**Ongong & another v Paragon Electronics Limited (Environment & Land Case 1205 of 2016) [2024] KEELC 4748 (KLR) (13 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4748 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ENVIRONMENT & LAND CASE 1205 OF 2016**

**AA OMOLLO, J**

**JUNE 13, 2024**

**BETWEEN**

**ESTHER ADHIAMBO ONGONG ..... 1ST PLAINTIFF**

**CARILUS OSAMBO ADEMBA ..... 2ND PLAINTIFF**

**AND**

**PARAGON ELECTRONICS LIMITED ..... DEFENDANT**

## JUDGMENT

1. Vide an amended plaint dated 3rd March, 2017, the Plaintiffs pleaded that they entered into a sale agreement with the Defendant over purchase of Apartment no. 5 Block A-1 of Remax Terrace Apartments. That the sale price was agreed at Kenya Shillings Sixteen Million Three Hundred Thousand and the terms of how the payment was to be done between 11th October, 2011 and 26th March, 2012.

2. The Plaintiffs pleaded that they faithfully performed their part by making all the requisite payments. That clause 8 of the agreement provided for the vendor to pay a penalty of amount equal to the rental income per month lost by the purchaser. The Plaintiffs averred that the Defendant failed and or refused to complete the performance of the agreement and deliver the apartment. They accuse the Defendant of fraudulently changing the numbering of the apartment thus prejudicing the plaintiffs who had identified a particular apartment they intended to purchase.

3. The particulars of breach and fraud pleaded are as follows:

    i. Failure and or refusing to complete the transaction on or before 1st August, 2012 in accordance with the sale agreement.

    ii. Failure and refusal to deliver the original Apartment Number 5 Block A-1 as agreed.

iii. The deliberate and fraudulent changing Apartment number 5 Block A-1 so as to be now Apartment 6 in Block A-1.

iv. The deliberate misrepresenting/mislabelling the Apartment 6 in Block A-1 is Apartment Number 5 Block A-1.

4. They prayed for judgment against the defendant for:

a. An order of specific performance directed against the defendant to complete the construction and deliver Apartment number 5 Block A-1 (now mislabelled as Apartment 6 in Block A-1)

That in Alternative to prayer (a) above, a refund of Kshs. 14,670,000.00 at commercial interest rates from the date of default being 1st August 2012 till payment in full.

b. A permanent injunction against the defendant barring the respondent by themselves or through their servants or agents from transferring, dealing alienating, disposing or in any other way interfering with Land Reference Number 330/335 where the Remax Terrace Apartments is located.

c. An order of permanent Injunction barring the defendants, their employees or agents from transferring, dealing, alienating or disposing Apartment number 5 Block A-1 (now mislabelled as Apartment 6 in Block A-1)

d. The total rent arrears to be determined by a licensed surveyor from 1st August, 2012 to date (This being the date of the failed completion) till payment in full.

e. Costs of this suit.

f. Interests on d and e above at the court's rates.

g. Any other relief that the honourable court may deem just and fair in the circumstances.

5. The Defendant filed a statement of defence and counter-claim dated 27th March, 2017 denying the claim. The Defendant pleaded that although the completion date was set for August 2012, it faced a number of challenges not within its control. For instance, between September – December 2011, there was acute shortage of materials due to currency fluctuations and between March – May 2012, there was heavy rainfall which caused difficulty in supply of raw materials as the property has sloppy elevation.

6. The Defendant pleaded that the Plaintiff has never issued a notice of delay or proposed the appointment of a quantity surveyor under the agreement hence they are estopped from invoking the clause. They averred that in September 2011, the Plaintiffs engaged them in negotiations on wanting to buy a corner apartment on 3rd or 4th floor regardless of how they were numbered. Consequently, they issued the Plaintiff with a letter of offer for apartment no. 5 on Block A-1 located on the 3rd floor and an agreement of lease was signed.

7. In the counter-claim, the Defendant pleaded that the apartment was complete and ready for occupation on 1st October, 2015 but the Plaintiffs failed/refused to complete payment of the outstanding balance of Kshs. 1,630,000. As a consequence, the Defendants shift breach to the Plaintiff.

8. The Defendant pleaded that on 7th April, 2016, they demanded payment of the outstanding balance. When the Plaintiffs failed to pay, the Defendant terminated the agreement vide its letter dated 30th July, 2016. It avers that due to the termination, the Plaintiffs no longer have any interest in the suit property. They urged the court to enter judgment as prayed thus:

a. The main suit be dismissed.

b. Cancellation of the lease registered in the names of Esther Adhiambo Ongong and Carilus Osambo Ademba on title land Reference No. 330/335, Nairobi.

c. In the alternative to prayer 2 above, the Plaintiffs be ordered to pay Kshs.1,630,000.00 together with interest from 1st October,2015.

d. The Caveat dated 23rd January, 2015 by Esther Adhiambo Ongong and Carilus Osambo Ademba registered against L.R No. 330/355 be lifted and cancelled from the register.

e. Damages for breach of contract.

f. Costs of the dismissed suit and the Counterclaim.

9. Once the pleadings closed, the parties took dates for oral hearing. The Plaintiffs called one witness while the Defendant called two witnesses. The 2nd Plaintiff gave testimony in supporting their claim by adopting his witness statement dated 3rd October, 2016 and their bundles of documents dated 27th June, 2018. He stated that they entered into a contract with the Defendant on 28th February, 2012 for purchasing the suit property. The agreement provided the completion date of 1st August, 2012 and the Plaintiffs performed their obligations.

10. PW1 said that he paid all the due instalments but did not pay the last one being Kshs. 1,630,000 because the apartment has never been completed to date. He averred that in case of default, they were not to pay the balance and the Defendant was required to pay rent determined by Knight Frank or Tysons from 1st August, 2012. They are claiming rents from 1st August 2012 to 7th September, 2020 amounting to Ksh. 8.7m.

11. It is the Plaintiffs' evidence that the completion date was never varied and the Defendant did not refund the monies paid or explained the reasons for the delay. In cross examination, PW1 said the 1st Plaintiff is his wife. He admitted they have not paid Kshs. 1,630,000. According to him, property completion dated (clause 3.5) means when the property is ready and that the same was defined in clause 1 of the agreement.

12. PW1 was referred to the demand letter dated 14th March, 2016 and answered that they must have responded to it. That their claim is based on clause 8.1 of their sale agreement. He also admitted that they had not issued a letter to the Defendant when they appointed the licensed Surveyor stating that he did not have contacts of the Defendant.

13. Further in cross examination, PW1 admitted the Defendant had written to all the purchases on 1st February, 2013 explaining the difficulties he was facing. The witness also denied asking for change of apartment instead stating the change was very preliminary and was abandoned. That they were denied opportunity to inspect the property until 2020 when they moved in.

14. In re-examination, PW1 said he did not write to the Defendant for appointment of licensed surveyor because it was provided for in the agreement. That the Defendant has never written to him to take occupation. That the difficulties expressed in the letter of 1st February, 2013 were short and would not justify delay of several years. He took possession on 7th September 2020 and currently his son is in occupation. This marked the close of the Plaintiff's case.

15. Simon Maina Muiruri who is a licensed valuer gave evidence as DW1 on 2nd October, 2023. He prepared a valuation report dated 29th April, 2022 which he produced as exhibit in support of the Defendant's case. He gave open market value of the property at Ksh. 18,000,000; gross monthly rental income at Kshs. 110,000 pm and value of the original security door at Kshs. 150,000.

16. During cross examination, DW1 said that during inspection of the apartment, it was occupied. That when he visited the apartment in 2018, it was not ready for occupation because the electrical appliances had not been fixed and so if someone took occupation in 2018, he must have fixed them. That the assessed rental income of Kshs. 110,000 would cover for the last 3 years. He also based his valuation of the security door of Kshs. 150,000 on market rate.

17. Mr. Gulbahar Bullent gave evidence as DW2 introducing himself as a director of the Defendant. He adopted his witness statement dated 2nd May, 2017 as his evidence in Chief together with his list of documents dated 6th April, 2017 and 25th May, 2017. DW2 posited that the request by the Plaintiff for change of apartment transpired on 30th May, 2015 after they were given a lease to sign.

18. DW2 stated that the indicative date of completion was 1st August, 2012 but the Defendant faced a number of challenges during the construction disclosed in the letter dated 1st February, 2013. He added that the delay was further caused by the slow connectivity of electricity to the development and the Plaintiffs were notified vide email dated 22nd April, 2015. The witness added that the suit apartment was complete and ready for occupation by October 2015. However, the Plaintiffs had not completed paying the purchase price as indicated in the sale agreement.

19. DW2 continued that in February 2016, the Plaintiffs' registered a caveat on the title LR No. 330/335 claiming purchaser's interest in respect to apartment 5 block A-1. He asserted that the Defendant wrote a demand letter to the Plaintiffs on 14th March, 2016 for payment of the balance. That when the Plaintiff did not comply, the Defendant proceeded to terminating the contract asserting it had performed its obligations as required. DW2 urged court to enter judgment as prayed in the counter-claim.

20. During cross examination by Munyua E, learned counsel for the Plaintiffs, DW 2 agreed that the contract was signed in February 2012 and completion date provided as 1st August, 2012. That it was incorrect to say completion date meant handling over the apartment to the purchaser. He had not procured occupation certificate as at 1st August, 2012. That he issued the Plaintiff with a completion notice on 30th March, 2015 outside the completion period. According to the witness, clause 8.1 had to be read together with other clauses in the agreement.

21. DW2 conceded that the letter explaining the letter explaining the difficulties he was facing was also done outside the date of 1st August, 2012. That the letter of 23rd April, 2015 stated that the change of apartment was subject to execution of a deed of variation and execution of a new lease and none was executed. The Defendant obtained the certificate of occupation on November, 2013 but he did not have evidence of forwarding the same to the Plaintiffs. He asserted that had the Plaintiffs complied with the default notice served, he would have given them possession.

22. In re-examination, DW2 stated that during the inspection ordered by this court in April 2022, a stranger was found living in suit apartment. He referred to clause 10.1 (f) which spoke about 3rd party contractor's and that Top mark is not one of the valuers listed. The witness concluded that the Plaintiffs had no right to possession because they had not paid the purchase price in full. This marked the end of oral evidence/hearing.

23. The Plaintiffs filed written submissions dated 16th February 2024 while the Defendant filed submissions dated 7th April, 2024. The Plaintiffs raised and discussed five (5) issues which they invited the court to determine as follows:

    i. What was the nature of the agreement entered between the Plaintiffs and the Defendant?

ii. Whether the Defendant was in breach.

iii. Whether there were intervening factors to constitute force majeure.

iv. Whether there was any conflict between clause 8.1 and clause 2.1 of the agreement dated 28th February,2012.

24. The Plaintiffs submitted on the provisions of Section 97 of *Evidence Act* where an agreement has been reduced into writing extrinsic evidence cannot be admitted to vary or change its terms. They cited the case of Adelity Commercial Bank Ltd vs Kenya Grange Vehicle Industries Ltd (2017) eKLR which expounded on the provisions of section 97 of the *Evidence Act* Cap 80.

25. They also submitted that they duly performed their part of the obligations in the contract. That clause 2.5 of the agreement required the vendor to issue notice of occupation 30 days prior to the anticipated property completion date and for the balance of Kshs.1,630,000 to be paid which the Defendant failed to meet. They proceeded to list the duties of the Defendant as per their agreement argue the Defendant was in breach for failing to perform those duties.

26. The Plaintiffs referred to the definition of acts of God as given in Black's Law Dictionary thus:

> " An overwhelming, unpreventable event caused by forces of nature such as an earthquake, flood or tornado ... the effect of which could not be prevented or avoided by the exercise of due care of foresight."

27. They posited that the acts of God put forth by the Defendant were not because both could have been avoided by reasonable foresight by the Defendant. In support of this argument, the Plaintiffs cited the case of Ryde vs. Bushell & Another (1967) EA 817 which held thus:

> " (i) The plea of Act of God is available to relieve a defendant from liability for damages suffered following the performance of part of his obligation and not merely to absolve the person from the performance of an obligation;
>
> (ii) Nothing can be said to be an act of God unless it is proved by the person setting up the plea to be due exclusively to natural causes of so extraordinary a nature that it could not reasonably have been foreseen and the results of which occurrence could not have been avoided by any action which should reasonably have been taken by the person who seeks to avoid liability by reason of the occurrence."

28. In concluding, the Plaintiffs submitted that the Defendant cannot be allowed to benefit from its breaches and cited several case law in support of their arguments. They urged the court to dismiss the counter-claim and grant the prayers sought in the plaint.

29. On its part, the Defendant raised eight issues for determination as follows:

a. Whether or not the Plaintiffs are in breach of the Agreement for Lease by failing to pay the full Lease Premium and other payments due thereunder. If so, what orders should the Court make?

b. Whether or not the Plaintiffs were entitled to take possession of the suit property, being Apartment No 5 at Block A-1 as they purported to do. If not, what orders should the Court make?

c. Whether or not the caveat dated 23rd January 2015 by the Plaintiffs against Apartment No 5 Fifth Floor Block A1 is lawful. If not, what orders should this court make?

d. Whether the Plaintiff's claim for specific performance is made out and justified if at all.

e. Whether the Plaintiff's claim of breach of contract is made out and justified if at all.

f. Whether the Plaintiff's alternative claim for a refund of Kshs 14,670,000 at commercial interest rates from the date of default being 1st August 2012 till payment in full is made out and justified if at all.

g. Whether the Plaintiff's claim of rent arrears is made out and justified if at all.

h. Which order should be made in respect of the prayers by the parties in their respective claims?

30. The defendant submitted that the plaintiffs are in breach for failing to pay the lease premium in full and meet the attendant costs of legal fees, office disbursements, VAT, registration and valuation costs. They reproduced clause 4.1, 4.4. of the sale agreement and paragraph 3 of the first schedule. The defendant submits further that by a letter dated 30th March, 2015, they enclosed the lease and required of them to remit legal and transaction costs.

31. The Defendant argues that the circumstances of this case are similar to the circumstances in the case of Thuo Commercial Agencies Limited vs. Nakuru Workers Housing Co-op Society Ltd (2024) eKLR where the ELC court analysed a purchaser's payment obligation as follows:

> " DW1 testified that their advocate had requested for the completion documents so that they could pay the balance of the purchase price (DEX12) but the same were not released. It is noteworthy that the sale agreement did not provide that the balance of the purchase price was to be paid upon a party meeting certain condition. The agreement clearly stipulated that time was of the essence thus the completion date was on 8th June, 1990. DW2 further testified that the balance of the purchase price had never been completed but that he was ready to comply with the agreement once he was issued with the completion documents.
>
> 64. In the Court of Appeal case of National Bank of Kenya Ltd v Pipe plastic Sunkolit (K) Ltd & another [2003] 2 E.A 503 held as follows: "a court of law cannot rewrite a contract between the parties and that parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."
>
> 65. Further the case of Mwitia & another v Lydia Mburugu (Suing as the Legal Representative of the Estate of the Late Daniel Mathiu Mbiti) & another (Environment and Land Appeal E022 of 2021) [2022] Justice Nzili in allowing the appeal cited the case of William Kazungu Karisa v Cosmas Angore Cnzera [2006] eKLR, where it was held as follows:"...the basic rule of law of contract is that parties must perform their respective obligations in accordance with terms and conditions of the contract executed by them and an agreement could only be amended or varied by the consent of the parties."

66. It is not in dispute that Clause 1 of the sale agreement was specific on the timelines and mode of payment of the purchase price. This court is of the view that timelines on the payment of the purchase price had already been agreed upon at the signing of the agreement. DW1 could therefore not claim that it was ready and willing to pay the balance of Kshs. 600,000 upon the Plaintiff meeting certain conditions. This clearly meant that the Defendant did not fulfil its part of the contract obligation to wit payment of the balance of the purchase price on the completion date.

67. In the case of Sisto Wambugu v Kamau Njuguna [1983] eKLR the court held that: "...contracts for sale of land gives the vendor the right to rescind the sale if the purchaser does not pay on the appointed day after giving a reasonable notice to the defaulting party making time of essence."

68. In the instant case, the Defendant having failed to pay the balance within the stipulated completion date, the Plaintiff had the right to rescind the sale agreement. From the foregoing, I find that the Defendant breached the terms of the contract."

32. It is argued for the Defendant that the Plaintiffs occupation of the suit premises contravenes the doctrine of lis pendens and referred the court to the case of Mohammed Sheikh Abubakar vs Zaakarius Mboya (2019) eKLR and Langata Development Ltd vs Mary Wairimu (2018) eKLR. Further, the Defendant asserts that the agreement with the Plaintiffs was personal and they could not assign it (refers to clause 8.1). It contends that a prayer for specific performance cannot be granted as to do so amounts to re-writing the contract between the parties.

33. The Defendant added that the caveat lodged by the Plaintiff on the title was unlawful. On allegations of breach, the Defendant submitted that the completion by 1st August, 2012 was not absolute and it was subject to delays occasioned by force majeure which flowed directly from clause 10.1. He asserted that the force majeure was communicated to the Plaintiff.

34. The Defendant states that the Plaintiffs are estopped by their conduct from complaining about delay because they acquiesced to it. They refer the court to the decision in Charles Rickards Ltd vs. Oppenheim (1950) 1KB 616. It made particular reference to an email of 22nd April, 2015 which it alleges the Plaintiff acknowledges there was difficulty in connecting power to the property.

35. The Defendants cited its letter of 27th June, 2016 addressed to the Plaintiffs to assert the apartment was ready and which letter stated thus:

> " Finally, since mid-2015 the sold units were ready for occupation. Some of the purchasers have already moved in and are staying on the premises. It is our client's view that your clients do not have any reasonable claim against it. They are free to come view their apartment, remit the outstanding balance and thereafter take possession of their property. This is on a strictly without prejudice basis to our client's letter of 14th March, 2016."

36. On the remedy claimed, the Defendant cited Mugambi & Another vs Kanyuuro & 3 others (2023) KECA 1382 which held that:

> " The downside for Kanyuuru was that he too was in default and was not ready, able and willing to keep his side of the bargain and was not deserving of the equitable remedy of specific performance which is only available to a purchaser who is not in breach. In

this regard is the decision of the Court in Kukal Properties Development Ltd vs. Tafazzal H.Maloo & 3 others [1993] eKLR in which Muli, JA. observed: "The Maloos were in breach of the intended agreement. They accepted the refund of 10% deposit. The purchase price was not tendered during the contractual period or thereafter. The remedy of specific performance was not available to the Maloos. Specific performance is an equitable remedy and must flow from a legal right. The Maloos, having committed breach of their agreement, specific performance could not be legally decreed. The learned trial judge fell into error in decreeing specific performance (see Sisto Wambugu v Kamau Njuguna (1988) 1 KAR 219)."

37. It is argued by the Defendant that the Plaintiffs have no legal basis to seek or be granted an equitable order of specific performance. That the agreement was lawfully terminated vide the letters dated 14th March, 2016, 7th April 2016 and 30th July 2016. It urged the court to dismiss the Plaintiffs' case and grant the orders in their counter-claim.

**Determination**

38. I have considered the pleadings, the evidence adduced (oral and documentary) and the submissions rendered. Flowing therefrom, I frame 4 questions for determination:

    a. Who between the parties breached the contract?

    b. Are the Plaintiffs entitled to the relief of specific performance? Or;

    c. Is the Defendant entitled to payment of the outstanding balance of the lease premium?

    d. Who bears the costs?

39. I associate myself with the case law relied on by the parties as they give correct position in law concerning the principles to be applied in agreements made in writing. For instance, the case of National Bank of Kenya Ltd v Pipe plastic Sunkolit (K) Ltd supra that it is not the business of the courts to re-write contracts between parties. I will proceed to read the agreement dated 28th February, 2012 that was executed between the Plaintiffs and the Defendant as it is in ascertaining who has proved their case.

40. There is no dispute that both parties executed the sale agreement dated 28th February 2012 which governed the relationship between them. They have both produced the document in support of their case and made references to the various clauses. Equally they have cited caselaw which has held that it is not the business of courts to re-write contracts between parties.

41. On the face of the agreement for sale, the contract was time bound. At page 3 of the Agreement, property completion Date was stated as;

> " the date of issuance by the City Council of Nairobi of the occupation certificate for the sale property and being not later than the date specified in paragraph 2.1 of the first schedule.
>
> Paragraph 2.1 of the first schedule provided thus "the property completion date:1st August 2012."
>
> Clause 3 of the first schedule also gave timelines on payment of the lease premium. At clause 3.5, it provided thus; "the sum of Kenya Shillings One Million, six hundred and thirty thousand (Kshs.1,630,000) shall be payable on or before the property completion date.

42. It is on the plain reading of these clauses alongside others which calls for the determination by this court on who was/is in breach of the contract. The Plaintiff sued the Defendant claiming it was in breach

and which claim the Defendant has vehemently denied. I have considered the bundle of documents produced and relied upon by the parties. From the correspondences exchanged, it appears that the Defendant admits delay on its part.

43. For instance, in the letter dated 1st February 2013, the Defendant wrote thus,

Dear Purchaser,

We would like to update you on the status of the construction and allay any concerns.

We have faced a number of obstacles which were not within our control.

a. Between the months of Sept-December 2011, there was acute shortage of materials due to huge currency fluctuations.

b. Between the months of March and May 2012, due to heavy rainfall and sloppy elevation of the property, our suppliers were unable to make delivery for fear of skidding and crushing into the buildings that were constructed. This means we were not able to make any substantial progress

44. It is noteworthy that the agreement was executed in February 2012 hence the obstacle experienced between September to December 2011 has nothing to do with meeting the timelines set between the parties. Further, Clause 10.1 defined what constituted force majeure and the reasons contained in paragraph (a) of this letter does not include those specified in the agreement as fluctuation in currencies are determined by man.

45. The second reason stated that the suppliers feared skidding due to heavy rainfall that took place. Again, it means that the occurrence of the event complained of donot fall within those defined by Black's law dictionary. In any event clause 10.2 required the Defendant to promptly notify the Plaintiffs in writing. The letter of 1st February 2013 refers to a "force majeure" suffered in March -May 2012.Thus the Defendant not only failed to complete the construction on 1st August 2012 but also failed to promptly notify the Plaintiffs of the cause delay.

46. The Defendant averred that the Plaintiff did not issue any notice for non-completion to it. The agreement was self-executing and so whether or not a notice was issued does not vary the obligation of the parties. However, the Plaintiff's advocate did write to the Defendant's advocate (for the transaction) vide a letter dated 2nd November 2012 which read thus,

> " Kindly let us have an update on the progress made in the development. The completion date is long past and our clients are anxious to have information on the same."

47. Vide various correspondences, the Plaintiffs sought from the Defendant the anticipated completion date. This is exhibited in the letters dated 26.5.2014,26.6.2014,25.8.2014,11.4.2016 and 6.7.2016. In all these periods, there was no evidence produced by the Defendant to affirm that the construction was complete and the certificate of occupation from the Nairobi City County had been obtained. As at the date of giving his testimony, DW2 on behalf of the Defendant said he obtained the certificate of occupation in November 2013 but none was produced in evidence. He confirmed during cross-examination that he had no evidence forwarding the same to the Plaintiffs.

48. If there was indeed a certificate of occupation obtained as of November 2013, then his email of April 25th 2015 would not present the true position. In the said email he wrote that the KPLC issue has not been resolved hence their decision to appoint a contractor to do the connection and sue KPLC for the delays. This is also confirmed by DW1 who during cross-examination said that as at 2018 when he

visited the apartment it was not ready for occupation because the electrical appliances had not been fixed. Enough said on the default on the part of the Defendant.

49. Was the Plaintiff also in default? The obligation on the Plaintiffs was to pay the lease premium in full on or before the property completion date. The meaning of the property completion date was given in the agreement. In my view, the Plaintiffs had the option to go ahead and pay the entire premium sum before or wait for confirmation by the Defendant that it had been issued with "occupation certificate for the sale property" and then pay the last instalment.

50. Thus, a plain reading of the agreement executed between the parties exempted the Plaintiffs from default in this situation where there was no evidence of when the occupation certificate was obtained and notice of the same brought to their attention. The mode of forwarding such communication was provided for under Clause 9.1 of the agreement. Given that the Plaintiffs got possession almost ten (10) years post the property completion date agreed, I discharged them from any breach.

51. The allegation of re-assigning the agreement to third parties was unfounded for two reasons. First, the Defendant did not produce any document in writing as evidence of such assignment. Second, the Plaintiffs explained that the person found in the house at the time of inspection by DW1 was his son and occupation by family member or renting the premises does not amount to assignment in law.

52. Are the Plaintiffs entitled to the reliefs sought? As stated herein above, the agreement was self-executory (page 15 Clause 11 states so). The Defendant relied on clause 4 to submit that the Plaintiff is not entitled to any remedy. Clause 4.1 stated that the Plaintiff was to pay the lease premium in accordance with paragraph 3 of the first schedule or otherwise as the Vendor may direct. Clause 3 (already quoted above) required the Plaintiffs to pay the balance on the property completion date which event the Defendant has not shown document to prove it was completed.

53. According to me, the Plaintiffs were not in default and so they are entitled to compensation for the breach as provided against a party in default at clause 8. Clause 8.1 states thus;

> " The Vendor shall pay a penalty in an amount equal to the rental income per month lost by the purchaser in respect of the sale property for each complete month of delay and prorated for a period of less than one (1) month. The monthly rent shall be determined by an independent qualified surveyor appointed by the Vendor in consultation with the Plaintiffs from Knight Frank Kenya Limited or Tysons Limited experienced in the valuation of rental properties in Nairobi...."

54. The Plaintiffs did not present a valuation report undertaken by qualified surveyors stated in the agreement as so the Defendant posit that they are not entitled to the lost rental income sought of Kshs. 8.7 Million. The Defendant produced a valuation report by Topmark Valuers Limited who was not the recommended surveyor in the sale agreement. Topmark ltd set the monthly rental income at Kshs.110,000 while the Plaintiff had sought the rent at Kshs.100,000.

55. The two figures are close to each so that the failure by the Plaintiffs to produce a valuation report does invalidate the claim. Hence, this court adopt the monthly rental income of Kshs.100,000 proposed by the Plaintiffs' witness in calculating what is due and payable to the Plaintiffs. The same shall be calculated from November 2013 to August 2020.I have used the date of November 2013 because the Plaintiffs made demand for payment of rent vide their advocates letter dated 10.10.2013 (by Ojienda & Co advocates). This gives a running total of Kshs.8,200,000.

56. I note from the agreement and the evidence adduced that there was no provision for forfeiture of the lease premium in case of breach by the Vendor (Defendant). Clause 6.3(e) stated that the Vendor shall

be entitled to recover by action any amounts due in the event of there being deficiency. The Plaintiffs took possession in September 2020 four years after this suit was filed seeking a declaration of breach and a claim by the Defendant for the balance. Thus, the suit is treated as an action to recover and since the Plaintiff is in occupation, it is deemed that the balance became payable.

57. In conclusion, I hold that the Defendant was in breach of the agreement executed on 28th February 2012, and the breach disentitle it to prayers 1, 2, 4 and 5 of the counter-claim. The said prayers are dismissed. I allow the prayer for payment of the outstanding balance of Kshs 1630000 with no interest. There shall be no order on costs of the counter-claim since it is partially allowed.

58. In conclusion, judgement is entered for the Plaintiffs against the Defendant as follows;

    **a. An order of permanent injunction be and is hereby issued directed at the Defendant, its agents or employees from transferring, dealing, alienating or in any other way interfering with the Plaintiffs possession, rights and use of apartment 5 Block A-1 (now mislabeled as apartment 6 in block A-1)**

    **b. To pay the Plaintiffs lost rental income at Kshs 100000 per month from November, 2013 to August 2020 (Kshs 8,200,000) less the lease premium balance of Kshs 1,630,000. Thus, the amount due to the Plaintiffs is Kshs 6,570,000.**

    **c. Interest on (b) at court rates from the date of this judgement until payment is made in full**

    **d. Costs of the suit (by way of the plaint) to the Plaintiffs**

**Dated, Signed & Delivered at Nairobi This 13TH Day of June, 2024**

**A. OMOLLO**

**JUDGE**

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