



Taibjee & another v Kanabar & another; Kanabar & 6 others (Counter Claimers) (Environment & Land Case 154 of 2019) [2025] KEELC 3374 (KLR) (23 April 2025) (Judgment)

Neutral citation: [2025] KEELC 3374 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 154 OF 2019**

**JO MBOYA, J
APRIL 23, 2025**

BETWEEN

AZIM TAIBJEE 1ST PLAINTIFF

MADHAV BHALLA 2ND PLAINTIFF

AND

HARISH KUMAR BHAGWANDAS KANABAR 1ST DEFENDANT

NCBA BANK KENYA PLC 2ND DEFENDANT

AND

HARISH K KANABAR COUNTER CLAIMER

KERIT B KANABAR COUNTER CLAIMER

LIMURU HILLS LIMITED COUNTER CLAIMER

HIGHGROVE HOLDINGS LIMITED COUNTER CLAIMER

SUN APARTMENTS LIMITED COUNTER CLAIMER

THE OTHAYA VILLAS LIMITED COUNTER CLAIMER

ABCOM INVESTMENT LIMITED COUNTER CLAIMER

JUDGMENT

Introduction:

1. The Plaintiffs' herein approached the court vide Plaint dated the 8th of May 2019; and wherein the Plaintiffs' sought diverse/ various reliefs. Subsequently the Plaint was amended culminating into the amended Plaint dated 17th august 2020; and wherein the Plaintiffs have sought the following reliefs;



- a. Specific performance of the said Agreement for sale dated 14th July 2016 entered into between the Plaintiffs and the Defendant including the payment by the Defendant of all outstanding loans and amounts due and or obligations tied to the Suit Premises.
- b. All necessary accounts and enquiries be undertaken.
- c. In the alternative, a refund of the purchase price of Kshs. 128,000,000.00 plus damages for breach of contract in lieu of or in addition to specific performance;
- d. Special damages in the sum of Kshs. 2,185,823.00 as pleaded;
- e. Costs of and incidental to this suit.
- f. Interest on all the reliefs sought wherever applicable on a compounding basis at the rate of 14% per annum.
- g. Further and or other relief as this Honourable Court may deem fit to grant.
- h. A declaration that the 2nd Defendant has acted contrary to the Plaintiffs' legitimate expectations.
- i. A declaration that the 2nd Defendant was not entitled and or authorised to release Kenya Shillings 28,000,000.00 to the 1st Defendant,
- j. A declaration that the amount of Kes. 28,000,000.00 already paid by the Plaintiffs into the accounts related to the 1st Defendant be used to offset the part purchase price for a Town House Number 12, Highgrove Village on Land Reference Number 29998
- k. An order compelling the 2nd Defendant to prepare discharge documentation and present it for registration with the Chief Lands Registrar to enable the release the Suit Premises known as Town House Number 12, Highgrove Village on Land Reference Number 29998 in favour of the Plaintiff.
- l. [Sic] An interlocutory injunction do issue to restrain NCBA Bank and or the 2nd Defendant and or any other third parties by themselves and or their servants and or agents and or employees and or howsoever from selling or offering for sale whether by Public Auction or Private Treaty auctioning, transferring, charging, leasing, pledging, or in any other way alienating or in any other manner whatsoever and howsoever interfering with the ownership, possession and or title thereof and or dealing with or transacting with the property the subject matter of this suit, otherwise known as Town House Number 12, Highgrove Village on Land Reference Number 29998 and or in any other manner whatsoever from dealing with and or interfering with and or remaining on or continuing in occupation of the same, pending the hearing and determination of the suit.
- m. A Permanent Injunction do issue to restrain NCBA Bank, and or their agents and or the 2nd Defendant and or any other third parties by themselves and or their servants and or agents and or employees and or howsoever from selling or offering for sale whether by Public Auction or Private Treaty auctioning, transferring, charging, leasing, pledging, or in any other way alienating or in any other manner whatsoever and howsoever interfering with the ownership, possession and or title thereof and or dealing with or transacting with the property the subject matter of this suit, otherwise known as Town House Number 12, Highgrove Village on Land Reference Number 29998 and or in any other manner whatsoever from dealing with and or interfering with and or remaining on or continuing in occupation of the same.



- n. An order directing the Chief Lands Registrar to ensure that no other transactions are effected or any dealings is initiated, registered or noted that in any way form or shape derogate from or subtract or extinguish or in any other manner whatsoever diminishes or prejudices the title in the said suit property hereinabove described pending the hearing and determination of this application and suit.
 - o. An order directing the Chief Lands Registrar and or their servants, agents and or employees to ensure that they update their register by accepting and registering the discharge documents from the Defendants and further registering property Town House Number 12, Highgrove Village on Land Reference Number 29998 in favour of the Plaintiffs.
In the alternative and totally without prejudice to the foregoing
 - p. Restitution of Kenya Shillings 28,000,000.00 by the 2nd Defendant and the same be used to offset the part purchase price for a Town House Number 12, Highgrove Village on Land Reference Number 29998.
2. The First Defendant duly entered an appearance and filed a statement of defence and counter claim. The statement of defence and counterclaim is dated the 22nd of June 2019. Vide the counterclaim the first defendant has sought the following reliefs;
- a. Declarations that:
 - i. The 1st Agreement for sale entered into on 2/4/2014 in respect of LR No. 1870/IV/75, Pili Pili Way. Nairobi was fraudulent for want of due consideration
 - ii. That the 2nd Agreement for sale entered into on 14/7/2016 in respect of House No. 12, High Grove Villa in LR No. 29998, Nairobi is likewise null and void on account of the fraud practised on the Defendant by the Plaintiffs and the breach of the fiduciary duty on the part of the Plaintiffs.
 - iii. That a court of equity cannot sanction the specific performance of a fraudulent sale.
 - iv. That court of law cannot enforce any rights obligations arising from a fraudulent sale. and
 - v. The possession of House No. 12 within LR No. 29998 Known as High Grove Villas pursuant to the fraudulent sale is in itself illegal, null and void ab initio and the Plaintiffs are directed yield vacant possession thereof to the Defendants forthwith
 - vi. The Plaintiffs suit herein is an attempt at self-enrichment.
 - b. Special Damages
 - c. Mesne Profits in respect of House No. 12 within LR No. 29998 with effect from 14th July 2016 until; the date of Judgment or payment in full.
 - d. General, aggravated and punitive damages for professional negligence of the Plaintiffs against the Defendants.
 - e. General, aggravated and punitive damages deceit as pleaded above. for fraud,
 - f. Costs
 - g. Any other order that this Honourable Court may deem fit to grant.



3. The Plaintiffs herein thereafter filled a reply to defence and defence to counterclaim dated the 4th of July 2019. Instructively, the Plaintiffs/ defendants to the counterclaim denied the claims at the foot of the counterclaim. Furthermore, the Plaintiffs also sought to place the defendant/ counter claimers to strict proof.
4. The second defendant duly entered an appearance and filled a statement of defence dated the 22nd of march 2022. The 2nd defendant denied the claims by the Plaintiff[s]. Furthermore, the second defendant contended that the Plaintiff's suit didn't disclose a reasonable cause of action.
5. The Plaintiff's case is premised on the evidence of one witness, namely; Madhav Bhalla. The witness testified as PW 1. It was the testimony of the witness that same is the 2nd Plaintiff in the matter. Furthermore, the witness averred that by virtue of being the 2nd Plaintiff in respect of the instant matter, same (witness) is conversant with the facts of the case.
6. Additionally, the witness testified that same is an Advocate of the High Court of Kenya. Moreover, the witness averred that same has practised law for over 25 years. It was the further testimony of the witness that same has since recorded two [2] sets of witness statements. To this end, the witness referenced the witness statement dated 8th day of May 2019 and which witness statement, the witness sought to adopt and rely on as his evidence in chief.
7. For good measure, the witness statement dated the 8th day of May 2019 [details in terms of the preceding paragraph] was duly adopted and constituted as the evidence in chief of the witness.
8. It was the further testimony of the witness that same has since filed a further/supplementary witness statement dated the 19th day of November 2019 and which witness statement, the witness further sought to adopt and rely on as his further evidence in chief. Instructively, the witness statement dated 19th November 2019 was duly adopted and constituted as the further evidence in chief of the witness.
9. It was the further testimony of the witness that same has also filed a list and bundle of documents dated the 8th day of May 2019, containing 21 documents. To this end, the witness sought to adopt and produce the documents as Exhibits before the Court. There being no objection to the production of the documents under reference, same were tendered and admitted as Exhibit[s] P1 – P21, respectively.
10. The witness further referenced the list and bundle of Documents dated 19th day of August 2021 containing one Document. In this regard, the witness sought to tender and produce the document as an exhibit. There being no objection to the production of the document, same was tendered and produced as Exhibit P22.
11. Moreover, the witness testified that the Plaintiffs herein filed an Amended Plaint dated the 17th day of August 2020 and a Verifying Affidavit. To this end, the witness sought to adopt and rely on the Amended Plaint. Furthermore, the witness implored the Court to grant the reliefs as sought at the foot of the Amended Plaint.
12. On cross-examination by learned Counsel for the 1st Defendant, the witness averred that same has been an Advocate of the High Court of Kenya for more than 25 years. In addition, the witness averred that same is conversant with the 1st Defendant herein. Besides, the witness averred that same has acted for the 1st Defendant and his (1st Defendant's) Group of Companies for over 10 years.
13. While still under cross-examination, the witness averred that the Plaintiffs herein entered into and executed a Sale Agreement between themselves (Plaintiffs) and the 1st Defendant. Furthermore, it was averred that the Sale Agreement was in respect of House Number 12 Highgrove Village.



14. It was the further testimony of the witness that the Advocate[s] who acted for the Parties at the foot of the Sale Agreement were M/s Taibjee & Bahlla Advocates LLP. In particular, the witness averred that the firm of Advocates is where both Plaintiffs are Partners. In addition, the witness averred that the Plaintiffs herein were both the Advocates for the Vendor and the Purchasers, respectively.
15. It was the further evidence of the witness that the Purchase price in respect of the suit Property, namely, House Number 12 Highgrove Village was agreed at in the sum of Kshs.128, 000, 000/= only. Moreover, the witness averred that the Purchase price was agreed to be paid in two aspects. Firstly, the witness averred that the Parties agreed that the deposit of Kshs.28, 000, 000/= only, was to be paid in cash while the remainder sum, namely, Kshs.100, 000, 000/= only was to be paid vide surrender [exchange] of LR NO. 1870/IV/175 (the Pili Pili Property).
16. Additionally, the witness testified that even though the Plaintiffs herein acted for both the Vendor and the Purchasers in respect of the suit Property, the Plaintiffs did not discern any conflict of interests. In addition, the witness averred that same is conversant with the provisions of Rule 95 of the Advocates Practice and Standardization Regulations.
17. While still under cross-examination, the witness averred that Rule 95 of the Advocates Practice and Standardization Regulations does not prohibit and/or bar an Advocate from acting for both the Vendor and the Purchasers. In any event, the witness testified that same is aware that the Pili Pili project had stalled by the time the Plaintiffs and the Vendor entered into the Sale Agreement dated the 14th day of July 2016.
18. It was the further testimony of the witness that the Purchase price over and in respect of the suit Property was broken down into two segments. In particular, the witness averred that the purchase price was to be paid vide cash of Kshs.28, 000, 000/= only, while the second part was to be paid vide surrender of another property. Furthermore, the witness averred the manner pertaining to the payments of the balance of Kshs.100, 000, 000/= only, was to be paid was duly explained/ captured at the foot of the Sale Agreement.
19. The witness further testified that the payments of the sum of Kshs.28, 000, 000/= was duly acknowledged at the foot of the Sale Agreement. Besides, the witness testified that the Vendor (1st Defendant) duly understood the terms of the Sale Agreement. In addition, the witness averred that the Vendor undertook to avail certain documents to facilitate the completion of the process.
20. Additionally, the witness testified that at the time when the Plaintiffs and the 1st Defendant entered into the Sale Agreement, the Plaintiffs herein were aware that the suit Property was duly charged to the 2nd Defendant. In any event, the witness testified that the Plaintiffs herein were the Advocates for the Vendor.
21. It was the further testimony of the witness that by virtue of being the Advocates for the Vendor, same (witness) covenanted to procure and obtain the consent of the Chargee. However, the witness admitted that same did not procure and/or obtain the consent of the Chargee. In addition, it was averred that the suit Property was also not discharged.
22. The witness further testified that at the time when the Plaintiffs prepared the Sale Agreement and acted for the both the Vendor and the Purchasers, the Plaintiffs were not conflicted. In any event, the witness averred that the Plaintiffs as the Advocates for the Vendor were not under an obligation to advise the Vendor to seek for and obtain an Independent legal opinion.
23. It was the further testimony of the witness that the Plaintiffs herein also entered into and executed another Sale and Exchange Agreement with ABCOM Investments Limited . In this regard, the witness



averred that the Agreement with ABCOM Investments Limited related to the exchange of LR NO. 1870/IV/175 (the Pili Pili Property).

24. It was the further evidence of the witness that the Vendor (the 1st Defendant) herein covenanted to allow the Plaintiffs to take possession of the suit Property. In any event, it was averred that the taking over and occupation of the suit Property was captured at the foot of the Sale Agreement dated 14th July 2016.
25. The witness further testified that the Vendor also allowed the Plaintiffs to commence renovations in respect of the suit Property. In this regard, the witness referenced various documents that were tendered and produced to demonstrate the renovations that were undertaken in respect of the suit Property.
26. While still under cross-examination, the witness averred that the payments of the stakeholder's sum, namely, the sum of Kshs.28, 000, 000/= only, was undertaken vide RTGS. In particular, it was averred that the monies were paid in two batches. Furthermore, the witness testified that the first batch comprised of Kshs.5, 000, 000/= only, which was paid into the account of SUN APPARTMENTS LIMITED while the sum of Kshs.23, 000, 000/= only, into the account of the 1st Defendant. At any rate, it was averred that the payments of the sum of Kshs.28, 000, 000/= only, was captured at the foot of the documents at page 144 of the Plaintiffs' List and Bundle of Documents.
27. It was the further testimony of the witness that same mounted a Complaint against the 1st Defendant with the Directorate of Criminal Investigations (DCI). Furthermore, the witness averred that the Complaint which was mounted related to the manner in which the 1st Defendant procured and obtained the sum of Kshs.28, 000, 000/= only. To this end, the witness referenced the copy of the Charge Sheet at the foot of pages 307 – 308 of the 1st Defendant's List and Bundle of Documents.
28. On further cross-examination, the witness averred that same is not aware whether Kirit Kanabar approached him (witness) with a view to settling the matter at the foot of the Charge Sheet at page 307 of the 1st Defendant's List and Bundle of Documents.
29. Upon being referred to the documents pertaining to the RTGS concerning the sum of Kshs.10, 000, 000/= only, the witness averred that the payments in question was in respect of professional/ Advocate[s] fees. For good measure, the witness averred that the payments in question had nothing to do with the refund of part of the purchase price of the suit Property.
30. It was the further testimony that there was also a transfer of lease relating to apartment Number 5 on Kusi Lane Parklands, Nairobi. To this end, the witness averred that the apartment was said to be worth Kshs.18, 000, 000/= only. In addition, the witness averred that the transfer instrument was duly executed by the 1st Defendant and his wife. Besides, the witness also acknowledged that the transfer instrument was also executed by himself and his Partner.
31. The witness further testified that RTGS of Kshs.10, 000, 000/= only and the transfer of the apartment on Kusi Lane Parklands, Nairobi were not in refund of the deposit of Kshs.28, 000, 000/= only, that was paid at the foot of the purchase of the suit Property. In particular, the witness reiterated that the payments in question were on account of payments of professional fees and same had nothing to do with the Sale Agreement of House Number 12, Highgrove Village.
32. It was the further testimony of the witness that the Plaintiffs facilitate the transfer and registration of the Property LR NO. 1870/IV/175 to ABCOM Investments Limited . Furthermore, the witness averred that the said property was transferred to ABCOM Investments Limited by M/S Shanzu Bazaar Limited.



33. It was the further testimony of the witness that the said property, namely, LR NO. 1870/IV/175 [the Pili Pili Property] had been bought by the Plaintiffs, but same had not been transferred to the Plaintiffs. Nevertheless, the witness testified that the Plaintiffs had beneficial rights and interests over the said property.
34. The witness further testified that same undertook due diligence over and in respect of the property namely, LR NO. 1870/IV/175 before same entered into the transaction with Shanzu Bazaar Limited. In addition, the witness testified that ABCOM Investments Limited were made aware of the circumstances surrounding the transactions in respect of LR NO. 1870/IV/175.
35. Moreover, it was the testimony of the witness that even though LR NO. 1870/IV/175 was registered in the name of Shanzu Bazaar Limited, the Plaintiffs herein were the beneficial owners of the Property. In any event, it was averred that it was the Plaintiffs who procured the transfer and registration of LR NO. 1870/IV/175 to and in favour of ABCOM Investments Limited .
36. While still under cross-examination, the witness averred that the Sale Agreement between the Plaintiffs and ABCOM Investments Limited , was entered into on the 2nd day of April 2014. In addition, the witness averred that the completion date was indicated to be the 31st day of March 2014 or such other date as may be agreed by the Parties. Nevertheless, the witness testified that the completion date has a typographical error.
37. It was the further evidence of the witness that the Plaintiffs herein had also covenanted to facilitate ABCOM Investments Limited to procure and obtain a Banking facility. To this end, the witness testified that the Plaintiffs indeed introduced ABCOM Investments Limited to Fidelity Bank Limited. In addition, it was averred that Fidelity Bank Limited thereafter advanced to ABCOM Investments Limited a facility in the sum of Kshs.300, 000, 000/= only.
38. On further cross-examination, the witness averred that the Plaintiffs herein also acted for the 1st Defendant and 6 other Companies wherein the 1st Defendant was/is a Shareholder cum Director. Moreover, the witness averred that the Plaintiffs had acted for the 1st Defendant and his Group of Companies for more than 10 years. In any event, the witness acknowledged that same advised the 1st Defendant on the basis of the Sale Agreement situated at Kilifi and which property was owned by the Estate of Mr. Mureithi.
39. While still under cross-examination, the witness testified that the Plaintiffs herein also acted for the 1st Defendant in respect of the Sale Agreement relating to the purchase of the property belonging to the Estate of Mureithi. Additionally, it was the testimony of the witness that same also advised the 1st Defendant on matters pertaining to the Sale Agreement at page 87 of the 1st Defendant's List and Bundle of Documents.
40. It was the further testimony of the witness that same also acted for the firm of PJ DAVE LIMITED. In addition, the witness averred that same also acted for Limuru Flowers. However, the witness averred that same was never negligent in the exercise and discharge of his professional duties.
41. While still under cross-examination, the witness averred that same has tendered and adduced evidence before the Court as pertains to the Pili Pili property. Nevertheless, the witness averred that the Pili Pili Property was registered in the name of Shanzu Bazaar Limited at the time of the entry into and execution of the Sale and Exchange Agreement.
42. Furthermore, the witness testified that same was also requested to craft/draw a Memorandum of Understanding. In this regard, the witness averred that the purpose of the Memorandum of Understanding was towards swapping certain properties between the 1st Defendant and M/S PJ DAVE



LIMITED. In any event, the witness averred that the Memorandum of Understanding was dated 21st May 2015.

43. On cross-examination, by learned Counsel for the 2nd Defendant, the witness averred that the 2nd Defendant has been sued on account of Kshs.28, 000, 000/= only, that was paid to/deposited into the account domiciled at the 2nd Defendant. Furthermore, the witness averred that the amount in question was paid towards settling the balance due on account of House Number 12, Highgrove Village. In addition, the witness averred that the monies were not to address any other facilities that the 1st Defendant had with the 2nd Defendant.
44. It was the further testimony of the witness that the suit Property, which is the subject of the Sale Agreement dated the 14th day of July 2016 was charged to the 2nd Defendant. In any event, the witness testified that the payments of Kshs.28, 000, 000/= only was directed to and concerned with the clearing of the debt due on account of House Number 12 Highgrove Village.
45. The witness further testified that as at the time when the Sale Agreement was entered into, the suit Property was duly charged to and in favour of the 2nd Defendant. Furthermore, the witness added that the Charge Instrument was registered on the 5th day of February 2015.
46. It was the further testimony of the witness that the suit Property had been charged to the 2nd Defendant to secure a Banking facility which had been granted in US dollars. In any event, the witness clarified that by the time of entry into and execution of the Sale Agreement there was an existing Charge over the suit Property.
47. Moreover, it was the testimony of the witness that a property which is duly charged to the Bank [the Chargee] cannot be transferred without the Consent of the Bank. Furthermore, the witness testified that no transfer can be done without the Bank being fully paid the amount at the foot of the Charge.
48. On further cross-examination, the witness testified that the Plaintiffs herein did not undertake any Independent inquiry to ascertain and confirm the status of the loan account. In any event, the witness averred that the Plaintiffs herein have sought for refund of the sum of Kshs.128, 000, 000/= only at the foot of the Amended Plaint.
49. It was the further testimony of the witness that the Plaintiffs paid the sum of Kshs.5, 000, 000/= only, on the 6th day of July 2015. In any event, it was averred that the payments in question were made prior to and before the entry into the Sale Agreement in respect of the suit Property.
50. It was the further testimony of the witness that at the time of making the payments, namely, Kshs.5, 000, 000/= only, the Plaintiffs herein gave instructions to their Bank, to wit, I & M Bank Limited. Furthermore, the witness added that same informed I & M Bank Limited of the purpose of the money. However, the witness conceded that there were no instructions that were given to the 2nd Defendant as to the usage of the monies that were forwarded from I & M Bank Limited.
51. While still under cross-examination, the witness averred that the sum of Kshs.23, 000, 000/= only, was paid to the Account of the 1st Defendant. In any event, the witness testified that the Bank Account in which the monies were paid is different from the 1st Defendant's Loan Account.
52. On further cross-examination, the witness averred that same did not inform the 2nd Defendant of the purpose why the money was remitted to the 2nd Defendant. Furthermore, the witness averred that same has accused the 2nd Defendant at the foot of paragraph 25 of his witness statement.
53. It was the further testimony of the witness that at the foot of paragraph 13 of the witness statement, same has highlighted claims of fraud against the 1st Defendant and his Group of Companies. Moreover,



- the witness testified that it is the 1st Defendant who has been accused of fraud. In particular, the witness reiterated that the fraud in question was perpetrated by the 1st Defendant and his family.
54. Additionally, the witness testified that same is aware that the suit Property was sold to and transferred in favour of a Third Party. In this regard, the witness averred that owing to the sale of suit Property, the Plaintiffs' interests in now concentrated and focused on the recovery of Kshs.128, 000, 000/= only.
 55. With the foregoing testimony, the Plaintiffs' case was closed.
 56. The First Defendant's case is premised on the evidence of one witness namely, Harish Kumar Bhagwandas Kanabar. The witness testified as DW1. Furthermore, it was the testimony of the witness that same is the 1st Defendant in respect of the instant matter. In addition, the witness averred that by virtue of being the 1st Defendant, same is privy to and conversant with the facts of the instant matter.
 57. Moreover, the witness testified that in respect of the instant matter, same has since recorded a witness statement. To this end, the witness referenced the witness statement dated the 14th October 2023 and which witness statement, the witness sought to adopt and rely on as the evidence in chief of the witness. In this regard, the witness statement was thereafter adopted and constituted as the evidence in chief of the witness.
 58. Additionally, the witness referenced the List and Bundle of Documents dated the 17th day of May 2023, containing 19 Documents and which Documents the witness sought to tender and produce before the Court as Exhibits. There being no objection to the production of the documents, same were tendered and produced as Exhibits D1 – 19 on behalf of the 1st Defendant.
 59. It was the further testimony of the witness that same also filed a Statement of Defence and Counter-Claim dated the 22nd day of June 2019. In addition, the witness also referenced the Verifying Affidavit sworn on the 22nd day of June 2019. Thereafter, the witness sought to adopt and rely on the Statement of Defence and Counter-Claim.
 60. On cross-examination by learned Counsel for the Plaintiff, the witness averred that same is privy to and conversant with the terms of the Sale Agreement that was entered into and executed on the 14th day of July 2016. In addition, the witness averred that the Sale Agreement was duly executed by himself and the Plaintiffs.
 61. It was the further testimony of the witness that the Sale Agreement was also executed by his (1st Defendant's) wife. Besides, the witness also testified that the Sale Agreement was also signed and sealed by the seal of M/S ABCOM Investments Limited .
 62. While still under cross-examination, the witness also averred that same is also conversant with the various clauses of the Sale Agreement. In particular, the witness averred that same is privy to the conclusion date, which the witness referenced as the 30th day of June 2016.
 63. It was the further testimony of the witness that the Plaintiffs paid the Stakeholder sum of Kshs.28, 000, 000/= only. Besides, the witness averred that the payment of Kshs.28, 000, 000/= only was duly confirmed and acknowledged at the execution of the Sale Agreement. Moreover, the witness testified that the balance of the purchase price was equally settled vide surrender of the Pili Pili Property. In particular, the witness averred that the surrender of the Pili Pili Property was to settle the balance of the purchase price.
 64. While still under cross-examination, the witness averred that the Pili Pili property indeed settled and liquidated the balance of the purchase price. In any event, the witness added that same was a Director



- and Shareholder of ABCOM Investments Limited . Nevertheless, the witness testified that same has since ceased to be a Shareholder and Director of ABCOM Investments Limited .
65. On further cross-examination, the witness testified that same was able to pay back/refund the sum of Kshs.10, 000, 000/= only. To this end, the witness referenced the RTGS document at page 35 of the 1st Defendant's List and Bundle of Documents. Nevertheless, the witness testified that the said document does not however contain any words like refund of the money.
 66. The witness further testified that the document at page 35 of the 1st Defendant's List and Bundle of Documents does not relate to the Plaintiffs herein.
 67. On further cross-examination, the witness averred that the Sale Agreement contained several clauses. In particular, the witness testified that there were clauses that related to the transfer of certain apartments unto him. However, the witness testified that the Plaintiffs herein did not transfer the Apartments in question.
 68. Moreover, it was the testimony of the witness that the Plaintiffs herein were ready and willing to perform their part of the bargain. Nevertheless, the witness testified that same (1st Defendant) was not able to perform his part of the obligation. In particular, the witness testified that same did not comply with the terms of the Sale Agreement.
 69. It was the further testimony of the witness that same did not transfer the suit Property to the Plaintiffs. In particular, the witness averred that the property was not transferred to the Plaintiffs because the Property was charged. Moreover, the witness added that same was unable to discharge the Property.
 70. The witness further testified that same had undertaken to avail the completion documents to the Purchasers. However, it was the testimony of the witness that same was unable to avail the completion documents, including the original discharge of the property to the Plaintiffs.
 71. While still under cross-examination, the witness averred that even though same (1st Defendant) did not avail the completion documents to the Plaintiffs, same however facilitate the occupation of the suit Property by the Plaintiffs. To this end, the Witness averred that the Plaintiffs indeed took possession of the Suit house.
 72. Additionally, it was the testimony of the witness that the suit Property has since been sold by the Bank. In this regard, the witness conceded that the suit Property was never transferred to and in favour of the Plaintiffs.
 73. On further cross-examination, the witness testified that the Plaintiffs duly paid/deposited the sum of Kshs.28, 000, 000/= only, into his account. Furthermore, the witness conceded that the monies in question were thereafter withdrawn from his account. In addition, it was the further testimony of the witness that the monies were deployed towards his (1st Defendant's) personal endeavours. Besides, the witness averred that the monies were not utilized towards redemption of the debt with the 2nd Defendant.
 74. While still under cross-examination, the witness averred that same is aware that he has filed Counter-Claims. In particular, the witness averred that the Counter-Claims has been filed on behalf of 7 people. Nevertheless, the witness testified that he has not filed any Authority or resolution[s] on behalf of the 2nd – 7th Counter-Claimers.
 75. It was the further testimony of the witness that same is aware that Highgrove Limited; Othaya Villas; and Abcom Investments Limited , were not Parties to the suit.



76. Additionally, the witness averred that the Co-operative Bank Account relating to the RTGS at page 35 of the 1st Defendant's List and Bundle of Documents relate[s] to the Account of M/s Kyalo Mbobu & Company Advocates. Furthermore, the witness averred that the sum of Kshs.10, 000, 000/= only, was deposited into the account of his Advocates. Nevertheless, the witness testified that same has not tendered any evidence to show that the money in question was paid out to and in favour of the Plaintiffs.
77. It was the further testimony of the witness that same is aware that ABCOM Investments Limited took out a facility from Fidelity Commercial Bank Limited. However, the witness averred that same is not aware whether ABCOM Investments Limited re-paid the entire facility.
78. Moreover, it was the testimony of the witness that same has not tendered evidence and/or breakdown to show the claims before the Court. Furthermore, the witness testified that the breakdown in support of his claims before the Court shall be availed by way of submissions.
79. It was the further testimony of the witness that same has not supplied details pertaining to the claims at the foot of paragraph 50 (i) of the Counter-Claim. Nevertheless, the witness testified that the monies at the foot of paragraph 50 of the Counter-Claim has not been paid.
80. On cross-examination by learned Counsel for the 2nd Defendant, the witness averred that the suit Property was charged to and in favour of the 2nd Defendant. Furthermore, the witness added that the suit Property was charged to secure a Banking facility of US Dollars 1, 000, 000 only.
81. It was the further testimony of the witness that the Charge in question was duly registered. In any event, the witness averred that at the time of entering into the Sale Agreement, the suit Property was lawfully charged to the 2nd Defendant. While still under cross-examination, the witness averred that the consent of the 2nd Defendant was not obtained. In addition, the witness averred that the Charge Document contained a clause which prohibited the sale of the suit property.
82. The witness further testified and conceded that by attempting to sell and dispose of the suit Property, same breached and violated the terms of the Charged Document.
83. On further cross-examination, the witness testified that the Plaintiffs herein were aware of the existence of the Charge over the suit property. In particular, the witness testified that the Plaintiffs herein are the ones who crafted the Sale Agreement.
84. Moreover, it was the testimony of the witness that the Plaintiffs paid the sum of Kshs.28, 000, 000/= only. Furthermore, the witness testified that the said monies were to be utilized as part payments towards the purchase of the suit Property. However, the witness conceded that the payments in question was not sufficient to clear the debt owing to the 2nd Defendant.
85. It was the further testimony of the witness that same has since refunded the sum of Kshs.28, 000, 000/= only, to the Plaintiffs. In any event, the witness averred that same executed warranties including an undertaking to indemnify the Plaintiffs in the event of any loss arising from the sale agreement. Furthermore, the witness averred that same has since indemnified the Plaintiffs as pertains to the loss suffered.
86. With foregoing testimony, the 1st Defendant's case was duly closed.
87. The 2nd Defendant's case revolves around the evidence of one witness, namely, Susan Wangoi Mungai. Same testified as DW2. It was the testimony of the witness that same is currently the Legal Manager of the 2nd Defendant. In this regard, the witness averred that same is therefore conversant with and knowledgeable of the facts of the matter.



88. It was the further testimony of the witness that same has since recorded a Witness Statement dated the 3rd November 2023 and which witness statement the witness sought to adopt and rely on as her evidence in chief. To this end, the witness statement was adopted and duly constituted as the evidence in chief.
89. Additionally, the witness referenced the List and Bundle of Documents dated the 14th day of October 2022, containing 17 Documents and which documents the witness sought to adopt and produce before the Court. There being no objection to the production of the said Documents, same were duly produced and admitted as Exhibits D1 – 17, respectively, on behalf of the 2nd Defendant.
90. Moreover, the witness adverted to the Statement of Defence dated the 22nd day of March 2022 and thereafter sought to adopt the contents thereof. Furthermore, the witness implored the court to find and hold that the Plaintiffs' claim as against the 2nd Defendant was pre-mature and misconceived.
91. On cross-examination by learned Counsel for the Plaintiff, the witness averred that the 1st Defendant was indeed a Customer of the 2nd Defendant's Bank. Furthermore, the witness testified that the 1st Defendant sought for and obtained a Banking Facility from the 2nd Defendant. In addition, the witness averred that the Loan facility was to be repaid by the 1st Defendant. Nevertheless, the witness acknowledged that the loan facility was outstanding as at the time when the Plaintiffs entered into the Sale Agreement.
92. Moreover, the witness testified that the Charge Document contained a clause which prohibited the sale of the suit Property without the Consent of the Bank. Nevertheless, the witness averred that same is aware that the 1st Defendant attempted to sell and dispose of the suit Property without the Consent of the Bank.
93. It was the further testimony of the witness that insofar as the Bank did not authorize the sale of the suit Property, the impugned sale of the suit Property was therefore illegal and unlawful. In addition, the witness averred that the Bank only discovered about the sale of the suit Property when the instant case was filed.
94. While still under cross-examination, the witness averred that the 1st Defendant could not have transferred the suit Property to the Plaintiffs prior to and/or before the Discharge of the Charge, which had been registered on behalf of the 2nd Defendant.
95. On cross-examination by learned Counsel for the 1st Defendant, the witness averred that the suit property was indeed charged to the 2nd Defendant. Furthermore, the witness added that the Banking facility remained in arrears and thereafter, the 2nd Defendant sold the suit Property in exercise of its statutory powers of sale.
96. With the foregoing testimony, the 2nd Defendant's case was closed.
97. The Plaintiffs filed written submissions dated the 26th of December 2024; and wherein the Plaintiffs have highlighted nine [9] legal issues for consideration. For coherence, the issues raised by the Plaintiffs are duly enumerated at the foot of paragraphs 26 and 27 of the written submissions.
98. The first Defendant filed written submissions dated the 4th of February 2025 and wherein same has raised a plethora of legal issues covering both the Plaintiffs' Claim and the Counter- Claim on behalf of all the Counter-Claimers. Furthermore, the 1st Defendant has contended that the 1st Defendant has duly proved his claims against the Plaintiffs herein. To this end, the 1st Defendant has implored the Court to grant the reliefs sought at the foot of the Counter-Claim dated the 22nd day of June 2019.



99. The second Defendant filed written submissions dated the 3rd of February 2025 and wherein same has highlighted two [2] key issues, namely; whether the Plaintiffs' suit disclose a reasonable cause of action as against the 2nd Defendant; and whether the reliefs sought as against the 2nd Defendant are legally tenable. In addition, the 2nd Defendant has also sought for costs of the suit.

ISSUES FOR DETERMINATION:

100. Having reviewed the pleadings filed by and/or on behalf of the Parties: the evidence tendered [both oral and documentary] and upon consideration of the written submissions filed by and on behalf of the Parties, I come to the conclusion that the following issues do emerge and are thus worthy of determination:
- i. Whether the Plaintiffs and the first defendant entered into a lawfully binding sale agreement dated the 14th of July 2016 as between themselves[s] or otherwise.
 - ii. Whether the sale agreement in terms of clause 1 was procured by fraud, misrepresentation, breach of professional Duty or otherwise.
 - iii. Whether the Plaintiffs performed their part of the bargain or otherwise.
 - iv. Whether the sale agreement dated 14th July 2016 was breeched and if so by whom?
 - v. Whether the Plaintiffs suit disclose a reasonable cause of action against the second Defendant [the Bank] or otherwise; and whether the Reliefs sought against the 2nd Defendant are legally tenable?
 - vi. Whether the counterclaim by [sic] the 2nd to 7th Defendant is legally tenable or otherwise.
 - vii. Whether the counterclaim by the 1st Defendant was proved or otherwise.
 - viii. What reliefs,[if any] ought to issue.

Analysis And Determination

Issue Number 1 Whether the Plaintiffs and the first defendant entered into a lawfully binding sale agreement dated the 14th of July 2016 as between themselves[s] or otherwise.

101. The Plaintiffs' herein entered into and executed a sale Agreement with the 1st Defendant. The sale Agreement touched on and/or concerned a property known as HOUSE NO. 12, HIGHGROVE situated on LR NO. 29998, LOWER KABETE ROAD [hereinafter referred to as the suit property]. At the time of entry into and execution of the said Sale Agreement, the suit property belonged to and was registered in the name of the 1st Defendant.
102. Be that as it may, it important to underscore that though the suit property was registered in the name of the 1st Defendant, the suit property was however charged to the 2nd Defendant to secure a Banking Facility [the facility] which the 2nd Defendant had granted to the 1st Defendant and his various Companies.
103. Notwithstanding the fact that the suit property was Charged to the 2nd Defendant, the 1st Defendant and the Plaintiffs herein proceeded to and entered into a Sale Agreement. However, it is worth recalling that neither the 1st Defendant nor the Plaintiffs sought for and obtained the Consent of the 2nd Defendant.



104. The effects and legal consequences of entering into and executing a Sale Agreement over the suit property without the Consent of the 2nd Defendant will be reverted to and addressed shortly. Nevertheless, it is important to state that the 1st Defendant remained as the Legal owner of the suit property subject to the existing Charge.
105. Insofar as the 1st Defendant remained as the legal owner of the suit property albeit subject to the Charge, the 1st Defendant proceeded to and entered into the Sale Agreement dated the 14th day of July 2016. For good measure, the 1st Defendant offered the suit property for sale and the Plaintiffs herein accepted the suit property.
106. To my mind both the 1st Defendant [as the Vendor] and the Plaintiffs as the Purchasers had a common intention as pertains to the nature of the contract that same were entering into. Quite clearly, there was an offer by the 1st Defendant to sell the suit property and which offer was duly accepted by the Plaintiffs.
107. Moreover, the 1st Defendant and the Plaintiffs herein also negotiated and agreed on the requisite purchase price [read, the consideration]. Notably, the Purchase price was agreed at in the sum of Kshs. 128,000,000/= only. Furthermore, the parties herein, namely the 1st Defendant and the Plaintiffs also agreed on a scheme of payment.
108. To start with, the 1st Defendant and the Plaintiffs agreed that there shall be a Deposit payment of Kshs. 28,000,000/= only payable to the 1st Defendant. To this end, the Sum of Kshs. 28,000,000/= was duly paid to the 1st Defendant vide two instalments. In any event, the payment of the sum of Kshs. 28,000,000/= only was duly acknowledged and confirmed by the 1st Defendant. In addition, there is no gainsaying that the payment of the said sum of Kshs. 28,000,000/= only was confirmed and acknowledged by the signing of the Sale Agreement.
109. The Parties herein also agreed that the balance of the Purchase price, namely, the sum of Kshs. 100,000,000/= only was to be liquidated by way of set-off whereby the Purchasers [Plaintiffs] were to relinquish their four two-bedroom apartment[s] in Pili-pili property. For good measure, the Pili-pili property was known as LR NO. 1870/IV/175.
110. Additionally, the 1st Defendant and the Plaintiffs herein agreed that the Pili-pili property was to be transferred to and in favour of ABCOM Investments Limited . In this regard, it is worthy to recall that though the Pili-pili property, namely, LR. No 1870/IV/175] was not registered in the name of the Plaintiffs, the Plaintiff herein testified and tendered evidence and demonstrated that same [Plaintiffs] had beneficial rights thereto.
111. Furthermore, evidence abound that the Plaintiffs herein procured the entry into and execution of the transfer Instruments between Shanzu Bazaar Limited and ABCOM Investment Limited. The transfer Instrument was dated the 6th day of July 2014. In addition, the Transfer Instrument was duly presented for registration and same was duly registered on the 17th day of July 2014.
112. Pertinently, the property namely, 1870/IV/175 was duly transferred and registered in the name of ABCOM Investment Limited. Furthermore, the fact that the Pili-pili property was transferred and registered in the name of ABCOM Investment Limited was not disputed. On the contrary, the transfer and registration of same was conceded to by the First Defendant.
113. On the other hand, it is also important to posit that upon the transfer and registration of the Pilipili property in favour of ABCOM Investment Limited, the title of the property was utilized/dployed to procure and obtain a Banking Facility in the sum of Kshs. 300,000,000/= only. To this end, it suffices to state that the Title was thereafter Charged to and in favour of M/S Fidelity Commercial Bank Limited.



114. From the foregoing position, what becomes apparent is that the 1st Defendant and the Plaintiffs had a common intention pertaining to the sale of the suit property. In this regard, there was an offer and which offer was duly accepted by the Plaintiffs. Furthermore, the parties agreed on the consideration payable.
115. Arising from the foregoing, it is my finding and holding that the parties had a common intention pertaining to the sale of the suit property and the intention was duly reduced into writing vide the Sale Agreement dated the 14th day of July 2016. To this end, it suffices to underscore that the Sale Agreement which was entered into and executed between the Plaintiffs on one hand and the 1st Defendant on the other hand captured the true intention of the Contracting Parties.
116. Simply put, all the requisite ingredients which underpin the existence of a binding Contract exists at the foot of the sale agreement dated the 14th day of July 2016. In any event, there is no gainsaying that the 1st Defendant and the Plaintiffs acted at arms- length. Furthermore, it is not lost on the Court that both parties exercised their freedom of Contract.
117. The Supreme Court of Kenya in the case of *Moi University v Zaippeline & another* (Petition 43 of 2018) [2022] KESC 29 (KLR) (17 June 2022) (Judgment), elaborated on the ingredients that underpin the existence of a valid and binding Contract.
118. For coherence, the Court stated thus:
37. It is trite that for any contract to be valid at law, it must meet certain elements commencing with offer and acceptance. The essential components of a contract as was observed by Harris JA in *Garvey v Richards* [2011] JMCA Civ 16 ought to ordinarily reflect the following principles: “ [10] It is a well-settled rule that an agreement is not binding as a contract unless it shows an intention by the parties to create a legal relationship. Generally, three basic rules underpin the formation of a contract, namely, an agreement, an intention to enter into contractual relationships and consideration. For a contract to be valid and enforceable all essential terms governing the relationship of the parties must be incorporated therein. The subject matter must be certain. There must be positive evidence that a contractual obligation, born out of an oral or written agreement is in existence.” In terms of the evidentiary value of the contract, section 97(1) of the *Evidence Act* which provides that: “When the terms of a contract or a grant or any other disposition of property have been reduced to the form of a document, and in all other cases which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property or such matter, except the <https://new.kenyalaw.org/akn/ke/judgment/kesc/2022/29/eng@2022-06-17> 15 document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act suffices.
119. In a nutshell, I come to the conclusion that the Sale Agreement entered into and executed by the 1st Defendant and the Plaintiffs herein, constitutes a lawful and binding Agreement as between the said Parties. To this end, the Sale Agreement culminates into a Contract inter-pates and same is thus binding and enforceable as against the Contracting parties.



Issue Number 2 Whether the sale agreement in terms of clause 1 was procured by fraud, misrepresentation, breach of professional Duty or otherwise.

120. The 1st Defendant herein contended that the Sale Agreement dated the 14th day of July 2016 was crafted and prepared by the Plaintiffs. Furthermore, it was contended that the Plaintiffs herein, who are Advocates of the High court of Kenya were themselves the Purchasers of the suit property.
121. Moreover, it was averred by the 1st Defendant that the Plaintiffs herein had previously acted for himself [1st Defendant] and various Companies associated with him. In addition, it was averred that the Plaintiffs herein had by virtue of acting for the 1st Defendants and the various Companies associated with him, procured and obtained knowledge of the 1st Defendant and his Companies.
122. It was further contended that though the Plaintiffs herein acted for both the Vendor [1st Defendant] and the Purchasers [Plaintiffs], the Plaintiffs did not advise the 1st Defendant of the likelihood of conflict of interest arising from the Sale Agreement.
123. Furthermore, it was contended that even though the 1st Defendant and the Plaintiffs entered into and executed the Sale Agreement, the entire consideration was not paid. In particular, it was contended that the consideration premised on the Sale and exchange of LR NO. 1870/IV/175 [Pilipili Project] collapsed and the Plaintiffs are duly aware of the said position.
124. In short, the 1st Defendant contended that the Sale Agreement dated the 14th day of July 2016 was procured by Fraud, misrepresentation, breach of professional duty and fiduciary obligations on the part of the Plaintiffs. To this end, the 1st Defendant has implored the Court to find and hold that the impugned Sale Agreement is vitiated and thus invalid.
125. On the other hand, the Plaintiffs have contended that the sale agreement under reference was entered into by the parties at arms-length and out of own volition. In addition, it has been contended that the 1st Defendant was at liberty to seek for and obtain a second legal opinion, if same [1st Defendant] deemed it appropriate.
126. Additionally, it has been contended that the 1st Defendant executed the Sale Agreement without any protest or at all. In this regard, it has been averred that the Sale Agreement reflects the conscious and deliberate intentions of the Contracting Parties.
127. Having carefully considered the rival positions taken by the 1st Defendant on one hand and the Plaintiffs on the other hand, I beg to address the issue herein in a four- pronged manner. Firstly, it is imperative to outline that the 1st Defendant was and remains an adult of sound Mind and Disposition. In this regard, there is no gainsaying that the 1st Defendant was privy to and knowledgeable of his Constitutional rights, including the right to choose own legal Counsel. [See Article 50 (2) (g) of [the Constitution](#), 2010].
128. Despite the fact that the 1st Defendant had the right and liberty to choose own Counsel during the preparation and engrossment of the Sale Agreement, the 1st Defendant remained content with the representation by the Plaintiffs Law Firm. In this regard, the 1st Defendant cannot now be heard to resile from the contents of the Sale Agreement merely because the Plaintiffs acted for both the Vendor and the Purchasers.
129. Secondly, it is important to underscore that the 1st Defendant herein was also at liberty to seek for timelines to procure and obtain a second legal opinion, prior to and before executing the Sale Agreement. For good measure, the 1st Defendant could have informed the Plaintiffs that same required to submit and/or subject the Sale Agreement for further legal review before execution.



130. Yet again, the 1st Defendant chose not to avail himself of the opportunity to procure and obtain a second legal opinion. In this regard, I am afraid that the 1st Defendant cannot now become wiser on the basis of hindsight.
131. Thirdly, there is no gainsaying that the 1st Defendant could very well have declined to sign the impugned Sale Agreement in exercise of his [1st Defendant] freedom of expression. No doubt, no one would have coerced same to sign and/or execute the sale agreement.
132. To my mind, the 1st Defendant entered into and executed the Sale Agreement voluntarily and with the full knowledge of the contents thereof. In this regard, I am afraid that the Plea of Fraud, misrepresentation, breach of professional duty and fiduciary obligations, have neither been established nor proven.
133. Moreover, it is common knowledge that whosoever impleads and raises the Plea of Fraud and misrepresentation is called upon to plead and particularize Fraud and thereafter to avail evidence to prove same. Furthermore, it is not lost on this Court that proof of Fraud required plausible, cogent and credible evidence. In addition, Fraud must also be proven to a standard beyond the balance of probabilities [See the case of Kuria Kiarie –VS Sammy Magera [2018] Eklr.] [See also Ardhi Highway Developers Limited –vs- West end Butchery Limited \$ 6 Others 2015] Eklr].
134. Besides, it is important to state that where parties enter into and execute contracts, it is not the business of the Court to re-write, alter or revise the terms of the contract for the parties. On the contrary, the obligation of the Court is to interpret and apply the terms of the contract as highlighted by the parties, unless Fraud, misrepresentation and/or duress is specifically pleaded and proved.
135. In the case of National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] KECA 362 (KLR), the Court of Appeal stated thus:

A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.

As was stated by Shah JA in the case of *Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000)* (unreported):

“It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain”.

136. Moreover, the legal position that Courts of Law do not exist to re-write agreements for the parties was reaffirmed in the case of Centurion Engineers & Builders Limited v Kenya Bureau of Standards (Civil Appeal E398 of 2021) [2023] KECA 1289 (KLR) (27 October 2023) (Judgment), where the Court stated as hereunder:

22. As this Court has severally stated, and now a longstanding principle of law, that parties to contract are bound by the terms and conditions thereof, and that it is not the business of courts to rewrite such contracts. In National Bank of Kenya Limited v Pipe Plastic Samkolit (K) Ltd [2002] 2 EA 503 [2011] eKLR at 507, this Court stated: “A court of law cannot rewrite a contract between parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded or proved.” See also Pius Kimaiyo Langat v Co-operative Bank of Kenya Limited [2017] eKLR.



23. In the House of Lord’s decision in *Brogden v Metropolitan Rly Co* [1876-77] LR 2 APP CAS 66, Lord Blackburn held as follows:“I have always believed the law to be this, that when an offer is made to another party and in that offer, there is a request express or implied that he must signify his acceptance by doing some particular thing, then as soon as he does that thing, he is bound.”
137. I beg to remind myself and by extension the Advocate[s] for the Parties of the legal position that where parties, the 1st Defendant and the Plaintiffs herein not excepted, have entered into a contract, such a contract ought to be interpreted by looking at the Contract itself in accordance with the prescription provided under the law. For good measure, contracts are to be interpreted in accordance with the four square rule, which rule prohibits parole [extraneous] evidence.
138. Pertinently, the provisions of Section 97 of the *Evidence act* Chapter 80 Laws of Kenya, are succinct and apt.
139. For good measures, the said provisions stipulate thus:
97. Written contracts and grants.
- (1) When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.
 - (2) Notwithstanding the provisions of subsection (1) of this section—
 - (a) wills admitted to probate in Kenya may be proved by the probate;
 - (b) when a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved.
 - (3) Subsection (1) of this section applies equally to cases in which contracts, grants or dispositions of property referred to are contained in one document, and to cases in which they are contained in more documents than one.
Where there are more originals than one, one original only need be proved.
 - (5) The statement, in any document whatever, of a fact other than the facts referred to in subsection (1) of this section, shall not preclude the admission of oral evidence as to the same fact.
140. Moreover, the manner in which a contract, Memorandum or Deed is to be interpreted and applied was highlighted by the Court of Appeal in the case of the Speaker of the County Assembly - Kisii County & 2 others v James Omariba Nyaoga [2015] KECA 52 (KLR), where the Court observed thus:
- The 1st appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the *Evidence Act*, Chapter 80 Laws of Kenya, which attempt we must reject. . This is not the first time we are doing so. In the case of *John Onyantha Zurwe v Oreti Atinda alias Olethi Atinda* [Kisumu Civil Appeal No. 217 of 2003] (UR), we cited, with approval, *Halisbury's Laws of England* 4th Edition vol. 12, on interpretation of deeds and non Testamentary Instruments paragraph,1478 as follows:-



" Extrinsic evidence generally excluded:

Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions ,drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the terms of the document.

Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."

141. My answer to issue number two [2] is to the effect that the 1st Defendant neither established nor proved the allegations of Fraud, misrepresentation, negligence and/or breach of professional duty. Instructively, the 1st Defendant was privy to the totality of the circumstances surrounding the pre-contract negotiations, the terms thereof and the execution.
142. In a nutshell, the Plea that the contract in question was vitiated by Fraud, including [sic] want of consideration, was neither proved nor established to the requisite standard.

Issue Number 3 Whether the Plaintiffs performed their part of the bargain or otherwise.

143. Following the agreement which was entered into and executed by the 1st Defendant and the Plaintiff[s] on the other hand, the Plaintiff[s] herein proceeded to and remitted the agreed deposit of Kshs.28, 000, 000/= only, to the 1st Defendant herein. For coherence, the sum of Kshs.5, 000, 000/= only was remitted directly to the account of the 1st Defendant held with the 2nd Defendant. At any rate, the remittance of the sum of Kshs.5, 000, 000/= was duly confirmed and acknowledged by the 1st Defendant.
144. Additionally, the Plaintiffs proceeded to and remitted the sum of Kshs.23, 000, 000/= only, to Sun Apartments Limited which is a Company associated with the 1st Defendant. Furthermore, it is imperative to state that the remittance of the sum of Kshs.23, 000, 000/= only, into the Account of Sun Apartment Limited was undertaken on the instruction[s] and advise of the 1st Defendant.
145. Other than the payment[s] of the sum of Kshs.28, 000, 000/= Only (details in terms of the preceding paragraph), the Parties herein also agreed that the balance of the purchase price, namely, Kshs.100, 000, 000/= only was to be liquidated vide set off. In this regard, the Plaintiffs entered into and executed a Sale and exchange Agreement which was entered into between the Plaintiffs on one hand and ABCOM Investments Limited on the other hand.
146. Suffice to posit that the Sale and exchange Agreement related to LR NO. 1870/IV/175 [hereinafter referred to as the Pili Pili Property]. Nevertheless, evidence was tendered that at the time of entry into and execution of the Sale and Exchange Agreement, the Property in question was registered in the name of M/s Shanzu Bazaar Limited and not the Plaintiffs herein.
147. Be that as it may, it is not lost on the Court that the Plaintiffs herein claimed that same held beneficial interests in respect of the Pili Pili Property. Moreover, there is no gainsaying that the Plaintiffs proceeded to and facilitated the transfer and registration of the Pili Pili Property to and in favour of ABCOM Investments Limited . To this end, it is appropriate to reference the Transfer Instrument dated 6th June 2014, but which was lodged for registration on the 17th day of July 2014.
148. It is equally important to recall that the Plaintiffs also tendered and produced before the Court a copy of the Certificate of Title in respect of LR NO. 1870/IV/175, showing the effective transfer and



registration of the property in the name of ABCOM Investments Limited . Furthermore, it is also evident that upon the transfer and registration of the property in favour of ABCOM Investments Limited , the property was thereafter charged to and in favour of Fidelity Commercial Bank Limited.

149. The bottom line is that the Plaintiffs duly paid to and in favour of the 1st Defendant the agreed purchase price/consideration. Besides, the payment of the purchase price vide transfer of Kshs.28, 000, 000/= on the instructions of the 1st Defendant and the transfer of LR NO. 1870/IV/175 in favour of ABCOM Investments Limited , is well documented.
150. In the premises, even though the 1st Defendant had contended that the Plaintiffs misrepresented facts pertaining to the ownership of LR NO. 1870/IV/175, there is no gainsaying that the Plaintiffs indeed facilitated the transfer and registration of the said property in accordance with the instructions of the 1st Defendant. At any rate, it is evident that the said property remains registered in the name of ABCOM Investments Limited to date.
151. In the premises, I come to the conclusion that the Plaintiffs duly complied with and fulfilled their part of the bargain as pertains to the Sale Agreement entered into and executed on the 14th day of July 2016.

Issue Number 4 Whether the sale agreement dated 14th July 2016 was breached and if so by whom

152. Pursuant to clause T of the Sale Agreement entered into and executed on the 14th day of July 2016, the 1st Defendant [who was the Vendor] and the Plaintiffs (who were the Purchasers) covenanted that same shall be bound by the terms of the contract. For ease of appreciation, Clause T states as hereunder

T: Intention to be bound.

Each of the Parties hereto agree and confirm for the purposes of the *Law of Contract Act*, (Chapter 23, Laws of Kenya), that it has executed this Agreement for Sale with the intention to bind itself to the contents thereof.

153. At the foot of the Sale Agreement, the 1st Defendant (who was the Vendor) covenanted to ensure that the suit Property shall be discharged and thereafter that the completion documents were to be handed over to the Plaintiffs. Furthermore, it is important to reiterate that the Sale Agreement spoke to the completion date which was indicated as 30th day of June 2016. Nevertheless, the indication of the completion date as 30th June 2016 appears to be an error [read, mistake] given that the Sale Agreement was entered into on the 14th day of July 2016.
154. Be that as it may, PW 1 explained that the indication of the completion date as 30th June 2016 was a typographical error. For good measure, the witness averred that the completion date was the 30th day of July 2016. However, it was stated that the 1st Defendant failed to comply with the terms of the Sale Agreement.
155. Moreover, it was averred that the suit Property remained charged to and in favour of the 2nd Defendant. In any event, it was posited that the Charge in respect of the suit Property was never discharged.
156. Other than the foregoing, it is common ground that the suit Property was never transferred and registered in the name of the Plaintiff[s]. In any event, the 2nd Defendant tendered evidence to demonstrate that the suit Property was subsequently sold and transferred to a Third Party in exercise of the 2nd Defendant's statutory power of sale. In this regard, there is no gainsaying that the suit Property was never registered in favour of the Plaintiffs.



157. To my mind, the 1st Defendant who had covenanted to facilitate the transfer and registration of the suit Property to and in favour of the Plaintiff did not comply with and/or perform his part of the bargain. In this regard, it is crystal clear that the Agreement was breached by the 1st Defendant.
158. Other than the foregoing, it is also important to underscore that even though the 1st Defendant had held himself out as being ready to transfer the suit Property to and in favour of the Plaintiffs, same (1st Defendant), failed to procure and obtain the consent of the 2nd Defendant in accordance with the provisions of Section 87 and 88(g) of the Land Act, 2012 (2016).
159. Suffice it to state that without procuring and obtaining the consent of the 2nd Defendant, the 1st Defendant herein could not have complied with the terms of the Sale Agreement. Instructively, the 2nd Defendant's rights to the suit Property superseded the rights of the 1st Defendant (See the provisions of Section 25 of the Land Registration Act, 2012 which underscores the priority of the Chargee's rights over a charged Property).
160. Additionally, it is also important to take cognizance of the decision in the case of Paul Gatete Wangai & 13 Others V Capital Realty Ltd & Another [2020] EKLRL, where the court considered the legal import and consequences of a charge.
161. For coherence the court stated as hereunder; -
- Although the Plaintiffs have a beneficial interest in the suit property having purchased the same, the said interest is subordinate to the Bank's interest as Chargee. A charge is an overriding interest within the meaning of section 28(g) of the Land Registration Act, which means that the rights and interest of a chargee in the charged property are rights in rem and therefore remain superior to any other interest even where there is a sale, transfer or any other disposition in the property.
97. It is trite that the bank being the holder of the charge would have first priority over the suit property as long as the land remains charged . In HCCC No. E035 of 2020: Monica Waruguru Kamau & Anor vs. Innercity Properties Ltd., Tuiyott, J. in dismissing the claim for an injunction quoted with approval the case of Innercity Properties Limited vs. Housing Finance & 3 others- HCCC No. E030 of 2020 where Majanja, J. held as follows: "The Interested Parties' case is that they purchased their apartments from the plaintiff and that they have paid the purchase price and are in possession thereof. Quite apart from the fact that they do not have any claim to be litigated against the defendants which would entitle them to an injunction, they have not shown that they have a legal claim against the bank. Since the bank is the chargee, it must give consent to the Plaintiff to sell the property. The Interested Parties have not shown that they received the bank's consent to purchase the apartments or that they paid the Bank any money. Since they have not established a legal claim against the bank, the court cannot issue an injunction in their favour..."
98. Just like in the above case, the Plaintiffs have not exhibited any evidence to show that the 2nd Defendant gave its consent before the Maisonettes standing on the suit property were sold to them.
162. From the foregoing analysis, what becomes apparent is that the Sale Agreement under reference was breached by the 1st Defendant. Notably, the 1st Defendant was not able to perform his part of the bargain obviously because the property was not available for sale without the concurrence of the 2nd Defendant.



Issue Number 5 Whether the Plaintiffs suit disclose a reasonable cause of action against the second Defendant [the Bank] or otherwise; and whether the Reliefs sought against the 2nd Defendant are legally tenable

163. The Plaintiffs herein have impleaded and/or joined the 2nd Defendant in the instant suit. Furthermore, the Plaintiffs have thereafter raised and highlighted a number of reliefs as against the 2nd Defendant. Pertinently, the Plaintiffs have sought for inter-alia for an order for specific performance, namely, an order to compel the 2nd Defendant to transfer the suit Property to the Plaintiffs.
164. Additionally, the Plaintiffs have also contended that the 2nd Defendant received the sum of Kshs.28, 000, 000/= on account of the 1st Defendant and Sun Apartments Limited, respectively, but thereafter failed to comply with and/or adhere to [sic] the express instructions given by the Plaintiffs. In particular, it was contended that the Plaintiffs clearly stated the purpose for which the payments were made.
165. Arising from the foregoing, the Plaintiffs have therefore sought for an order to compel the 2nd Defendant to refund unto the Plaintiffs the sum of Kshs.28, 000, 000/= only, which was paid on account of the 1st Defendant and Sun Apartments Limited, respectively.
166. Furthermore, the Plaintiffs have also contended that the 2nd Defendant breached their (Plaintiffs') legitimate expectation. In this regard, the Plaintiffs have thereafter sought for damages as against the 2nd Defendant.
167. The 2nd Defendant on its part contended that the suit Property which was allegedly being sold to the Plaintiffs was lawfully charged to the 2nd Defendant. Furthermore, it has been contended that neither the Plaintiffs nor the 1st Defendant procured the consent of the 2nd Defendant before entering into and/or executing the impugned Sale Agreement.
168. Additionally, the 2nd Defendant contended that the Plaintiffs herein had no Agreement with the 2nd Defendant or at all. In this regard, it was posited that in the absence of any Agreement between the Plaintiffs and the 2nd Defendant, the Plaintiffs cannot be heard to contend that the 2nd Defendant breached any contract or at all.
169. Other than the foregoing, it was submitted that the payments which were made to and/or on behalf of the 1st Defendant and Sun Apartments Limited, respectively, were not under the control of the 2nd Defendant. In any event, it was contended that the 2nd Defendant was not a signatory to the various accounts. Besides, it was also contended that the 2nd Defendant could not control the manner in which the 1st Defendant and Sun Apartments Limited, transact over the monies lawfully deposited in their accounts.
170. Arising from the foregoing, the 2nd Defendant contended that the suit against the 2nd Defendant was not only pre-mature and misconceived, but same does not disclose any reasonable cause of action.
171. Having considered the rival submissions by the Parties, I come to the conclusion that the issue herein can be disposed of in a three- pronged manner. Firstly, there is no gainsaying that the suit Property which was being sold to and in favour of the Plaintiffs was lawfully charged to the 2nd Defendant. Furthermore, it was conceded that at the time of the purported sale, the Banking facility secured vide Charge of the suit Property was still in debit balance.



172. Secondly, it is also worthy to recall that even though both the Plaintiffs and the 1st Defendant knew that the suit Property was duly charged to the 2nd Defendant, neither the Plaintiffs nor the 1st Defendant procured the consent of the 2nd Defendant or at all.
173. Suffice to underscore that where a property is charged, the Chargee of the Property, in this case, the 2nd Defendant accrues legal rights thereto subject only to the equity of redemption. In this regard, it is common ground that the Chargor cannot deal with the charged Property unless and until the prior consent of the Chargee is procured. [See the provisions of Section 89 of the [Land Act](#), 2012[2016].
174. Furthermore, the provisions of Sections 87 and 88(g) of the [Land Act](#), 2012 (2016) are equally succinct, apt and imperative. For ease of appreciation, it is apposite to reproduce the said provisions;
175. Same are reproduced as hereunder;

Section 87 of the [Land Act](#):

“If a charge contains a condition, express or implied that chargee prohibits the chargor from, transferring, assigning, leasing, or in the case of a lease, subleasing the land, without the consent of the chargee, no transfer, assignment, lease or sublease shall be registered until the written consent of the chargee has been produced to the Registrar.”

Section 88 of the [Land Act](#)

Implied covenant by the charger

- (1) There shall be implied in every charge covenants by the Chargor with the chargee binding the Chargor—
- (a) to pay the principal money on the day appointed in the charge agreement, and, so long as any of the principal money or any part thereof remains unpaid, to pay interest on the money thereon or on so much of the money that for the time being remains unpaid at the rate and on the days and in the manner 2012 Land No. 6 specified in charge agreement;
 - (b) to pay all rates, charges, rent, taxes and other outgoings that are at all times payable in respect of the charged land;
 - (c) to repair and keep in repair all buildings and other improvements upon the charged land or to permit the chargee or chargee’s agent to enter the land and examine the state and condition of such buildings and improvements at after a seven days notice to the chargor until the charge is discharged;
 - (d) to ensure by insurance or any other means that may be prescribed or which are appropriate, that resources will be available to make good any loss or damage caused by fire to any building on the land, and where insurance is taken out, it is done so in the joint names of the chargor and chargee with insurers approved by the chargee and to the full value of all the buildings;
 - (e) in the case of a charge of land used for agricultural purposes, to use the land in a sustainable manner in accordance with the principles and any conditions subject to which the land or lease under which the land is held, and in compliance with all written laws and lawful orders applicable to that use of the land;



- (f) not to lease or sublease the charged land or any part of it for any period longer than a year without the previous consent in writing of the chargee, which consent shall not be unreasonably withheld;
- (g) not to transfer or assign the land or lease or part of it without the previous consent in writing of the chargee which consent shall not be unreasonably withheld;
- (h) in the case of a charge of a lease, during the continuance of the charge, to pay, perform and observe the rent, covenants and conditions contained in or implied by and in the lease contained and implied and on the part of the lessee to be paid, performed and observed and to keep the chargee indemnified against all proceedings, expenses and claims on account of non-payment any part of the rent or part of it or the breach or non-observance of any covenants and conditions referred to above, and, if the lessee has an enforceable right to renew the lease, to renew it; 61 No. 6 Land 2012
- (i) if the charge is a second or subsequent charge, that the chargor will pay the interest from time to time accruing on each prior charge when it becomes due and will at the proper time repay the principal money or part of it due on each prior charge at the proper time;
- (j) if the chargor fails to comply with any of the covenants implied by paragraphs (b), (c), (d), (e) and (h) of this subsection, that the chargee may spend any money which is reasonably necessary to remedy the breach and may add the amount so spent to the principal money and that amount shall be deemed for all purposes to be a part of the principal money secured by the charge.

176. To the extent that the prior written consent of the 2nd Defendant (the Chargee) was neither sought nor obtained, it means that the Sale Agreement that was being entered between the 1st Defendant and the Plaintiffs was illegal and unenforceable as against the 2nd Defendant. In this respect, there is no gainsaying that the Sale Agreement that underpins the claims against the 2nd Defendant does not disclose a cause of action. [See the holding of the Court of Appeal in the case of D.T Dobie [K] Limited versus Joseph Mbaru Muchina [1982] eKLR]

177. Secondly, it is worthy to recall that the 2nd Defendant was not a Party to the Sale Agreement which underpins the suit beforehand. Insofar as the 2nd Defendant was not a Party to the said Agreement, a question does arise as to whether the terms of the said Agreement can be enforced against a person who was not party to the Agreement.

178. Suffice to underscore that an Agreement can only be enforced against the Parties thereto and not otherwise. For good measure the doctrine of privity of contract underscores that only parties to the Agreement are bound by the terms thereof; and not otherwise.

179. In the case of Savings And Loan (k) Limited –vs- Kanyenje Karangaita Gakombe Limited & Another (2015) eKLR, the Court of Appeal held and stated thus:

In its classical rendering, the doctrine of privity of contract postulates that a contract cannot confer rights or impose obligations on any person other than the parties to the contract. Accordingly, a contract cannot be enforced either by or against a third party.

In *Dunlop Pneumatic Tyre Co Ltd V Selfridge & CO LTD* [1915] AC 847, Lord Haldane, LC rendered the principle thus:

“My Lords, in the law of England certain principles are fundamental. One is that only a person who is a party to a contract can sue on it.”



In this jurisdiction that proposition has been affirmed in a line of decisions of this Court, among them *AGricultural Finance Corporation V Lengetia Ltd* (supra), *Kenya National Capital Corporation Ltd V Albert Mario Cordeiro & Another* (supra) And *William Muthee Muthami V Bank Of Baroda*, (supra).

Thus in *Agricultural Finance Corporation V Lengetia LTD* (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:

“As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may be considered a party to the consideration does not entitle him to sue upon the contract.”

180. Other than the foregoing, it is also worthy to recall that the Plaintiffs are seeking for an order of specific performance. What I hear the Plaintiffs to be saying is that same require the 2nd Defendant [the Bank] to facilitate the transfer of the charged property unto them.

181. Nevertheless, it is not lost on the court that an order for specific performance is an equitable relief which can only accrue if and only if the claimant, the Plaintiffs not excepted, can prove the existence of a valid contract and not otherwise. Furthermore, it is also worthy to recall that even where there is proof of a valid contract, an order for specific performance must issue sparingly and not as a matter of right.

182. The law as pertains to specific performance and the ingredients that must be proven by any claimant was elaborated in the case of *Reliable Electrical Engineers Limited –vs- Mantrac (k) Limited* (2006) eKLR, where the Court stated as hereunder

Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles.

The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

183. Finally, and before departing from the issue herein, it is imperative to highlight that the Plaintiffs conceded and acknowledged that the suit property, which underpins the Claim for Specific performance was duly sold by the 2nd Defendant. In this regard, it then means that the Order for Specific Performance stands defeated on account of the alienation of the suit property.

184. Furthermore, the fact that the suit property was indeed sold was highlighted by DW2, namely, Susan Mungai. Suffice it to reproduce the pertinent aspect[s] of the evidence of DW2.



185. While under cross examination by Learned Counsel for the 1st Defendant, DW2 stated as hereunder:
- “I do confirm that the suit property was Charged to the 2nd Defendant. The suit property was later sold and disposed of by the Bank. The property has since been sold. The Bank sold the property in exercise of its Statutory Powers of Sale.
186. From the foregoing, there is no gainsaying that the Prayer for Specific Performance is not only misconceived but legally untenable.
187. In the premises, I come to the conclusion that the Plaintiffs’ suit as against the 2nd Defendant is not only misconceived and legally untenable, but same also does not disclose a reasonable cause of action. Furthermore, it is also not lost on this Court that the various reliefs that have been sought are also not capable of being granted as against the 2nd Defendant.

Issue Number 6 Whether the counterclaim by [sic] the 2nd to 7th Defendant is legally tenable or otherwise.

188. The Plaintiffs filed the instant suit as against the 1st Defendant. For good measure, the 1st Defendant was the only Defendant at the onset. Nevertheless, the Plaintiffs thereafter filed an amended Plaint dated the 17th day of August 2022 and wherein the Plaintiffs introduced the 2nd Defendant.
189. Arising from the foregoing, there is no gainsaying that the suit beforehand only impleaded two Defendants, namely, Harish Kumar Kanabar [1st Defendant] and NCBA Bank PLC [2nd Defendant]. In this regard, it is common ground that only the said Defendants could, where appropriate, file and/or mount a Counter-claim.
190. At any rate, it is worthy to recall that the 1st Defendant has indeed mounted a Counter-claim on his own behalf. For good measure, the competence or otherwise of the 1st Defendant’s Counter-claim shall be addressed presently. However, the issue beforehand touches on and concerns the competence or otherwise of the Counter-claim filed on behalf of [sic] the 2nd – the 7th Counter-Claimer[s].
191. To start with, it is important to posit that the 2nd – 7th Counter-claimers were never Defendants to the instant suit. For good measure, I have highlighted the details as to who were the Defendants impleaded at the foot of the amended Plaint.
192. Insofar as the 2nd – 7th Counter-claimers were not Defendants at the foot of the amended Plaint, it is common knowledge that same could not therefore purport to file and/or mount any Counter-claim in opposition to the Plaintiffs’ suit. To this end, it suffices to take cognizance of the provisions of Order 7 Rule 3 of the Civil Procedure Rules, 2010.
193. For ease of appreciation, the Provisions of Order 7 Rule 3 of the Civil Procedure Rules [supra] states as hereunder:
3. Set-off and counterclaim [Order 7, rule 3]
- A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot



be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.

194. My reading of the provisions of Order 7 Rule 3 of the Civil Procedure Rules [which has been reproduced in the preceding paragraph] drives me to the conclusion that it is only a Defendant who has been impleaded in a particular suit, who can file a Statement of Defence and Counter-claim: or set-off.
195. To my mind, a party who had not been impleaded as a Defendant to the suit, cannot purport to file a Counter-claim, whether on his/her own account or with others. In this regard, I am afraid that the 2nd – 7th Counter-claimers, had not capacity to purport to join the 1st Defendant in bringing a Counter-claim.
196. Simply put, the Document christened as a Counter-claim on behalf of the 2nd – 7th Counter-claimers, [who were never Defendant[s] and neither sought to be joined as Defendants] is unknown to law.
197. The Court of Appeal in the case of County Government of Kilifi v Mombasa Cement Limited [2017] KECA 633 (KLR) dealt with the question of who can mount a Counter-claim. The Court stated thus:

Counterclaims are provided for under order 7 rule 3 of the Civil Procedure Rules which is in terms:-

“A defendant in a suit may set-off, or set-up by way of counterclaim against the claims of the plaintiff, any right or claim, whether such set-off or counterclaim sound in damages or not, and whether it is for a liquidated or unliquidated amount, and such set-off or counterclaim shall have the same effect as a cross-suit, so as to enable the court to pronounce a final judgment in the same suit, both on the original and on the cross-claim; but the Court may on the application of the plaintiff before trial, if in the opinion of the court such set-off or counterclaim cannot be conveniently disposed of in the pending suit, or ought not to be allowed, refuse permission to defendant to avail himself thereof.” [Emphasis added]

In our view, a plain reading of the above provision allows or gives a defendant in a suit permission or a carte blanche, to raise a counterclaim based on any right or claim against a plaintiff. That provision says nothing to the effect that such counterclaim must be related to the original subject matter of the suit and neither does it attract such an implication. That position is supported by Halsbury’s Laws of England, Fourth Edition, vol. 42, which defines a counterclaim as follows:-

“When A has a claim of any kind against B and brings an action to enforce that claim, and B has a cross-claim of any kind against A which by law he is entitled to raise and have disposed of in the action brought by A, then B is said to have a right of counterclaim.”[Emphasis added].

Further that,

“ Any claim in respect of which the defendant could bring an independent action against the plaintiff may be enforced by counterclaim subject only to the limitation that it must be such as can conveniently be tried with the plaintiff’s claim. Thus not only claims for money but also other claims such as a claim for an injunction or for specific performance or for a declaration may be the subject of a counterclaim.”

198. The identity of the person who is[are] mandated and/or authorized to file a Counter-claim; cross Petition or otherwise was also highlighted by the Supreme Court of Kenya [the apex Court] in the case



of Senate & 3 others v Speaker of the National Assembly & 10 others (Petition 19 (E027) of 2021) [2025] KESC 11 (KLR) (21 March 2025) (Judgment); where the Court stated thus;

Rule 15(3) of the Mutunga Rules provides that in reply to a petition, a respondent may file a cross petition. The Black's Law Dictionary (11th ed) Bryan A Garner defines a cross petition as, "a claim asserted by a defendant ... for a matter relating to the subject of the action. Also known as a cross-complaint." This definition underscores two critical elements: (i) the party asserting the claim is a defendant/respondent; and (ii) the claim must relate to the subject of the action at hand. [Emphasis supplied].

69. This requirement that a cross petition should relate to the subject of the action provides a crucial interpretative foundation for determining this question. This Court in Independent Electoral and Boundaries Commission vs. Chege [2023] KESC 74 (KLR) (IEBC Case) stated as follows at paragraph 69: "..., there is a difference between a cross appeal and a cross petition. A cross appeal is an action by a respondent, who intends to counter an appellant's cause in an appeal with the view of obtaining certain relief(s) from the court. A cross petition on the other hand, is an action by a defendant in first-instance claims, intending to counter the claim of a petitioner with the view of obtaining certain remedies." [Emphasis added]
70. From the foregoing, it becomes evident that a cross petition is designed specifically to counter the claims made by the petitioner in a petition. It is fundamentally reactive in nature, and meant to answer or address the issues raised in the petitioner's claim, rather than to introduce entirely new, unrelated issues or questions. In practical terms, this means that a cross petition must remain tethered to the same set of facts and questions of law presented in the original petition otherwise a respondent is supposed to file another suit where those different matters can be interrogated. A respondent should not use a cross petition as a vehicle for raising unrelated claims or expanding the scope of the dispute beyond what has been framed by the petitioner. Therefore, the essence of a cross petition is that it serves as a counter to the petition, addresses the claims and seeks remedies directly related to the issues raised by a petitioner.
199. Flowing from the decisions [supra], there is no gainsaying that the Counter-claim purportedly mounted by and on behalf of the 2nd – 7th Counter-claimers, is not only premature and misconceived but same is also legally untenable.
200. The second perspective that arises and flows from the purported Counter-claim[s] on behalf of the 2nd – 7th Counter-claimers, related to whether or not the said Counter-claims were duly verified by the requisite verifying Affidavit[s] in accordance with the law or at all.
201. To start with, it is common ground that whosoever wishes to mount and/or lodge a Counter-claim, is obligated to file the requisite Verifying Affidavit in accordance with the provisions of Order 7 Rule 5 of the Civil Procedure Rules, 2010 as read together with the provisions of Order 4 Rule 1 (2) of the Civil Procedure Rules, 2010.
202. The provisions of Order 7 Rule 5 of the Civil Procedure rules, where pertinent provides as hereunder:
 5. Documents to accompany defence or counterclaim
[Order 7, rule 5]

The defence and counterclaim filed under rule 1 and 2 shall be accompanied by—

 - (a) an affidavit under Order 4 rule 1(2) where there is a counterclaim;
 - (b) a list of witnesses to be called at the trial;



- (c) written statements signed by the witnesses except expert witnesses; and
 - (d) copies of documents to be relied on at the trial.
- Provided that statements under sub-rule
- (c) may with leave of the court be furnished at least fifteen days prior to the trial conference under Order 11. .

112. Moreover, the provisions of Order 4 Rule 1 (2) of the Civil Procedure Rules, 2010; which have been referenced [supra] states thus:

1. Particulars of plaint [Order 4, rule 1]

(1) The plaint shall contain the following particulars—

- (a) the name of the court in which the suit is brought;
- (b) the name, description and place of residence of the plaintiff, and an address for service;
- (c) the name, description and place of residence of the defendant, so far as they can be ascertained;
- (d) the place where the cause of action arose;
- (e) where the plaintiff or defendant is a minor or person of unsound mind, a statement to that effect; and
- (f) an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaint.

(2) The plaint shall be accompanied by an affidavit sworn by the plaintiff verifying the correctness of the averments contained in rule 1(1)(f) above.

203. .Did the 2nd – 7th Counter-claimers comply with the peremptory provisions of Order 7 Rule 5 of the Civil Procedure Rules, 2010; as read together with the provisions of Order 4 Rule 1 (2) of the Civil Procedure Rules, 2010, or otherwise?

204. Without belabouring the point, the answer to the foregoing question is in the negative. For good measure, the only [sic] verifying Affidavit that has been filed and annexed to the Counter-claim beforehand is the Verifying Affidavit sworn by Harish Kumar Kanabar on the 22nd day of June 2019. In any event, the said verifying Affidavit relates to the verification of what the Deponent references as (sic) a Plaint.

205. Moreover, it is also important to underscore that the verifying Affidavit sworn on the 22nd day of June 2019, does not show that same is being [or has been] made on behalf of the 2nd – 7th Counter-claimers.

206. From the foregoing, it is crystal clear that the Counter-claim, purportedly filed by and on behalf of the 2nd – 7th Counter-claimers have not been duly verified in the manner stipulated under the law. In this regard, it is therefore common ground that even if the purported Counter-claim, were truly Counter-



claims in accordance with the law [which is not the case], same are fatally deficient, defective and thus invalid for all intents and purposes.

207. The Court of Appeal in the case of *Research International East Africa Ltd V Julius Arisi & 213 Others* [2007] KECA 506 (KLR) considered the legal implications [consequences] of the failure to file the requisite verifying Affidavit.
208. The Court stated and held thus:

In our view, the true construction of rule 1 (2) of Order VII Civil Procedure Rules is that even in cases where there are numerous plaintiffs, each plaintiff is required to verify the correctness of the averments by a verifying affidavit unless and until he expressly authorizes any of the co-plaintiffs or some of them in writing, and, files such authority in the case, to file a verifying affidavit on his behalf in which case such a verifying affidavit would be sufficient compliance with the rule. Moreover, the *Grace Ndegwa's* case (supra) and rule 12(1) of Order I CP Rules leave no doubt that one or more of the co-plaintiffs can validly file an affidavit verifying the correctness of the averments of the plaint on behalf of the other co-Plaintiffs with their authority in writing.

Having come to the conclusion that the verifying affidavit of Julius Arisi was filed without authority of the other 213 plaintiffs, it follows that the other 213 respondents have not complied with mandatory provisions of rule 1 (2) of Order VII Civil Procedure Rules and that their suit was liable to be struck out by the superior court under rule 1 (3) of Order VII CP Rules.

The superior court however had a discretion. It had jurisdiction instead of striking out the plaint to make any other appropriate orders such as giving the plaintiffs another opportunity to comply with the rule.

209. Additionally, it is also worthy to recall that the 3rd - 7th Counter-claimers, are Limited Liability Companies. In this regard, it is imperative to observe that the said Companies could only file and/or lodge Counter-claims [if any] upon procuring the Resolutions duly signed under Seal. Furthermore, the Resolutions, if any, would be filed with the Court alongside the pleadings where appropriate.
210. Nevertheless, it is evident that no Resolutions were ever filed by and on behalf of the 3rd - 7th Counter-claimers. In this regard, what comes out is that the names of the 3rd - 7th Counter-claimers have been used and/or deployed at the foot of (sic) the Counter-claim, albeit without the requisite Resolutions. Yet again, the impugned Counter-claim is premature and unlawful.
211. As pertains to the requirements that the 3rd - 7th Counter-claimers ought to have procured and file the requisite Resolution [if at all], it is imperative to reference the holding of the Supreme court in the case of *Fanikiwa Limited & 3 others v Sirikwa Squatters Group & 17 others* (Petition 32 (E036), 35 (E038) & 36 (E039) of 2022 (Consolidated)) [2023] KESC 105 (KLR) (15 December 2023) (Judgment), where the Court stated thus

An additional reason as to why the two superior courts below ought to have accorded little weight to the letter from JP Hulme is that it is not clear whether the said JP Hulme had the sanction, competence or authority of Lonrho Agribusiness, a registered limited liability company to bind the company. In our view, there was insufficient evidence to support the claim that Lonrho Agribusiness intended to surrender the suit properties for the allocation to Sirikwa. This is a serious question that the two superior courts below did not address their minds to. It is elementary principle of company law that a company as a distinct legal



entity from its promoters, directors or employees can only act through its organs and make decisions by resolutions. No resolution of the company's board supporting the purported purpose for the surrender was presented in evidence.

212. In the absence of the requisite Resolution, it is my finding and holding that the purported Counter-claim by and on behalf of the 3rd – 7th Counter-claimers is equally premature and stillborn.
213. It is also important to recall that when DW1 was cross examined on the question of authority to file the Counter-claim on behalf of the 2nd – 7th Counter-Claimers, same stated that no authority had been procured and/or obtained on behalf of the said Counter-Claimers.
214. For ease of appreciation, it is appropriate to reproduce the salient aspect[s] of the testimony of DW1 while under cross examination by Learned Counsel for the Plaintiffs. DW1 stated thus:
- “I am aware that I have filed the Counter-claim. The Counter-claim has been filed on behalf of 7 people. I have not availed authority on behalf of Kirit Kanabar. I have filed the counter-claim on behalf of Limuru Hills Limited. I have not filed any authority on behalf of Limuru Hills Limited. I have not filed any authority on behalf of Highgrove Limited. I have not filed any authority on behalf of Othaya Villas Limited. I have not filed any authority on behalf of ABCOM Investments Limited . I have not filed any authority on behalf of the Parties shown in the Counter-claim.
215. While still under cross-examination by the Learned Counsel for the Plaintiffs, DW1 stated thus:
- “I wish to state that Highgrove Limited, Othaya Villas Limited, ABCOm Investment Limited are not parties to the instant suit. “
216. Suffice it to state, that DW1 conceded that the Counter-claims on behalf of the 2nd – 7th Counter-claimers, were bereft of the requisite verifying Affidavits and Resolutions. In this regard, there is no gainsaying that the purported Counter-claims are illegal and invalid.
217. Other than the question of competence of the Counter-claim on behalf of the 2nd – 7th Counter-claimers, it is also important to observe that the only witness who testified on behalf of the said Counter-claimers was DW1. However, it is not lost on this Court that DW1 did not tender and/or produce any evidence that same was authorized by the rest of the Counter-claimers to testify on their behalf.
218. Arising from the foregoing, it then means that the Counter-claims on behalf of the 2nd – 7th Counter-claimers, were equally not proved in accordance with the stipulations of the law. For good measure, it is common ground that the person who lays the claim or makes the affirmation, is obligated to discharge the burden of proof. (See Sections 107, 108 and 109 of the *Evidence Act*, Chapter 80 Laws of Kenya.)
219. Form the foregoing analysis, I come to the conclusion that the Counter-claim[s] by and on behalf of the 2nd – 7th Counter-claimers are premature, misconceived and invalid. Furthermore, it is also common ground that the Claims thereunder were not proven in the manner envisaged under the law.

Issue Number 7 Whether the counterclaim by the 1st Defendant was proved or otherwise.

220. Other than the Counter-claims by the 2nd – 7th Counter-claimers, which has been discussed in the preceding paragraphs, it is worthy to recall that the 1st Defendant [namely, Harish Kumar Kanabar] also filed a Counter-claim and wherein same sought diverse reliefs. In this regard, I beg to address the competence and merit [if any] of the said Counter-claim.



221. To start with, the Counter-claim by the 1st Defendant is purported to be verified by the Verifying Affidavit sworn on the 22nd day of June 2019. The said verifying Affidavit has been sworn by Harish Kumar Kanabar. It is important to reproduce the contents of the said verifying Affidavit.

222. The contents of the said Verifying Affidavit are reproduced as hereunder:

“I, Harish Kanabar of P. O. Box 10712 – 00100 Nairobi, make Oath solemnly make oath and state as follows:

1. That I am the Manager of the Plaintiff herein duly authorized to swear this Affidavit on its behalf.
2. That I am well versed with all facts and circumstances pertaining to this case.
3. That I hereby verify the averments contained in the Plaint herein to be correct.
4. That what is deponed to herein is true to the best of my knowledge, save as to matters deponed to on information and belief the sources and grounds whereof are specified.

223. The foregoing reproduction reflects the contents of (sic) the verifying Affidavit that has accompanied the Counter-claim. The question that does arise is whether the Verifying Affidavit relates to the Counter-claim or to the Plaint. To make the matters worse, the heading of the verifying Affidavit reflects Azim Taibjee And Madhav Bhalla, as the Plaintiffs while Harish Kumar Kanabar, is reflected as the Defendant.

224. On the other hand, the verifying Affidavit speaks to the Deponent being the Manager of the Plaintiff. Yet again, it is not clear which Plaintiff is being referenced. To my mind, the verifying Affidavit sworn on the 22nd day of June 2019, does not relate to the Counter-claim by the 1st Defendant/Counter-claimant. In any event, there is no gainsaying that no attempt was made by the 1st Defendant to file a complaint verifying Affidavit.

225. Arising from the foregoing, I come to the conclusion that even the Counter-claim by the 1st Defendant/Counter-claimant is not verified by a competent verifying Affidavit. In this regard, I come to the same conclusion that the Counter-claim on behalf of the 1st Defendant is equally premature, misconceived and legally untenable.

226. It is imperative to observe that parties, the 1st Defendant not excepted, are obligated to comply with and/or abide by the Rules of Procedure and the prescriptions of the law. In any event, where a party is not able to comply, it behoves the party to tender sufficient explanation as pertains to the failure and/or neglect to comply.

227. Simply put, a party cannot just disregard the Rules of Procedure with licentious abandon. Time is ripe for parties to comply with the law. Failure to do so, the non-compliant party, the First Defendant not excepted, must suffer the consequences prescribed under the law.

228. In this regard, I am guided by the ratio in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 others* [2013] eKLR where the Court of Appeal stated thus:

A five judge bench of this Court expressed itself very succinctly but a few days ago on this precise point is the case of *Mumo Matemu Vs. Trusted Society Of Human Rights Alliance & 5 Others* Civil Appeal No. 290 of 2012 as follows;



“In our view it is a misconception to claim, as it has been in recent times with increased frequency, that compliance with rules of procedure is antithetical to Article 159 of the Constitution and the overriding objective principle under Section 1A and 1B of the Civil Procedure Act (Cap 21) and Section 3A and 3B of the Appellate Jurisdiction Act (Cap 9). Procedure is also a handmaiden of just determination of cases.”

229. Other than the question of competence of the Counter-claim on behalf of the 1st Defendant/Counter-claimant, it is also important to recall that the Counter-claim under reference has sought various reliefs. In this regard, it is thus appropriate to interrogate the various reliefs that have been sought by the 1st Defendant/Counter-claimant.
230. First and foremost, the 1st Defendant/Counter-claimant has sought for a declaration that the Sale Agreement entered into on the 2nd day of April 2014 in respect of the LR NO. 1870/IV/175, Pilipili Way, Nairobi, was fraudulent for want of consideration. However, it is common ground that the said Sale Agreement was never entered into with the 1st Defendant. Instructively, the said Sale Agreement was between the Plaintiffs herein and ABCOM Investment Limited.
231. Owing to the foregoing, it is common ground that the 1st Defendant herein, who was not privy to the said Sale Agreement cannot seek any reliefs arising therefrom and/or thereunder. [See the Doctrine of Privity of Contract]. [See also the Decision in the case of AFC –vs- Lengetia Limited [1985] eKLR.
232. The second relief that has been sought for by and at the instance of the 1st Defendant relates to a declaration that the 2nd Agreement pertaining to the sale of Highgrove House No. 12, was procured vide Fraud; breach of Fiduciary obligation and professional duty by the Plaintiffs.
233. However, while under cross examination by the Learned Counsel for the Plaintiffs, the Witness [DW1] actually confirmed that the Sale Agreement dated the 14th day of July 2016 was entered into freely and at arms-length.
234. To appreciate the evidence of DW1, it is imperative to reproduce certain salient aspects thereof. “
235. The witness [DW1] stated as hereunder:
- “I do remember the sale agreement dated the 14th July 2016. The sale agreement was between the Plaintiffs and myself. I do confirm that I entered into and executed the sale agreement. I do confirm that I signed the sale agreement. The sale agreement was also signed by the Plaintiffs. I do confirm that my spouse also signed the said sale agreement. The sale agreement was also signed and sealed by two Directors of ABCOM Investments Limited. I do confirm that the sale agreement was confirmed by the Company.
236. While still under cross examination by Learned Counsel for the Plaintiffs, DW1 testified thus:
- “I do confirm that the Plaintiffs herein paid the Sum of Kshs. 28,000,000/= on account of the Sale agreement. The payment was duly acknowledged. I do confirm that the balance of the Purchase price was settled vide Surrender of the Pilipili Project. The surrender of the Pilipili Project was to settle the balance of the purchase price. The Pilipili Project settled the balance of the Purchase price.
237. What I hear the witness [DW1] to be stating is that the Sale Agreement under reference was entered into and executed freely by himself. Furthermore, I hear the witness to be confirming that the Purchase price was indeed paid and/or settled.



238. To my mind, I am unable to discern any evidence of fraud, breach of fiduciary obligations and breach of professional duty. In any event, there is no gainsaying that proof of fraud required plausible, cogent and credible evidence. Moreover, fraud must be proven to the intermediate standard.
239. Next is the claim for declaration that the possession and occupation of House NO. 12 Highgrove was illegal, null and void. In this regard, it is imperative to take cognizance that the handover of House No. 12 Highgrove Villas was part of the terms of the Sale Agreement. In particular, Clause D [d] is imperative.
240. Same stated thus.

“The Purchasers shall be entitled to possession of the property upon execution of this agreement and to receipt of the rents and profits of the property thereon.

241. From the terms of the Clause which has been reproduced in the preceding paragraph, what becomes apparent is that the 1st Defendant covenanted to surrender possession of the suit property to the Plaintiffs upon the execution of the Sale Agreement. I am afraid that the plea by the 1st Defendant that the entry upon and the taking of possession was illegal, is misconceived.
242. Moreover, the 1st Defendant has also sought for payment of mesne profit in respect of House No. 12 Highgrove. Nevertheless, even though the 1st Defendant has sought for payment of mesne profits weft 14th day July 2016, it is evident that the claim on account of mesne profits has neither been pleaded nor particularized.
243. At any rate, there is no gainsaying that a claim for mesne profit is akin to a claim for Special Damages. Such a claim must not only be pleaded and particularized, but same must also be strictly [specifically] proved.
244. The law as pertains to the pleading and proof of a claim for mense profits was elaborated upon in the case of Christine Nyanchama Oanda v Catholic Diocese of Homa Bay Registered Trustees [2020] KECA 536 (KLR), where the Court stated thus:

It is settled law that where a party claims for both mesne profits and damages for trespass, the court can only grant one and not both. Mesne Profits is defined as the profit of an estate received by a tenant in wrongful possession between the dates when he entered the suit property and when he leaves (See: Black’s Law Dictionary 9th edition). Mesne Profits must be pleaded and proved. In the case Peter Mwangi Msuitia & Another v Samow Edin Osman [2014] eKLR, this Court held as follows:

“As regards the payment of mesne profit, we think the applicant has an arguable appeal. No specific sum was claimed in the Plaint as mesne profit and it appears to us prima facie, that there was no evidence to support the actual figure awarded...”

245. Similarly, it is imperative to take cognizance of the holding in the case of Karanja Mbugua & another v Marybin Holding Co. Ltd [2014] KEELC 378 (KLR), where the Court highlighted the following:

This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of Order 21, Rule 13 of [*Civil Procedure Act*](#). The said provisions state as follows with regard to a decree for possession and mesne profits:

“(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-



- a. For the possession of the property.
 - b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.
 - c. Directing an inquiry as to rent or mesne profits from the institution of such suit until :-
 - i. The delivery of possession to the decree-holder
 - ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or
 - iii. The expiration of three years from the date of the decree, whichever even first occurs.
- (2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/= per month, and this court is therefore not able to award the same. In any event when the Plaintiffs agreed to give vacant possession to the Defendant after payment of only the deposit, and they must be taken to have accepted the risks that would follow in the event of non-performance of the contract. The forfeiture of the deposit by the Defendant therefore in the circumstances adequately compensates them for such non-performance.

The Plaintiffs has also claimed damages incurred as a result of the Defendant’s breach. The general rule as to payment of damages when a purchaser wrongfully fails to complete a contract for sale of land is the injury sustained by the vendor in terms of the contract price of the property less the market price at the time fixed for completion. (See McGregor on Damages, Eighteenth Edition at paragraph 22-034 to 22-035.) No such injury has been suffered by the Plaintiffs in this case as the court has found that the suit premises be returned to their ownership and possession.

The Plaintiffs in this case claim that the injury they sustained was its mortgage debt that should be taken up and paid off by the Defendant. However, this mortgage debt was already existing at the time the Plaintiffs entered into the sale agreement with the Defendant, and cannot therefore be said to be damage naturally arising out of the breach of the said agreement as required by the rule in *Hadley v Baxendale* (154) 9. Exch, 241 stated by Alderson P.at page 354 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 of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made a contract as the probable result of a breach of it”

246. Suffice it to underscore that if the 1st Defendant was keen to pursue the claim founded on mesne profits, then it was incumbent upon the 1st Defendant to plead and particularize the claim beforehand.



Furthermore, it was equally incumbent upon the 1st Defendant to tender and produce credible evidence to prove the quantum.

247. Simply put, an award on account of mesne profit is not at large. Same must be pleaded, particularized and thereafter strictly proved. [See the Court of Appeal decision in Superior Homes (Kenya) PLC v Water Resources Authority & 9 others (Civil Appeal E330 of 2020) [2024] KECA 1102 (KLR) (19 August 2024) (Judgment)]
248. Other than the foregoing, it is also worthy to recall that the entry upon and the taking of possession of the suit property [HOUSE 12 HIGHGROVE] was premised on clause D [d] of the Sale Agreement. In this regard, it suffices to underscore that the taking of possession was actually consensual.
249. In the premises, can one contend that a basis has been laid to warrant a claim for mesne profits. In my humble view, a claim for mesne profits presupposes that the entry upon and/or continued possession of the designated property is without permission and/or consent of the owner thereof.
250. In the case of Embakasi Properties Limited & another v Commissioner of Lands & another [2019] KECA 1001 (KLR) stated thus:

Secondly, arising from section 2 aforesaid, mesne profits is defined as those profits and interest which the person in wrongful possession of a property received or might have received exercising ordinary diligence. Expressly excluded from the definition are profits that may arise from improvements on the property made by the person in wrongful possession. Accordingly, mesne profits must be drawn from the land itself, rather than those improvements on it made by the party in wrongful occupation.

The figures presented by Embakasi Properties are alleged rents from developments made on the suit property by Safe Cargo, the party in wrongful occupation. It is on this score that we have resolved in the previous paragraphs that it has benefited from its own development by receiving rent for the entire period it has remained in wrongful occupation of the suit property.

251. To my mind the claim based on mesne profit is not only premature for lack of the requisite pleadings, but same is also untenable on account that the impugned entry and occupation of the suit property was premised on consent.
252. Lastly, the 1st Defendant has sought for general, aggravated and punitive damages for professional negligence and fraud against the Defendants. It is not clear which are the Defendants for which the claim beforehand is being sought. For good measure, it is worth recalling that there are only two Defendants namely Harish Kumar Kanabar [1st Defendant] and NCBA BANK KENYA PLC [2nd Defendant].
253. Notwithstanding the foregoing, it is also important to underscore that whosoever seeks to procure aggravated and punitive damages, the 1st Defendant not excepted, is obligated to meet the requisite threshold that was highlighted by the Court of Appeal in the case of Municipal Council of Eldoret v Titus Gatitu Njau [2020] KECA 782 (KLR).
254. For coherence, the Court stated as hereunder:



As stated by this Court in *Godfrey Julius Ndumba Mbogori & another v Nairobi City County* [2018] eKLR:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter. We are guided by the case of *Rookes v Barnard* [1964] AC 1129 where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:

- i) in cases of oppressive, arbitrary or unconstitutional action by the servants of the government, ii) cases in which the defendant’s conduct has been calculated to make a profit for himself which may well exceed the compensation payable to the plaintiff and iii) where exemplary damages are expressly authorized by statute”.

In his judgment the learned Judge in awarding the exemplary damages relied on the authority of *Rookes v Barnard* (1964) 1 All ER 367, which espouses principles already set out above. The case has been cited with approval in our jurisdiction in *Obongo v Kisumu Council* (1971) EA 91; *C A M v Royal Media Services Limited* [2013] eKLR, *Ken Odondi & 2 Others v James Okoth Omburah T/A Okoth Omburah & Company advocates* [2013] eKLR.

27. The learned Judge awarded the respondent exemplary damages and justified the award as follows:

“Exemplary damages are at the discretion of the court and the amount to be awarded must depend on the surrounding circumstances of each case. In our case, the defendant flagrantly disobeyed an order stopping them from demolishing a building...They may have thought that since such damages may not be awarded, then they will walk away without paying a cent. If they thought so, then they are very wrong. The court cannot allow the defendant to benefit from its conduct. In my opinion, a sum of Kshs. 15 Million in exemplary damages will be fair in the circumstances. In arriving at this figure, I have taken note of the need to deliver a message to all, that court orders must be obeyed, and I have further taken into consideration the value of the property that was demolished and the general conduct of the defendant, who never at any one time, attempted to make amends or apologize to the plaintiff for its deplorable conduct.”

28. This Court, in *Nation Media Group v Gideon Mose Onchwati & Kenya Oil Company Limited* [2019] eKLR stated as follows:

“The bulk of the learned Judge’s award fell under the head of exemplary damages for which she granted some Kshs. 12,000,000. Now, exemplary damages are awardable in very rare instances where the conduct of the defendant is deserving of punishment, and they are meant to vindicate the law. They have nothing to do with compensating the plaintiff. This Court in *The Nairobi Star Publication Limited V Elizabeth Atieno Oyoo* [2018] addressed this issue as follows, and we agree;

“As regards exemplary damages, the same are only to be awarded in limited instances. The categories of cases in which exemplary damages should be awarded are set out, in paragraph 243 of *Halsbury’s Laws of England*, as follows:-



- (1) Oppressive, arbitrary or unconstitutional actions by servants of government;
- (2) Conduct calculated by the defendant to make him a profit which may well exceed the compensation payable to the plaintiff; or
- (3) Cases in which the payment of exemplary damages is authorized by statute.”

See also JOHN V MGN LIMITED (supra).

“We are not satisfied from our perusal of the record, and from the submissions made before us, that there is anything in the conduct of NMG (the appellant), far from laudable though it was, that was so callous, reprehensible, steeped in impunity or actuated by mercenary considerations, that it called for the extreme measure of punishing it by way of exemplary damages. The same did not lie and we would set aside that head and the sum of Kshs. 12,000,000 in entirety.”

255. My answer to issue number seven [7] is two-fold. Firstly, the Counter-claim by and on behalf of the 1st Defendant is deficient, defective and thus invalid for non-compliance with the provisions of Order 7 Rule 5 of the civil Procedure Rules, 2010 as read together with Order 4 Rule 1[2] of the Civil Procedure Rules. Simply put, the impugned Counter-claim is not supported by the requisite verifying Affidavit.
256. Moreover, the 1st Defendant did not tender and/or place before the Court plausible, cogent and credible evidence to substantiate the claims. In this regard, the 1st Defendant failed to discharge the burden of obligation which squarely laid on shoulders of the said 1st Defendant. [See the holding in Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] KECA 642 (KLR)]

ISSUE NUMBER 8 What reliefs, [if any] ought to issue.

257. The Plaintiffs herein sought for a plethora of reliefs at the foot of the amended Plaintiff dated the 17th day of August 2020. Furthermore, the reliefs under reference were sought as against the two Defendants.
258. Nevertheless, while discussing issue number Five, the Court has since found and held that the Plaintiffs’ claim as against the 2nd Defendant did not only fail to disclose a reasonable cause of action, but same was also not proven. Instructively, the Court found that the prayer for refund of Kshs. 28,000,000/= only as against the 2nd Defendant was illusory and imaginary.
259. Furthermore, the Court also found that the Claim for specific performance was invalid. In any event, the prayer for specific performance cannot issue on the face of the Provisions of Sections 87 and 88 g of the Land Act 2012 [2016] as read together with Section 59 of the Land Registration Act.
260. As concerns the claim for breach of legitimate expectations, the Court found that the 2nd Defendant did not issue and/or make any representation[s] and/or promises [if at all] to the Plaintiffs to underpin the claim for breach of legitimate expectation. In any event, it is worthy to recall the evidence of PW1 while under cross examination by Learned Counsel for the 2nd Defendant acknowledged that the Second Defendant did not make any such representation[s].
261. For ease of appreciation, PW1 stated as hereunder:

“ The 2nd Defendant has been sued on account of Kshs. 28,000,000/= only that was deposited in their account domiciled at the Bank. The amount was paid towards settling the balance



due on account of HOUSE NO. 12 HIGHGROVE VILLAGE. The monies were not to address any other facilities that the 1st Defendant had with the 2nd Defendant.

262. While under further cross examination by the Learned Counsel for the 2nd Defendant, PW1 stated thus
- “I do confirm that I duly informed I & M Bank Limited of the purpose of the money. There were no instructions to the 2nd Defendant as pertains to the usage of the payments that were forwarded from I & M Bank Limited. I do confirm that the sum of Kshs 23,000,000/= was paid into the Account of the 1st Defendant.
263. Flowing from the testimony of PW1, it is evident that neither did the Plaintiffs give unto the 2nd Defendant any specific instructions as pertains to the usage of the monies in question nor did the 2nd Defendant make any representations to the Plaintiffs. In short, the prayer for breach of legitimate expectation was anchored on quick sand.
264. As against the 1st Defendant, it is important to underscore that the 1st Defendant admitted and acknowledged that same was duly paid the entire Purchase price at the foot of the Sale of House No. 12 HIGHGROVE VILLAGE. For ease of reference, it is worthy to recall the explicit admissions by DW1 while under cross examination by Learned Counsel for the Plaintiffs.
265. Other than the foregoing, it is worthy to recall that DW1 attempted to state that the sum of Kshs. 28,000,000/= only which had been paid as the stakeholder sum was refunded. However, it suffices to underscore that DW1 was not able to demonstrate that the monies at the foot of the RTGS Application Form at page 35 of his bundle was actually remitted to the Plaintiffs. For good measure, no evidence was tendered to demonstrate that the money in question ever left the Account of the remitter. Instructively, no Bank Statement of the remitter [1st Defendant’s Advocates] was ever produced.
266. Moreover, it is also imperative to recall that PW1 testified and stated that the payment of Kshs. 10,000,000/= only which was being referenced by DW1, related to payment of Legal Fees and not refund of the Stakeholder sum.
267. The second document that was referenced by DW1 to underpin the contention that the balance of Kshs. 18,000,000/= only was also refunded is the transfer of Lease relating to Flat No. 5 erected on LR NO. 209/4/14. For coherence, the transfer of Lease is at pages 36 – 44 of the 1st Defendant’s bundle of documents.
268. Nevertheless, I must state that the Transfer of the Lease by and of itself does not speak to the purpose for which the Transfer was being made. At any rate, it is not lost on the Court that the 1st Defendant did not tender and/or produce any Sale Agreement between himself and Diviya Harish Kanabar on one hand and the Plaintiffs herein. Suffice it to state, that an Agreement, if any, was produced would have demonstrated the terms of the transaction [See Section 3(3) of the Law of Contract Act, Chapter 23, Laws of Kenya.]
269. In the premises, I have no evidence to demonstrate that the 1st Defendant ever refunded the sum of Kshs. 28,000,000/= only to the Plaintiffs. Furthermore, no evidence was tendered to demonstrate refund of the balance of the Purchase price, namely Kshs. 100,000,000/= only, which DW1 acknowledged was settled vide Transfer of LR NO. 1870/IV/175.
270. In a nutshell, I come to the conclusion that the Plaintiffs are entitled to the refund of the sum of Kshs. 128,000,0001/= only on account of the Purchase price of the House No. 12 Highgrove VillagE.



271. As pertains to the claim for general damages for breach of Contract, I beg to remind us that no award for General Damages can issue for breach of contract. In this regard, the Plaintiff's claim for general damages for breach of contract is misconceived. [See the Decision of the Court of Appeal in *Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited* [2016] KECA 56 (KLR)] [See also *Dharamshi Vs. Karsan* [1974] EA 41
272. Finally, the Plaintiffs sought for an Order of Permanent Injunction to bar and/or restrain the Defendants from alienating, selling and/or disposing off the suit property, namely House No. 12 Highgrove Village. However, during the testimony of DW2 [Susan Mungai] it transpired that the suit property was sold and disposed of by the 2nd Defendant in exercise of its Statutory Powers of Sale.
273. Quite clearly, no orders of permanent Injunction can issue either in the manner sought or at all. In any event, it is not lost on the Court that an Order of Permanent Injunction cannot issue to and in favour of a person devoid of any Legal Rights to the designated property.

Final Disposition:

274. Having considered the thematic issues which were raised in the body of the Judgment, it must have become apparent that the Plaintiffs have proven their claim, albeit against the 1st Defendant only. In any event, the claims proven have already been highlighted in the preceding paragraphs.
275. As pertains to the claims against the 2nd Defendant, there is no gainsaying that the Plaintiffs were/ are non-suited. Simply put, the claim against the 2nd Defendant was pre-mature, misconceived and stillborn.
276. In respect of the Counter-claims by the Counter-claimers, I came to the conclusion that same were not only misconceived but also legally untenable. To this end, the conclusion[s] while dealing with issues numbers Six and Seven, respectively, was to the effect that the Counter-claims had not been proven.
277. In the premises, the final Orders that commend themselves to the Court are as hereunder:
- i. The Plaintiffs shall be refunded the sum of Kshs. 128,000,000/= only by the 1st Defendant.
 - ii. The Plaintiffs are also entitled to refund of Kshs. 2,185,823 only being the proven special damages on account of the service charge, renovations and Insurance.
 - iii. The award in terms of clause [i] and [ii] shall attract interest at Court rates [14%] from the date of filing of the suit until payment in full.
 - iv. The Claim for Specific Performance is Dismissed
 - v. The Claim for General Damages for breach of contract is Dismissed.
 - vi. The claim for Permanent Injunction be and is hereby Dismissed.
 - vii. The Plaintiffs are awarded Costs of the suit against the 1st Defendant.
 - viii. The Plaintiffs' suit as against the 2nd Defendant is Dismissed.
 - ix. The Plaintiffs shall pay the 2nd Defendant's Costs of the suit.
 - x. The Counter-claim by the 1st Defendant/Counter-claimer be and is hereby Dismissed.



- xi. The 1st Defendant/Counter-claimant shall pay Costs of his Counter-claim to the Plaintiffs.
- xii. The Counter-claim by the 2nd – 7th Counter-claimants be and is hereby Struck out.
- xiii. The 2nd – 7th Counter-claimants shall pay Costs of the Counter-claim to the Plaintiffs.
- xiv. Any other relief not expressly provided for is declined.

278. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF .APRIL 2025.

OGUTTU MBOYA, FCIArb

JUDGE

In the presence of:

Benson/Brandy – Court Assistants.

Mr. Taib Ali Taib SC for the Plaintiff

Mr. Kyalo Mbobu EBS for the 1st Defendant/Counter-Claimants

Mr. Emmanuel Mumia for the 2nd Defendant

