execution of construction work on phase 2 as anticipated in the MOA arose and the plaintiff was denied an opportunity to construct the houses in that phase.
5. The Plaintiff avers that the defendant is in breach of the MOA and therefore seeks the following orders;
    a. A permanent injunction stopping the Defendant from developing and/or constructing any structures in any manner, disposing, leasing, subleasing or transferring to any party any part

of or the whole of the land currently registered as LR 209/132941/1 pending the hearing and determination of this suit.

b. An order of the court directing the Defendant to honor the terms of the memorandum of agreement dated 26.7.2007 by allowing the Plaintiff to construct phase 2 of the project of 139 units on LR No. 209/13294/1.

c. An order of the court forbidding the registrar from effecting or registering any sublease instruments or sectional titles with regard to any units built or to be developed on LR Number 209/13294/1 pending the hearing and/or the determination of any interlocutory proceedings and /or the main suit.

d. In the alternative to prayer 1, damages for breach of contract and interest thereon.

e. Costs

f. Any other reliefs which the court may consider just to grant.

6. The Defendant opposed the suit vide their statement of defence dated 17.2. 2022. They contend that the sole and only purpose and foundation of the entire MOA between the Plaintiff and the Defendant was that the Plaintiff was to construct a housing estate which would upon completion be purchased exclusively by interested members of the Defendant.

7. That the MOA further stipulated that if phase1 of the project was completed to the satisfaction of the Defendant and its members, the Plaintiff and the Defendant would consider executing a different 2nd contract for development of a 2nd phase on terms to be agreed upon.

8. They aver that the plaintiff never successfully implemented the terms of the MOA in regard to phase 1 as it transpired that plaintiff did not own both parcels LR no's 209/13294/1 and LR NO. 209/13294/2.

9. That the Plaintiff also turned out to be a brief case company with no financial muscle to carry out the project, thus the Defendant had no basis either in contract law or in business (good will) to engage in any future commitment with the Plaintiff.

10. It is also pleaded by the defendant that the legal ownership of the project land for phase 2 is under serous contest in Milimani ELC No. 939 of 2014 Kevevapi v AG & 14 others.

The Evidence

11. During the trial, only two witnesses gave evidence, one for each protagonist.

12. The Plaintiff's director, one Mohammed Hersi Ali testified as PWI. He adopted his witness statement dated 5.2.2020 as his evidence. He also produced 6 documents contained in their bundle of 4.2.2020 as P. Exhibit 1-6, 3 documents in their bundle dated 19.7.2021 as P. Exhibit 7-9, one document in the list of 21.7.2021 as P. Exhibit 10 and 3 documents in the list dated 14.7.2021 as P. Exhibit 11-13. It is noted that items 2 and 3 in the list dated 19.7.2021 are the same documents listed as items 1 and 2 in the list dated 14.7.2022.

13. In his witness statement, PW1 avers that on 26.7.2007, an MOA was signed between the Plaintiff and the Defendant where it was agreed that the Plaintiff would be the developer of phase 1 and 2 housing units which were to be purchased solely by the members of the Defendant. That phase 1 of the project was developed on parcel LR 209/13294/2 which was owned by the Plaintiff.

14. That in 2008, the Plaintiff secured parcel LR No. 209/13294/1 for development of phase 2 vide a sale agreement dated 19.4. 2008. That the Plaintiff agreed to transfer the said parcel directly to the Defendant with the anticipation that it would undertake phase 2 of the project as per the bill of quantities.

15. He contends that in 2012, the Plaintiff learnt that the Defendant's chairman intended to issue a contract for the development of phase 2 to another company, thus it filed this suit against the Defendant for breach of the MOA dated 26.7.2007.

16. That in a turnaround, the Defendant's chairman changed his mind and on 25.9.2013, the Defendant confirmed that the Plaintiff would continue with phase 2 of the project but no contact was signed between the parties in that regard.

17. In cross-examination, PW1 stated that the Plaintiff's claim is anchored under paragraph 14-15 and 18-24 of their plaint dated 27.6.2012 to the effect that the Defendant breached the MOA of 26.7. 2007.

18. He stated that the nature of the Defendant's breach is that despite their agreement that the Plaintiff would embark on constructing phase 2 immediately after completion of phase 1 of the project, it took 5 years for the Defendant to allow the Plaintiff to develop phase 2.

19. He averred that phase 1 was subject to the MOA dated 26.7.2007 and as per clause 1 thereof, the Plaintiff was the developer and everything was spelt out in the MOU, there was no other building contract between them.

20. He stated that as per clause 2 (a) of the MOA, the Plaintiff committed to procure land for purposes of phase 2 on its own resources.

21. That drawings had already been done when the Defendant approached the Plaintiff which undertook to supply; architect for the project, consulting engineers and project managers.

22. He pointed out that the Plaintiff had applied for funds to develop phase 1 of the project from Africa Development Bank. However, Kenya vaccine production (kevapi) took them (plaintiff) to court and wrote to the bank to stop the funding claiming that the land where phase 1 of the project lies belonged to them and following that, Africa Development Bank refused to fund the project.

    Therefore, the Plaintiff did not provide funds for the development of phase 1. It was funded by the Defendant contrary to the MOA.

23. He stated that though the Plaintiff had acquired LR No. 209/13294/2 for purposes of phase 1 developments, it had not finished paying for that land.

24. PW1 also stated that the Plaintiff contracted New Tech Home Builders and Developers Limited to do the actual construction of phase 1, but he had no documents to that effect. However, since the Defendant was the Plaintiff's financier, the Plaintiff requested them to pay New tech directly of which the defendant complied without any protest.

25. He reiterated that the Defendant financed the entire project, but that did not amount to a breach because the Defendant had a right to pull out when ADB failed to finance the project, but they opted to continue.

26. He also stated that the Plaintiff filed the plaint on 28.6.2012 and thereafter, the Defendant issued them with a contract. He maintained that the Plaintiff still has a claim since it was not issued with a commitment letter for phase 2 by the time it came to court.

27. Referred to the contract dated 25.9.2013, he stated that the Plaintiff was awarded a contract of ksh.1,286,986,454/= for development of phase 2 and that the Defendant paid for the land on which the 2nd phase was intended to be developed.

28. In re-examination, PW1 stated that by the time the Plaintiff entered into the MOA with the Defendant on 26.7.2007, it owned parcel LR 209/13294/2 pursuant to a transfer on 20.3.2006.

29. He further stated that clause (d) of the MOA stated that the Plaintiff was in the process of acquiring LR 209/13294/1 which it did as per the sale agreement dated 19.4.2008 between it and Ferndale Developers Limited.

30. PW1 also stated that as per the certificate from their architect, Reins Architects dated 20.11.2009, the Plaintiff successfully completed the project and also got a certificate of occupation from Nairobi County on 2.2.2010. Hence, they were not a brief case entity.

31. He also stated that on 21.6,2013, the Defendant awarded the Plaintiff a contract for developing phase 2 and that they accepted the offer. Thereafter, they got financing from Diamond Trust bank and National Bank of Kenya and if they had completed phase 2, the Plaintiff would have made a profit of ksh.200million.

32. The Defendant's sole witness, DW1 was Joseph James Okana, their former General manager who had retired by the time he was testifying. He adopted his witness statement dated 11.3.2022 as his evidence. He also produced 13 documents contained in their list dated 11.3.2022 as D. Exhibit 1-13.

33. In his witness statement, DW1 admits that the Plaintiff and the Defendant entered into an MOA dated 26.7.2007, but contends that while the MOA contemplated that the Plaintiff would be the actual investor/developer of LR No. 209/13294/2 (phase 1), it did not secure a building commitment in favour of the Plaintiff granting it exclusive rights to develop the adjoining property known as LR No. 209/13294/1 (phase 2) in the capacity of an investor as the reference to phase 2 was simply about a futuristic project, contemplated without commitment/details.

34. He states that the subject of the MOA which was phase 1 was completed but with considerable challenges and on completely different terms and there is no existing dispute in respect to that phase.

35. He avers that immediately after the parties signed the MOA, it became apparent to the Defendant that the Plaintiff had misrepresented itself. DW1 points outs the challenges that emerged; one of them being that the Plaintiff had falsely represented to the Defendant that it was the legal beneficial owner of LR No. 209/13294/2 but it later turned out that the purchase price had not been paid to the real owner of the property, one Anne Nyambura Mbugua prompting the Defendant to pay her ksh.23 million on Plaintiff's behalf.

36. He contends that the Plaintiff was a briefcase broker had no financial capacity as alleged, they had no office, machinery or even staff, such that the actual building was done by an entity known as New Tech Builders and Developers contracted by the Defendant. This was done with a view to protect the wider interests of Defendant's members.

37. Further, it is the Defendant who ended up financing the entire project in the form of advancing bridging loans to the Plaintiff to transmit the payments to the beneficiaries in the construction.

38. That further, due to Plaintiff's lack of managerial capacity, the Defendant engaged a consultant known as Hongo & Associates to supervise construction and achieve completion on its behalf.

39. That in addition, the Defendant took over the role of directly paying consulting engineers known as Messrs Rex Consultants, Karkan Partnership and John Muinde Maingi.

40. That despite representing that the project was to be wholly financed by the East African Development Bank (EADB), it later turned out that the said bank could not fund the Plaintiff at all as LR No. 209/13294/2 was the subject of an ownership dispute with the Kenya Agricultural Research Institute, the dispute also concerned LR 209/13294/1 and the litigation thereof was in ELC 939 of 2014. That this entire development exposed the defendant's entire investments to jeopardy.

41. DW1 avers that the plaintiff has not demonstrated breach of any contractual obligation /rights created by the MOA and that the Defendant did not promise /contract with the Plaintiff for any other property development.

42. In cross-examination, DW1 stated that it was on the basis of the MOA that the Plaintiff proceeded with construction of phase 1, which was completed.

43. He reiterated that in the MOA, the Plaintiff misrepresented itself as owner of parcel LR No. 209/13294/2 though there is on record a transfer of the said parcel to the Plaintiff dated 20.3.2007.

44. That as regards phase 2, the MOA provided that the Plaintiff was in the process of purchasing parcel LR No. 209/13294/1, so there was anticipation of the phase 2 development, but contrary to the MOA, the said parcel was paid for by the Defendant despite the sale agreement indicating that the sale transaction for the parcel was between the Plaintiff and Findale Developers Limited.

45. He stated that phase 1 was successfully completed, then the Defendant engaged the Plaintiff to develop phase 2 as per its letter dated 2.9.2013 but it was subject to a building contact.

46. That additionally, in furtherance to the letter dated 2.9.2013, the

    Plaintiff got a conditional offer dated 10.10.2013 from National Bank for ksh.1.2 Billion to finance phase 2 of the project but the Defendant did not sign a guarantee to that effect.

47. When referred to clause 13 of the MOA, he stated that it reads, "MOA shall come into force upon signature" and that the signature was appended on 26.7.2007 and since phase 2 had not commenced, the MOA was to come to an end after construction of phase 1 & 2 so it was not fully enforced by the parties.

48. He stated that while Newtech home builders and developers were not in the picture at the time the MOA was entered into, the MOA did not prevent the Plaintiff from getting a contractor and the Defendant paid it ksh. 18,994,130/= which was part of the ksh.551 million which was the contract sum awarded to the Plaintiff for development of phase 1.

49. In re-examination, DW1 reiterated that the Plaintiff did not satisfactorily perform its part of the MOA regrading phase 1 in terms of finances.

50. He further stated that with regard to phase 2, the Plaintiff was proceeding under a new arrangement and not the MOA, thus the Defendant was not in breach, hence the Plaintiff did not suffer any damages.

Submissions

51. The Plaintiff filed submissions dated 4.7.2023 where they argue that the MOA dated 26.7.2007 is a legally binding document creating binding obligations. To this end, the case of Eldo City Limited v Corn Products Kenya Limited & another [2013] eKLR was relied upon.

52. It is argued that the Defendant's averment that the MOA did not place any obligation on its part is inconsistent with clause 3 of the MOA which obligates it to proceed with the development of phase 2 of the project with the Plaintiff.

53. It is submitted that contrary to the Defendant's argument that the Plaintiff did not own the project land (LR 209/13294/2) on which phase 1 lies, a transfer of the title was effected to it from Anne Nyambura Mbugua on 20.3.2007 before the MOA was entered into.

54. It was submitted that LR No. 209/13294/1 was purchased by the Plaintiff on 19.4.2008 from Ferndale Developers Limited and transferred to the Plaintiff on 6.8.2008 in furtherance of clause D & G of the MOA.

55. The Plaintiff argues that the averments that the Plaintiff could only be contracted to undertake phase 2 if it was proved that it had satisfactorily executed phase 1 contradicts the MOA and as such, the Defendant's conduct comprises actionable breach of contract.

56. It is also argued that the Defendant's contention that the MOA is no longer tenable for reasons that the legal ownership of the parcel of land on which the project is to be developed on is under serious contest in ELC Suit No. 939 of 2014, Kevapi v AG & 14 others is untenable as the suit was dismissed by the court.

57. The Plaintiff also submits that DW1 was not a signatory of the MOA and that he had no authority or the defendant's board's resolution to testify.

58. The Plaintiff also submits that the claims that it had no capacity

    to put up a housing estate are debunked as it successfully completed construction of phase 1 and certificates of practical completion and occupation were issued by Plence Architect Limited, and by the City Council of Nairobi on 2.3.2010.

59. The Defendant's submissions are dated 9.10.2023 where they address the following issues;

    a. Whether the Defendant has breached its obligations under the agreement to warrant an order for specific performance of the agreement.

    b. Whether the reliefs sought in the plaint are legally capable of being granted in these proceedings in the obtaining circumstances?

    c. Whether the Defendant's designated witness had authority to give evidence in these proceedings?

60. On the 1st issue, it is submitted that the plaintiff did not plead specific performance for the reason that it had wholly failed during its implementation of phase 1 of the project.

61. It is further submitted that PW1 admitted that the MOA had required additional instruments and agreements where necessary for it to be fully enforced in law.

62. It is submitted that contrary to the MOA, the Defendant took over the financing and actual development of phase 1 including payment obligations of the Plaintiff to engaged 3rd party technical contractors without any protest from the Plaintiff.

63. It is argued that phase 2 of the project was a futuristic endeavor subject to the terms in the MOA and since the Plaintiff never met the antecedent provisions in clauses 3B and 3C of the MOA, it does not warrant an opportunity for development of the 2nd phase of the estate.

64. On the 2nd issue, it is submitted that orders (a) and (b) of the Plaint cannot lie in law as they are sought in a vacuum and without the Plaintiff establishing a prima facie case of an infringed legal right and an actionable validly enforceable claim.

65. It is also argued that if the said orders are granted, it will be an unjustified and unlawful affront to the undisputed constitutionality and statutory protected legal rights of the Defendant, lawfully arising from the Defendant's valid, separate and encumbered acquisition of the suit land, directly from the purchaser, Ferndale Developers Limited, upon the Plaintiff's failure to conclude a sale and transfer it for lack of resources.

66. It is also submitted that prayer (d) of the Plaint is also sought in vacuum as damages for breach of contact have not been pleaded. That additionally, the prayer has long been overtaken by events by the subsequent granting of the contract for development of the estate through a separate tendering bidding process, in which the Plaintiff had unreservedly participated in and emerged a winner.

67. On the 3rd issue, the court is urged to be bound by the oxygen rule under Sections 1A and 1B of the Civil Procedure Rules and treat DW1 as an authorized witness of the Defendant and to reject the Plaintiff's wish to eject him on a technicality of his having recently retired as a General manager of the Defendant. To buttress this point, the cases of Bakali Ali Ogada & 245 others v Unilever Kenya Ltd [2009] eKLR as well as Kenya Commercial Bank Limited v Kenya Planters Co-operative Union [2010] eKLR were relied upon.

Determination

68. I have considered the pleadings, the evidence adduced herein as well as the rival submissions. The dispute herein stems from the Memorandum of Agreement (MOA) signed by both parties on 26.7.2007. The said document contained an arbitration clause (clause 18), of which the defendant filed a Preliminary Objection dated 24.7.2013 opposing the jurisdiction of this court. However, this Preliminary Objection was not prosecuted until 9 years later and in a ruling of 24.11.2021, this court dismissed it. To this end, I will say no more on the issue.

69. The protagonists do not dispute that vide the MOA, the Plaintiff was to develop housing units which were to be purchased by the Defendant's members. The projects were to be undertaken in two phases, of which Phase 1 was to be done on parcel L.R. No. 209/13294/2. The second phase was proposed to be done on the adjacent plot L.R. No. 209/13294/1. It is also common ground that phase 1 was completed. The Plaintiff however did not develop phase 2 and they blame the Defendant for breach of the contract.

70. In light of the foregoing analysis, I deem it fit to frame the issues for determination as follows;

    a. Whether DW1 was a competent witness.

    b. Whether the MOA dated 26.7.2007 obligated the Defendant to commit the development of phase 2 to the Plaintiff, AND Whether the Defendant is in breach of the said MOA.

    c. Are the Plaintiff's prayers in the plaint merited?

71. On the issue of the competency of DW1 to give evidence, I find that Plaintiff raised the issue after the witness (DW1) finished giving his testimony. This case was filed in 2012 and had gone through case management, an issue captured by this court in its ruling dated 25.4.2023. The issue of D1Ws competence was not raised and cannot therefore be made a subject of contest at submission stage. I must add that DW1 is a member of the Defendant and also its retired general manager, thus his witness statement is relevant in this matter and shall be admitted by the court in light of the provisions of

Article 159 (2) (d) of [*the Constitution*] and in the spirit of furthering the overriding objective set out under the [*Civil Procedure Act*].

72. I now come to the next issue; Whether the MOA dated 26.7.2007 was binding upon the parties and if the defendant was in breach of the same. The dispute between the parties related to contractual matters. In that regard, this court is guided by the holding in Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd (2017) eKLR where the court stated that:

> "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."

Also see Hassan Zubeidi v Patrick Mwangangi Kibaiya & another [2014] eKLR.

73. The Plaintiff contends that under the said MOA, it was tasked with developing a housing project for use by the Defendant's members in 2 phases. That it successfully completed phase 1 on parcel LR 209/13294/2 which was comprised of 145 housing units at a cost of ksh. 551,600,000/=.

74. That after completing phase 1 and in anticipation of developing phase 2 as per the MOA, it acquired parcel LR 209/13294/1 from Ferndale Developers Limited then assigned the land to the Defendant but the latter failed to engage it to develop phase 2.

75. On its part, the Defendant argues that the MOA did not secure a building commitment in favour of the Plaintiff granting it

exclusive rights to develop parcel LR No. 209/13294/1, adding that the subject parcel is a subject of litigation in ELC 934 of 2014.

76. I have keenly perused the MOA of 26.7.2007 and it is apparent that the success of phase 1 was closely tied to commencement of phase 2 project. To this end, I find it necessary to capture the contents of clause (G) in the MOA, where it is stated that;

> "KBSACCO has an interest in acquiring by purchase, the Entire Project for allocation to its members, and the Parties hereto have held preliminary discussions regarding the possibility of the Estate being now developed by LEEBARN to completion for exclusive sale to KBSACCO in two phases, agreed by the parties to comprise firstly, Phase One, to be constructed on L.R. No. 209/13294/2, and subsequently, Phase Two, to be constructed on L.R. No. 209/13294/1, or upon any other alternative location in Nairobi City, satisfactory to KBSACCO."

77. It has emerged that there were fundamental challenges in the

development and completion of phase 1 which impacted negatively in the execution of the phase 2.

78. To start with, Cause 2 (a) of the MOA stipulated that:

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Leban will be the actual developer of the estate at its own costs".

However, PW1 admitted that the whole project was funded by the Defendant contrary to the MOA. The defendant is also the one who was meeting the 3rd party obligations of the plaintiff; (See the payments by the defendant to the contractor, New Tech Home Builders at page 32 of defendant's bundle). Thus from the onset, it is actually the plaintiff who breached the MOA for the entire project.

79. The fact that the defendant agreed to finance and to go ahead with phase 1 was not in any way a blank cheque for continuation of phase 2.

80. It has also emerged that although the plaintiff was registered as the owner of the parcel LR 209/13294/2, upon which phase 1 was to be developed, the plaintiff had not completed paying for the said land. PW1 admitted that much in cross examination. In the letter at page 30 of defendants bundle dated 20.8.2010, the plaintiff is asking the defendant to pay 23 million, the outstanding balance of the purchase price of the aforementioned land to one Ann Mbugua, the one who sold that land to the plaintiff. Thus by the time the project (phase 1) was commencing, the Plaintiff had not finished paying that land. That again was another red flag to the incapabilities of the plaintiff to carry out the MOA smoothly.

81. Away from the implementation challenges of phase 1, it is also quite apparent and as rightly put by the defendant, the MOA was futuristic, and was not a binding instrument upon the parties in relation to the phase 2 for the following reasons.

82. To start with, clause G of the MOA contemplates that phase 2 was to be constructed on parcel LR 209/13294/1 "or upon any alternative location in Nairobi". The development of phase two was thus dependent on future occurrences as parcel LR 209/13294/1 did not belong to any of the parties as at the time the MOA was signed.

83. Another point to note relates to the wording in clause 3C of the

MOA which states as follows;

> " Leebarn is to execute a letter of commitment to exclusivity with KBSACCO for the future phase 2, which will comprise the remaining 139 units on the phase 2 property or any other alternative property, and whose construction is intended to commence immediately on completion of phase 1."

84. There is no evidence that the Plaintiff executed the letter of commitment contemplated under the above clause.

85. Further the words at clause G of the MOA, (captured in paragraph 76 herein) talks of the parties holding preliminary discussions regarding the possibility of developing the estate. It is clear beyond peradventure that the parties were looking into future occurrences.

86. Yet another point for consideration is that the MOA had some degree of discernible general description of the contract in relation to phase 1 which included; The nature of the buildings to be put up (clause 3A & B) of the MOA, the land for phase 1 was available (Clause 6), the consideration was set out at clause 7 (a), the nature of how the costs were to be disbursed at various stages of the construction and the scope of the works are elaborately set out in clause 7 (a) i-v, (b) and clause 8 thereof. For phase 2, no such terms of engagement were set out in the MOA. PW1 confirmed this state of affairs during cross examination when he stated that "for phase 1 everything was spelt out and there was no other building contract .."

87. This far, it is clear that the MOA was not a binding agreement between the parties.

88. Further, even though the plaintiff scouted for the land for phase 2, that land was transferred directly to the defendant who paid the purchase price. To this end, the plaintiff requested the defendant to reimburse them the 26 million they had paid as deposit for the parcel L.R. 209/13294/1 (see letter at page 82 of defence bundle where the plaintiff has given an account of how the land was to be acquired).

89. The detailed sale agreement of the phase 2 land is dated 19.4.2008, where at clause 20, the parties have an understanding that the plaintiff would undertake the phase 2 housing project. How that undertaking was to be executed has not been spelt out.

90. In the Court of Appeal Case of Housing Company of East Africa Limited v Board of Trustees National Social Security Fund & 2 others [2018] eKLR, it was stated that;

> " It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court's role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally."

91. Guided by the above case law, I find that this court cannot step in to give further interpretation to the aforementioned sale agreement in relation to how the phase 2 project was to take shape.

92. Another point for consideration is that by the time the plaintiff was filing the suit on 28.6.2012, they had no evidence of meeting the requirements set out at clause 2 (a) of the MOA to the effect that they had the capabilities of commencing that project. The offers they got from National Bank for Ksh. 1.2 billion (letter at page 23 of plaintiffs bundle) is dated 10.10.2013, more than a year after the suit was filed. Thus the said letter cannot form a basis of an indication that the plaintiff had financial capabilities to carry out the project. What more, the defendant was required to be the guarantor of the facility offered by National Bank but they (defendants) did not sign the said letter.

93. Similarly, the letter by the defendant dated 25.9.2013 offering a contract to the plaintiff which the latter apparently accepted came after the suit was filed and cannot form a basis of supporting the pleadings herein which were never amended. It is the view of this court that having accepted a fresh contract, then there is no basis upon which this court can enforce the MOA. Thus whether the new offer as per the letter dated 25.9.2013 was honoured is a whole new cause of action not so far pleaded.

94. I find that the MOA presents itself as a classic case of the Murphy's law that; "What could go wrong will go wrong", as from the onset, the plaintiff did not have financial capabilities to undertake the project. "Once beaten twice shy" so goes another saying. In this case, the defendant was certainly not expected to undertake the phase 2 project with the plaintiff, having had a rather unpleasant experience in phase 1. To this end, I find that it was proper and prudent for the defendant to wriggle out of a bad bargain.

95. Having pronounced that the MOA was not binding in relation to phase 2, I then conclude that the defendant was not in breach of the said MOA. It follows that the plaintiff is not entitled to any of the reliefs sought in the plaint.

96. In the end, the case of the plaintiff is hereby dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 12TH DAY OF MARCH, 2024 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Koki Mbulu for Plaintiff

Ondiwa for Defendant

Court assistant: Judith