



Bayusuf & another v Siraf Wings Limited (Environment and Land Case Civil Suit E006 of 2023) [2024] KEELC 6185 (KLR) (23 September 2024) (Judgment)

Neutral citation: [2024] KEELC 6185 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND CASE CIVIL SUIT E006 OF 2023
LL NAIKUNI, J
SEPTEMBER 23, 2024**

BETWEEN

OMAR AWADH BAYUSUF 1ST PLAINTIFF

MISEIDA MOHAMED BAMRAGHA 2ND PLAINTIFF

AND

SIRAF WINGS LIMITED DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to the suit through the Complaint dated 1st February, 2023. It was instituted on 3rd February, 2023 by Omar Awadh Bayusuf and Miseida Mohamed Bamragha, the 1st and 2nd Plaintiffs herein. It was against Siraf Wings Limited, the Defendant herein.
2. Upon service of the pleading and summons to enter appearance, the Defendant entered appearance dated 9th February, 2023 and its Statement of Defence filed in court on 14th February, 2023. It is instructive to note that from the face value, this is case of breach of contract – specific performance.

II. Description of the Parties in the suit

3. The 1st Plaintiff was described as an adult of sound mind residing in Mombasa within the Republic of Kenya. The 2nd Plaintiff was described as an adult of sound mind residing in Mombasa within the Republic of Kenya
4. The Defendant was described as a limited liability company incorporated within the Republic of Kenya under the provisions of the repealed *Companies Act* Cap 486 of the Laws of Kenya and with its registered offices within the Republic of Kenya.



III. Court directions before the hearing

5. Nonetheless, on 28th May, 2024, the Honourable Court fixed the hearing dated on 6th June, 2024 with all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010. The Honourable Court proceeded on the same date whereby the Plaintiff called his witnesses and testified on the material day. The Parties called closed their case on the same day.
6. This matter proceeded on for hearing by way of adducing “Viva Voce” evidence. Although the Plaintiffs summoned PW – 1 and closed their case, the Defendant never called any witness whatsoever.

IV. The 1st & 2nd Plaintiffs’ case

7. From the filed pleadings, the 1st and 2nd Plaintiffs averred that at all material times, the Plaintiffs were the registered owners and vendors of the property known as Plot No. 5061/I/MN Mombasa (Hereinafter referred to as “The Suit Land”) while the Defendant was the Purchaser of the said suit property in accordance with the Agreement for Sale dated 8th November 2016. On 8th November, 2016 the Plaintiffs and the Defendant entered into an agreement for the sale of the said suit land terms and conditions stipulated thereof [Hereinafter ‘the Sale Agreement’] for a consideration amounting to Kenya Shillings Seventy Million [Kshs. 70,000,000/-].
8. In accordance with Clause 3.1 of the Sale Agreement, the Defendant paid the deposit of Kenya Shillings Thirty-Five Million [Kshs 35,000,000/-] after its the execution. He undertook to pay the outstanding balance of a sum of Kenya Shillings Thirty-Five Million [Kshs. 35,000,000/-] on or before the Completion Date. Pursuant to Clause 5 of the Sale Agreement, the completion date of the transaction would be on the business day falling go days from the date of the Agreement. Consequently, the transaction ought to have been completed on or about 9th February, 2017. However, by the said date the Defendant failed, neglected and/or refused to discharge its completion obligations under the Agreement. In particular, the Defendant had not paid the full purchase price for the aforementioned property as agreed.
9. Clearly, as at the agreed completion date, the Defendant was in no position to pay the outstanding balance as per the Agreement. On 19th July, 2018, the Defendant’s Advocate issued a professional undertaking to the Plaintiffs’ Advocates to pay the then outstanding balance of Kenya Shillings Twelve Million Five Hundred Thousand [Kshs.12,500,000/-] in order to secure the release of the original completion documents to the Defendant for registration. The Plaintiffs’ Advocate duly forwarded the original completion documents to the Advocate for the Defendant.
10. The Defendant only made a further payment of Kenya Shillings Five Million [Kshs. 5,000,000/-] towards the purchase price but thereafter completely failed, ignored and/ or neglected to pay the outstanding balance of Kenya Shillings Seven Million Five Hundred Thousand [Kshs 7,500,000/-]. Currently, and prior to fulfilling its obligation, the Defendant was in possession of the aforesaid property. He had commenced construction on the same before paying the full purchase price. In light of the foregoing, the Plaintiffs stated that the Defendant’s failure to fulfil, honor and satisfy its contractual obligations to the Plaintiffs amounts to a fundamental breach of the agreement for sale.
11. The Plaintiffs relied on the following particulars of breach of contract by the Defendant:-
 - a. Failing to honor and perform its obligations under the terms of the agreement.
 - b. Failing to complete the transaction in accordance with the terms of the agreement



- c. Failing to pay the balance of the Purchase Price on the completion date as provided for in the terms of the agreement for sale.
12. In the premises, there was a performance dispute arising from or relating to the Agreement between the parties. The dispute arose from a clear and conceded default by the Defendant on its obligation under the Agreement. The Plaintiffs issued the Defendant through its Advocate with a 21 days' completion notice dated 16th December 2022. Further the Plaintiffs state that despite several demands, including the 21 Days' Completion Notice dated 16th December, 2022, the Defendant has ignored, neglected and/or refused to settle the outstanding amount of a sum of Kenya Shillings Seven Million Five Hundred Thousand [Kshs. 7,500,000/-]. This suit is therefore necessary to protect the Plaintiffs' interests.
13. The Defendant took possession of the property and had commenced construction and other activities on the property. The actions of the Defendant would completely alter the character of the suit property so that in the event of the eventual reinstatement of the Plaintiffs, the Plaintiffs would have completely lost their property as it existed and the Plaintiffs will suffer irreparable loss of their property. The Plaintiffs' claim was that the sale agreement stood rescinded and the Defendant ought to hand over vacant possession of the suit property to the Plaintiffs forthwith.
14. The Plaintiffs' alternative claim was for the immediate payment of the sum of Kenya Shillings Seven Million Five Hundred Thousand [Kshs. 7,500,000/-] by the Defendant being the balance of the purchase price for the suit property. The Plaintiffs prayed for an order of restraining injunction to bar the Defendant from entering, developing, constructing on, accessing, wasting, selling, or otherwise dealing with the suit property.
15. The Plaintiffs averred that there was no other suit pending and there had been no previous proceedings in any court between the parties herein based on the cause of action herein. The Plaintiffs also admitted to the jurisdiction of this Court to hear and determine this suit.
16. The Plaintiffs herein prayed that Judgement be entered against the Defendant in terms of:-
- a. A declaration that the Defendant's actions constitute a breach of the Agreement for Sale dated 8th November, 2016.
 - b. A declaration that the agreement for sale dated 8th November, 2016 for the property known as Plot No. 5061/I/MN stands rescinded on account of the breach by the Defendant and the Defendant's failure to complete.
 - c. An order of restraining injunction to restrain the Defendant from entering, developing, constructing on, accessing, wasting, selling, or otherwise dealing with the suit property.
 - d. An order that the Defendant vacates and removes any structure erected on the suit property;
 - e. An order that the Plaintiffs forfeit and retain any deposit paid by the Defendant towards the purchase of the suit property.
 - f. In the alternative, Kenya Shillings Seven Million Five Hundred Thousand [Kshs.7,500,000/-] being the outstanding balance of the purchase price.
 - g. Interest on the balance of the purchase money computed from the completion date until the date of payment of the purchase price in full.
 - h. Costs of the suit



- i. Such further relief as this Honorable Court may deem fit to grant.
17. The Plaintiffs through their Learned Counsel M/s. Mwai in her opening remarks stated that the cracks of the matter was a breach of contract for the purchase of the as suit land. It was a case whereby the parties entered into a sale agreement between the Plaintiffs as the vendors and the Defendant as the purchaser. The terms and conditions were stipulated therefore. Despite of the part payment and all efforts made; the Defendant refused and/ or failed to complete the sale. Hence they were in court for part performance i.e. specific performance for the breach of contract. They had attempted an out of court settlement. They had not agreed on the workings and the interest. It was for that reason that they were in court.
18. As already indicated the Plaintiff called his witness PW - 1 on 6th June, 2024 who testified as follows.

A. Examination - in - Chief of PW - 1 by M/s. Mwai Advocate.

19. PW - 1 testified under oath in English language. He identified himself as Mr. Omar Awadh Bayusuf. He lived in Nyali, the County of Mombasa. He owned a transport company. He recorded and signed a witness statement dated 1st February, 2023 which he adopted as his evidence in chief and filed documents dated 1st February, 2023 which were produced as Plaintiff's Exhibit Numbers 1 to 5. He was the proprietor of all that property known as L.R. No. 5061/I/MN Mombasa which was co – owned with his wife. He had an official search to that effect dated 31st January, 2023 and a certificate of title deed issued on 1st November, 1984.
20. On 8th November, 2016 they entered into a sale agreement with SIRAF WINGS LTD the Defendant herein, the terms and conditions stipulated thereof for the sale of the land as follows:-
 - a. Purchase price – Kshs. 70,000,000/-
 - b. Deposit – Kshs 36,000,000/-
21. According to the witness upon execution he paid a sum Kenya Shillings Thirty Million [Kshs. 30,000,000/-] and balance of Kenya Shillings Forty Million [Kshs. 40,000,000/-] was to be paid within 90 days of the date of the execution of the agreement. Nonetheless, they continued paying for a period of 8 years in instalments leaving a balance of Kenya Shillings Seventy Million [Kshs. 7,000,000/-] and hence he decided to file the case. The Defendant was in possession of the suit property. He thought they were building some structure; he gave the original title deed which was in possession of their advocate. The advocate had given him an undertaking that there would be no transfer of the land until the purchaser paid the whole amount. He signed all the transfer documents though. He was praying for the payment of his money the land and the costs of litigation and damages.

B. Cross - Examination of PW - 1 by M/s. Julu Advocate.

22. The witness told the court that out of the total purchase price the Defendant had paid leaving a balance of Kenya Shillings Seven Million Five Hundred Thousand [Kshs. 7,500,000/-]. In the company of his wife he executed the sale agreement. He was familiar with the terms referred to Clause 10 of the agreement. He delivered all the completion documents to Messrs. Balala & Co. Advocates. He did not have proof of that.
23. From the sale agreement signed there was no provision for interest but the date was set for 90 days. He was praying for the agreement to be rescinded – prayer (b) in the filed Plaint.



C. Re - Examination of PW - 1 by M/s. Mwai Advocate.

24. PW - 1 confirmed when referred to the letter dated 19th July, 2018 Plaintiff Exhibit Number 4 that despite this letter, he had never received any request for the completion documents by the purchaser. He was not aware that the Law Society Conditions of Sale 1989 in part of the sale agreement - Clause 4.
25. On 6th June, 2024 the Plaintiffs marked their case closed their case through their Counsel M/s Mwai Advocate.

V. The Defendant's case

26. The Defendant closed their case on 6th June, 2024 with the Learned Counsel intimating that they would not call any witnesses.

VI. Submissions

27. On 6th June, 2024 after the Plaintiffs and Defendant marked the close of this case. Subsequently, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that the Parties complied accordingly and the Honourable court reserved a date to deliver its Judgement on 25th July, 2024.

A. The Written Submissions by the Plaintiff.

28. The 1st and 2nd Plaintiffs through the Law firm of Messrs. Munyao, Muthama & Kashindi Advocates filed their written submissions dated 1st July, 2024. M/s. Mwai Advocate commenced the submissions by providing a brief background of the case. She stated that they were in support of their Complaint dated 1st February, 2023 and filed on 3rd February, 2024. By the said Complaint, the Plaintiff sought for the aforesaid prayers against the Defendant. Upon service, the Defendant filed the Statement of Defence dated 17.05.2023.
29. The Learned Counsel stated that 8th November, 2016 the Plaintiffs and the Defendant entered into an agreement for the sale and purchase of Plot No. 5061/I/MN MOMBASA for a consideration of Kenya Shillings Seventy Million [Kshs. 70,000,000.00]. In accordance with Clause 3.1 of the Agreement, the Defendant paid the deposit of Kenya Shillings Thirty-Five Million [Kshs 35,000,000] sometime after the execution of the Agreement and undertook to pay the balance of Kenya Shillings Thirty-Five Million [Kshs.35,000,000] on or before the Completion Date. Pursuant to Clause 5 of the Agreement, the completion date of the transaction would be on the business day falling 90 days from the date of the Agreement. Consequently, the transaction ought to have been completed on or about 9th February, 2017. As at the agreed completion date, the Defendant was in no position to pay the outstanding balance as per the Agreement. On 19th July, 2018, the Defendant's Advocate issued a professional undertaking to the Plaintiffs' Advocates to pay the then outstanding balance of Kenya Shillings Twelve Million Five Hundred Thousand [12,500,000/-] in order to secure the release of the original completion documents to the Defendant for registration.
30. The Plaintiffs' Advocate duly forwarded the original completion documents to the Advocate for the Defendant. The Defendant only made a further payment of Kenya Shillings Five Million [5,000,000/-] towards the purchase price and thereafter completely failed, ignored and/or neglected to pay the outstanding balance of Kenya Shillings Seven Million and Five Hundred Thousand [Kshs.7,500,000/-]. The Plaintiffs issued the Defendant through its Advocate with a 21 days' completion notice dated 16th December, 2022. Despite several demands, including the 21 Days'



Completion Notice dated 16.12.2022, the Defendant has ignored, neglected and/or refused to settle the outstanding amount of Kenya Shillings Seven Million Five Hundred Thousand [Kshs. 7,500,000].

31. On the other hand, it was the Defendant's case that the Plaintiffs were unable to deliver all the completion documents for verification thereby halting the registration process, therefore declaring the professional undertaking null and void. According to the Learned Counsel there were three (3) issues for determination by the Court:- Firstly, whether there existed a valid contract between the Plaintiffs and the Defendant. The Learned Counsel responded to this query in affirmative manner. My Lord, the answer to this question is in the affirmative. To support the issue, she relied on the provision of the Section 3 (3) of Law of Contract Act, Cap. 23 and Section 38 of the Land Act which provided the threshold to be met where a party sought to rely on a contract for the disposition of an interest in land.
32. The Learned Counsel submitted that in the present suit, by an Agreement for Sale dated 8th November, 2016 the Plaintiffs agreed to sell to the Defendant the suit property known as Plot No. 5061/I/MN at a consideration of Kenya Shillings Seventy Million [Kshs.70,000,000.00]. As such, the said Agreement for sale meets the threshold set out in section 3(3) of the Law of Contract Act and section 38 of the Land Act. The Agreement was reduced to writing and the same was duly signed by all the parties, the Plaintiffs and the Defendant's Representatives, and it was attested by competent witnesses. She Referred to Page 5 of the Agreement for sale. Pursuing this line of submission further, Clause 11.6 of the Agreement for Sale expressly binds each of the parties to the terms of the Agreement to wit:-

“ Each of the parties hereto agrees and confirms that for the purpose of the Law of Contract Act (Chapter 23, Laws of Kenya) that it has executed this Agreement with the intention to bind themselves to the contents hereof.
33. Further, by Clause 11.8 of the Agreement for Sale, the Parties covenanted that the Agreement would remain binding until completion of all the matters contemplated in the said Agreement. On the contrary, the Defendant failed to adduce evidence to call into question the validity of the Agreement for sale. She contended that from the foregoing it was evident that the Plaintiffs and the Defendant entered into a binding and enforceable agreement for sale. By signing the Agreement, the parties became obliged to perform their obligations under the contract.
34. Secondly, was whether the Defendant acted in Breach of the Agreement. The Learned Counsel averred that the Black's Law Dictionary, 9th Edition, Page 213, defined a breach of Contract as:-

“ a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”
35. By Clause 3.1 of the Agreement for Sale the Plaintiffs and the Defendant covenanted that the purchase price for the sale and purchase of the suit property was Kenya Shillings Seventy Million [Kshs.70,000,000.00]. A deposit of Kenya Shillings Thirty-Five Million [Kshs. 35,000,000] was to be paid on the execution of the agreement and in exchange of and delivery up of possession to the Purchaser while the remaining sum of Kenya Shillings Thirty-Five Million [Kshs.35,000,000.00] was payable on or before the Completion Date. The Defendant paid the deposit of Kenya Shillings Thirty-Five Million [Kshs 35,000,000] sometime after the execution of the Agreement and undertook to pay the balance of Kenya Shillings Thirty-Five Million [Kshs.35,000,000] on or before the Completion Date. Pursuant to Clause 5 of the Agreement, the completion date of the transaction would be on the



business day falling 90 days from the date of the Agreement. Consequently, the transaction ought to have been completed on or about 9th December, 2017. As at the agreed completion date, the Defendant was in no position to pay the outstanding balance as per the Agreement. This is despite the fact that the Defendant took possession of the suit property after the execution of the agreement and remains in possession of the suit property. The Defendant only made a further payment of Kenya Shillings Twenty-Seven Million Five Hundred Thousand (Kshs. 27,500,000.00) and has completely neglected and failed to pay the outstanding sum of Kenya Shillings Seven Million Five Hundred Thousand [Kshs.7,500,000.00]. By failing to pay the balance of the Purchase price on the completion date, the Defendant was clearly in breach of the Agreement. The Plaintiff, on the other hand, fulfilled its end of the bargain by granting the Defendant vacant possession and delivering the completion documents to the Defendant's advocates. The delay in the successful finalization of the purchase has been occasioned by the failure to pay the outstanding balance of the purchase price.

36. Thirdly, whether the Plaintiffs were entitled to the reliefs sought. The Learned Counsel averred that the Plaintiffs were entitled to the reliefs sought. According to her, the Defendant failed to fulfil their obligations under the Contract by failing to pay the outstanding balance Kenya Shillings Seven Million Five Hundred Thousand [Kshs.7,500,000/=]. The Plaintiffs had submitted extensively above on how the cause action arose. The Plaintiffs sought to move this Court to issue, among other reliefs, a declaration that the agreement for sale stood rescinded on account of breach the contract by the Defendant. The Plaintiffs vide a Letter dated 16th December, 2022 informed the Defendant of their intention to rescind the contract in the event the Defendant failed to complete the transaction by paying the sum due and owing. The Defendant had failed, neglected and or refused to meet the Plaintiffs' demands. In the alternative, the Plaintiffs prayed for Judgment against the Defendant for the outstanding balance of the purchase price. Besides seeking to move this Court to compel the Defendant to pay the outstanding balance of the purchase price of Kenya Shillings Seven Million Five Hundred Thousand [Kshs. 7,500,000/=], the Plaintiffs also prayed for interest on the balance of the purchase price computed from the completion date until the date of payment of the purchase price in full. To buttress on this points, the eraned Counsel cited the case of:- "Kihumbu – Versus - Kariuki (Environment & Land Case E002 of 2021)[2022]KEELC 4896 (KLR) (16 August 2022) (Judgment) where the Court stated as follows with respect to interest payable for the period before the filing of the suit:

“That construction of section 26 (1) of the *Civil Procedure Act* was adopted by this Court in *New Types Enterprises Limited – Versus - Kenya Achand Insurance Company Limited* [1988] KLR 380 where the court held that the award of interest for any period prior to the filing of the suit is a matter of substantive law. Section 34 (1) of the Indian Code of Civil Procedure is still intact and is in the same language as section 26 (1) of the *Civil Procedure Act*, (see Mulla- The Code of Civil Procedure 16th Edition vol 1 page 505). At page 511 of Mulla (supra) the authors state:

“interest up to date of suit is a matter of substantive law and the section does not refer to payment of interest under the first head (that is interest accrued prior to the institution of the suit).

..... It has been said the right to interest prior to the suit is a substantive one whereas pendente lite, it is one of procedure within the discretion of the court”.

The authors further show that according to the substantive law, interest antecedent to the suit is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by



mercantile usage (which must be pleaded and proved) or where there is statutory right to interest or where an agreement to pay interest can be implied from the course of dealing between parties (see pages 511 - 514) of Mulla (supra).(Emphasis is mine).

37. Pursuant to Clause 4 of the said Agreement for Sale the parties covenanted that the sale would be subject to the Law Society Conditions of Sale (1989 Edition) as long as it was not inconsistent with the conditions contained in the Agreement. By virtue of Clause 4 of the said Agreement for sale, the Society Conditions of Sale (1989 Edition) were incorporated into the said Agreement at full length (in extenso) in so far as the said Conditions of Sale are not inconsistent with the conditions contained in the Agreement for Sale. Paragraph 8 of the Law Society Conditions of Sale (1989 Edition) stipulates that:

“Where the completion is, for any reason whatsoever, other than the default of the vendor or his mortgagee, delayed beyond the completion date, the purchaser shall, subject as is hereinafter otherwise provided, pay to the vendor on completion interest on the balance of the purchase money computed from the completion date until the date of payment of the purchase money in full (both dates inclusive) provided however that, where any portion of the purchase money is secured by an undertaking under the provisions of condition 4(2) (b), interest on the secured balance shall only be payable from the earlier of the following dates, namely:

- (a) a date seven (7) days after successful registration of the conveyance; or (b) a date thirty (30) days after the completion date.

38. Further, Paragraph 2 of the Law Society Conditions of Sale (1989 Edition) states as follows with respect to the applicable interest rate:

“The annual rate of interest specified in the Special Conditions or, if none is so specified, two (2) percentage points above the maximum rate of interest which; may be charged by specified banks for loans or advances pursuant to Section 39 of the [Central Bank of Kenya Act](#) (Cap. 491); provided that, if more than one maximum rate is so specified, the lowest rate shall be applied.

Section 39 of the [Central Bank of Kenya Act](#) was repealed by the Central Bank of Kenya (Amendment) Act 2004. She invited the Court to give effect to the mutual intentions of the parties at the time of contracting and apply the prevailing court rate which currently stood at 12%. In any event, the Plaintiffs were denied the use of the outstanding sum of Kenya Shillings Seven Million Five Hundred Thousand [Kshs. 7,500,000/=] for a period of not less than 5 years and as such the Plaintiffs should be compensated for such deprivation by way of interest. According to the Learned Counsel, the Court of Appeal in the case of “Highway Furniture Mart Limited – Versus - Permanent Secretary Office of The President & another[2006]eKLR stated as follows in respect of the justification for an award of interest on the principal sum:

“The justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a Defendant. In Later – Versus - Mbiyu [1965] EA 592, the forerunner of this Court said at page 593 paragraph E:

”In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the Defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods



or money to which he is entitled should be compensated for such deprivation by the award of interest”.

39. In conclusion, the Learned Counsel asserted that they had demonstrated that the Plaintiffs and the Defendant entered into a binding and enforceable agreement. Further, that the Defendant acted in breach of the agreement. In the premises, the Defendant having failed to fulfil their obligations under the Agreement by failing to pay the balance of the purchase price, the Plaintiffs were entitled to [a]rescind the agreement or [b] in the alternative the balance of the purchase price together with an interest on the outstanding sum to be computed from the completion date until the date of payment of the purchase price in full.

VII. Analysis and Determination

40. I have keenly assessed the filed pleadings by all the Plaintiffs herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
41. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are: -
- a. Whether the Defendant breached the terms of the agreement or sale of land registration number 5061/I/MN Mombasa dated 8th November, 2016?
 - b. Whether the Plaintiffs are entitled to the orders sought in the Plaintiff
 - c. Who bears the costs of the suit?

Issue No. a). Whether the Defendant breached the terms of the agreement or sale of land registration number 5061/I/MN Mombasa dated 8th November, 2016

42. Under this sub – title and the surrounding facts and inferences, this is a rather straight forward case. Ideally, it would have been determined under summary Judgement under the provision of Order 13 of the Civil Procedure Rules, 2010 as the filed Defence is full of mere denials and sham. There are no triable issues at all. Nonetheless, the main substratum in this matter whether the Defendant breached the terms of the agreement or sale of land registration number 5061/I/MN Mombasa dated 8th November, 2016. Whenever a Court of Law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the provisions of Section 3 (3) of the Law of contract and Section 38 of the *Land Act*, No. 6 of 2012. Section 3(3) of the Law of Contract reads as follows:-

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- (a) The contract upon which the suit is founded:
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and
- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party; provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust”



43. It is not in dispute that the Plaintiff's case is uncontroverted. That being the case they retain the burden to proof his case, albeit, on a balance of probabilities. As to whether the defendant breached the agreement for sale, Black's Law Dictionary, 9th Edition, Page 213, defines a breach of Contract as;
- “a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages.”
44. It is trite law that courts cannot re-write contracts for parties, neither can they imply terms that were not part of the contract. In the case of “Rufale – Versus - Umon Manufacturing Co. (Ramsboltom) (1918) L.R 1KB 592”, Scrutton L.J. held as follows:
- “The first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract.”
45. Equally in the case of “Attorney General of Belize et al – Versus - Belize Telecom Limited & Another (2009), 1WLR 1980 at page 1993”, citing Lord Person in “Trollope Colls Ltd – Versus - Northwest Metropolitan Regional Hospital Board (1973) 1 WLR 601 at 609”, held as follows:
- “The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.”
46. Based on the above decisions, the starting point for me will be the agreement that the parties signed and the terms therein. According to the agreement the defendant was to pay the balance of the purchase price on or before the completion date which was ninety (90) days from the date of the agreement dated 8th November, 2016.
47. It is the Plaintiffs' position that the Defendant breached the agreement and failed to meet the obligations set out in the agreement to wit; breaching the conditions in the agreement, entering into an agreement without sufficient funds to complete and failure to pay the balance of the purchase price even after extension of completion period. The completion date for the agreement was 90 days from the date of signing i.e. 8th November, 2016.
48. As at the agreed completion date, the Defendant was in no position to pay the outstanding balance as per the Agreement. On 19th July, 2018, the Defendant's Advocate issued a professional undertaking to the Plaintiffs' Advocates to pay the then outstanding balance of Kenya Shillings Twelve Million Five Hundred Thousand [Kshs.12,500,000/-] in order to secure the release of the original completion documents to the Defendant for registration. The Plaintiffs' Advocate duly forwarded the original completion documents to the Advocate for the Defendant. The Defendant only made a further payment of Kenya Shillings Five Million [Kshs. 5,000,000/-] towards the purchase price and thereafter completely failed, ignored and/ or neglected to pay the outstanding balance of Kenya Shillings Seven Million Five Hundred Thousand [Kshs 7,500,000/-]. Currently, the Defendant was in possession of the aforesaid property and had commenced construction on the same before paying the full purchase



price. In light of the foregoing, the Plaintiffs stated that the Defendant's failure to fulfil, honor and satisfy its contractual obligations to the Plaintiffs amounts to a fundamental breach of the agreement for sale dated 8th November, 2016.

49. In the premises, there was a performance dispute arising from or relating to the Agreement between the parties. The dispute arose from a clear and conceded default by the Defendant on its obligation under the Agreement. The Plaintiffs issued the Defendant through its Advocate with a 21 days' completion notice dated 16th December 2022. Further the Plaintiffs state that despite several demands, including the 21 Days' Completion Notice dated 16th December, 2022, the Defendant has ignored, neglected and/or refused to settle the outstanding amount of Kenya Shillings Seven Million Five Hundred Thousand [Kshs. 7,500,000/-].
50. This suit is therefore necessary to protect the Plaintiffs' interests. In Conclusion therefore, the Court finds the Defendant to have breached the Agreement for Sale by failing to pay the deposit of Kenya Shillings Seven Million, Five Hundred (Kshs 7,500,000/-) by the 16th December, 2022 as required.

Issue No. b). Whether the Plaintiff is entitled to the orders sought in the Plaintiff

51. Under this Sub heading, the Plaintiffs have sought for various Reliefs as contained at the foot of the Plaintiff, herein. Having held that the defendant is guilty of breach of the contract, the next thing I need to determine is the question of prayers in the plaintiff. In the case of "Hadley – Versus - Baxendale (154) 9. Exch 214" where Anderson P at page 354 stated as follows:

“Where two parties have made a contract which one of them has broken the damages which the other ought to receive should be such as may fairly and reasonably be considered either as arising naturally i.e according to the usual course of things, from such breach itself, or such as may reasonably be supposed to have been in contemplation of both parties at the time they made a contract as the probable result of a breach of it.”

52. Further in the case of "Millicent Perpetua Atieno – Versus - Louis Onyango Otieno (2013) eKLR", the Court of Appeal quoted with approval Halsbury's Law of England, Volume 12, 4th Edition at paragraph 1183 on the type and measure of damages recoverable by a purchaser upon breach by a seller of land.

“where it is the vendor who wrongfully refuses to complete the measure of damage is similarly, the loss incurred by the purchaser as the natural and direct result of the repudiation of the contract by the vendor. These damages include the return of any deposit paid by the purchaser with interest, together with expenses which he has incurred in investigating title, and other expenses within the contemplation of the parties, and also, where there is evidence that the value of the property at the date of repudiation was greater than the agreed purchase price, damages for loss of bargain.....”

53. The agreement contains a clause on default. It is clear that the parties anticipated an event of default. I find no valid reason to deny the Plaintiffs in the sum of Kenya Shillings Seven Million Five Hundred Thousand (Kshs. 7,500,000/-) as agreed in the agreement by the parties because the Court cannot interfere with the contract. The dispute herein involves ownership of a parcel of land, and the specific prayers sought by the Plaintiffs in the Plaintiff filed herein is for eviction orders to issue against the Defendant herein. These are clearly orders relating to the use, occupation and title to land and within the jurisdiction of this Court. Having found that the Plaintiffs have proven his claim on a balance of



probability and established that the Defendant has no legal right to remain on the suit land based on the evidence placed before this court.

54. On prayers numbers (a), (b), (c), (d) and € being that the Plaintiffs are the bona fide legal proprietor of the suit property then the same are granted with accordance to the provision of Sections 24, 25 and 26 of the [Land Registration Act](#), Number 3 of 2012.

Issue No. c). Who bears the costs of the suit.

55. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.
56. In the case of “Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR” quoted the case of “Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227” the Court held;
- “It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so.”
57. In the present case, the Plaintiffs have successfully managed to establish their case as pleaded from the filed pleadings against the Defendant therefore, I proceed to award her the costs of this suit.

VIII. Conclusion and Disposition

58. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities finds that the Plaintiff has fully established their case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:
- a. That Judgment be and is hereby entered in favour of the Plaintiff as pleaded in Plaintiff dated 1st February, 2023.
 - b. That a declaration be and is hereby issued that the Defendant’s actions constitute a breach of the Agreement for Sale dated 8th November, 2016.
 - c. That a declaration be and is hereby issued that the agreement for sale dated 8th November, 2016 for the property known as Plot No. 5061/I/MN stands rescinded on account of the breach by the Defendant and the Defendant’s failure to complete.



- d. That an order of restraining injunction be and is hereby issued to restrain the Defendant from entering, developing, constructing on, accessing, wasting, selling, or otherwise dealing with the suit property.
- e. That an order do and is hereby issued for the vacation and removal of any structure erected on the suit property.
- f. That an order do and is hereby issued that the Plaintiffs forfeit and retain any deposit paid by the Defendant towards the purchase of the suit property.
- g. That failure to comply with prayers numbers (b) to (f), the alternative is that the Defendant makes the payment of Kenya Shillings Seven Million Five Hundred Thousand [Kshs.7,500,000/-] being the outstanding balance of the purchase price
- h. That the costs of this suit vide the Plaint dated 1st February, 2023 and interest at the Court rates be awarded to the Plaintiffs.

It is so ordered accordingly

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 23RD DAY OF SEPTEMBER 2024.

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HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT AT
MOMBASA

Judgement delivered in the presence of:-

- a. M/s. Firdaus Mbula – the Court Assistant.
- b. M/s. Caroline Mwai Advocate for the Plaintiff.
- c. No appearance for the Defendant.

