



**Ringsview Apartments Limited v Vishnu Builders Company Ltd & another (Environment and Land Case Civil Suit 782 of 2014) [2023] KEELC 591 (KLR) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 591 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 782 OF 2014  
SO OKONG'O, J  
FEBRUARY 9, 2023**

**BETWEEN**

**RINGSVIEW APARTMENTS LIMITED ..... PLAINTIFF**

**AND**

**VISHNU BUILDERS COMPANY LTD ..... 1<sup>ST</sup> DEFENDANT**

**VIJAY MORJARIA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This suit was commenced by way of a plaint dated 17<sup>th</sup> June 2014. The plaint was amended on 17<sup>th</sup> March 2015 with leave of the court. In the amended plaint, the Plaintiff sought the following reliefs against the Defendants;
  - a. A mandatory injunction compelling the Defendants to forthwith return the keys to the residential apartments on L.R No. 4858/11 commonly referred to as Ringsview Apartments (hereinafter referred to only as “the suit property”).
  - b. A permanent injunction restraining the Defendants from selling, disposing of, transferring and/or accessing residential apartments on the suit property.
  - c. A permanent injunction restraining the Defendants jointly and severally from barricading and/or dealing with or in any way interfering with the possession and quiet enjoyment of the residential apartments on the suit property.
  - d. Kshs. 140,000,000/- from the 1<sup>st</sup> Defendant.
  - e. Kshs. 112,150,000/- from the 2<sup>nd</sup> Defendant.
  - f. A declaration that the leases for apartment numbers C1, A4 and B4 on the suit property were fraudulently registered through blackmail.



- g. An order for cancellation of the leases registered in respect of apartment numbers C1, A4 and B4 on the suit property.
- h. Interest on 4 and 5 above.
- i. Costs and interest thereon.

**The Plaintiff's case:**

2. The Plaintiff averred that by an agreement for building works dated 26<sup>th</sup> July 2011 between the Plaintiff and the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant agreed to construct for the Plaintiff apartments on the suit property at a contract sum of Kshs. 223,894,300.20/-. The Plaintiff averred that the construction which was to take 66 weeks was to commence on or about 27<sup>th</sup> July 2011 and be completed on 19<sup>th</sup> October 2012.
3. The Plaintiff averred that from the start, the 1<sup>st</sup> Defendant carried out the contractual works slowly and demanded the payment of the contractual sum in advance contrary to the terms of the agreement dated 26<sup>th</sup> July 2011 (hereinafter referred to only as "the contract"). The Plaintiff averred that it indicated to the 1<sup>st</sup> Defendant that it was unable to advance such funds since it had not made arrangements for the same. The Plaintiff averred that the 1<sup>st</sup> Defendant thereafter introduced the 2<sup>nd</sup> Defendant to the Plaintiff as one of the potential buyers of the apartments and its business partner who could advance to the Plaintiff money that the 1<sup>st</sup> Defendant had demanded.
4. The Plaintiff averred that it accepted advances from the 2<sup>nd</sup> Defendant to enable the project to move forward and gave four (4) apartments on the suit property to the 2<sup>nd</sup> Defendant purely as a lien for the money that he had advanced to the Plaintiff. The Plaintiff averred that the money advanced to it was to be paid back to the 2<sup>nd</sup> Defendant. The Plaintiff averred that the 2<sup>nd</sup> Defendant refused to acknowledge receipt of the cash payments that were made to him as well as a sum of Kshs. 9,735,000/- that was paid to him as interest on the loan that he had advanced to the Plaintiff.
5. The Plaintiff averred that as at the time of filing this suit, the 2<sup>nd</sup> Defendant was still holding several documents relating to the construction project including titles for apartments that he obtained fraudulently and in respect of which he was claiming ownership. The Plaintiff averred that it never prepared sale agreements with respect to apartments C1, A4 and B4 on the suit property in favour of the 2<sup>nd</sup> Defendant. The Plaintiff averred that the 2<sup>nd</sup> Defendant misrepresented to the Land Registrar that he had valid sale agreements in respect of the apartments and the Land Registrar registered leases in respect thereof in his favour. The Plaintiff averred that the said leases were fraudulently registered and as such the same should be cancelled since the 2<sup>nd</sup> Defendant had not paid for the apartments.
6. The Plaintiff averred that despite the inordinate delay of over 1 year and 6 months on the part of the 1<sup>st</sup> Defendant in completing the construction of the apartments on the suit property, the Plaintiff paid to the 1<sup>st</sup> Defendant an aggregate sum of Kshs. 226,859,657/- which was over and above the agreed contractual sum of Kshs. 201,000,000/-. The Plaintiff averred that in a meeting held on 19<sup>th</sup> May 2014 between among others, the Plaintiff's directors and the directors of the 1<sup>st</sup> Defendant, it was agreed that the main contractor would complete the construction works by 23<sup>rd</sup> May 2014 in default of which the construction contract was to stand terminated.
7. The Plaintiff averred that as at the time of filing the suit, the construction works remained incomplete and the Plaintiff consequently terminated the contract between it and the 1<sup>st</sup> Defendant on or about 31<sup>st</sup> May 2014. The Plaintiff averred that by an agreement dated 25<sup>th</sup> April 2012, the 1<sup>st</sup> Defendant undertook to pay to the Plaintiff Kshs. 10,000,000/- every month as damages for delayed completion



of the construction works from 30<sup>th</sup> March 2013 until completion of the said works. The Plaintiff averred that the 1<sup>st</sup> Defendant did not fulfil its part of this agreement. The Plaintiff averred that it was entitled to a sum of Kshs. 10,000,000/- per month from the 1<sup>st</sup> Defendant from 30<sup>th</sup> March 2013 until 31<sup>st</sup> May 2014 when the contract was terminated.

8. The Plaintiff averred that in response to the Plaintiff's termination of the contract as aforesaid, the Defendants colluded to frustrate the project by; illegally barricading the entry into the apartments, confiscating the keys for all the apartments and continuously harassing the occupants and proprietors of the apartments by demanding payment from them. The Plaintiff averred that the 2<sup>nd</sup> Defendant had unlawfully obtained a sum of Kshs. 6,000,000/- from some of the purchasers of the apartments promising them additional features such as a swimming pool and gymnasium which payment was not remitted to the Plaintiff. The Plaintiff averred that the 2<sup>nd</sup> Defendant received a further sum of Kshs. 5,500,000/- from potential purchasers of the apartments which were also not remitted to the Plaintiff. The Plaintiff averred that the 2<sup>nd</sup> Defendant was liable to pay to the Plaintiff a total sum of Kshs. 11,500,000/- on account of the said unremitted payments received on behalf of the Plaintiff.
9. The Plaintiff averred that the 2<sup>nd</sup> Defendant unlawfully obtained the title deed for the suit property and refused to release the same to the Plaintiff unless the Plaintiff signed agreements for sale and sub-leases for apartments which the 2<sup>nd</sup> Defendant had not paid for and for which he owed the Plaintiff a sum of Kshs. 62,127,860/-. The Plaintiff averred that it signed the said sale agreements and sub-leases under compulsion. The Plaintiff averred that this action on the part of the 2<sup>nd</sup> Defendant occasioned a delay of over 7 months in charging the suit property to obtain finance a delay that caused the Plaintiff to incur a cost of Kshs. 14,000,000/- in bank interest charges for which the Plaintiff held the 2<sup>nd</sup> Defendant liable.
10. The Plaintiff averred that the 2<sup>nd</sup> Defendant owed it a sum of Kshs. 112,150,000/- made up as follows;

Apartments Kshs. 18,500,000/-  
 A9,  
 Apartments Kshs. 29,000,000/-  
 A10,  
 B4 and  
 Apartments Kshs. 10,500,000/-  
 B3  
 B1 and  
 Buyers ..... Kshs. 11,500,000/-  
 C4  
 funds.  
 Interest..... Kshs. 14,000,000/-  
 Funds paid to Vijay-Cash ..... Kshs. 9,750,000/-  
  
 Funds ..... Kshs. 8,000,000/-  
 owed  
 Funds ..... Kshs. 3,000,000/-  
 on C7  
 owed  
 Swimming. Kshs. 5,000,000/-  
 on C10  
 pool  
 Legal ..... Kshs. 2,900,000/-  
 built  
 costs,  
 total Kshs. 112,150,000/-  
 caveats  
 demolished  
 the

11. The Plaintiff averred that the 2<sup>nd</sup> Defendant had admitted being indebted to the Plaintiff.  
 sales

**The Defendants' case:-**

12. The Defendants filed a joint statement of defence and counter-claim on 28<sup>th</sup> August 2014. The Defendants averred that after the commencement of the construction works on 27<sup>th</sup> July 2011, there were numerous delays occasioned by variation and extra works under clause 30.0 of the contract. The Defendants averred that the completion date of the contract was extended to 30<sup>th</sup> May 2014 instead of



- 19<sup>th</sup> October 2012 for various reasons such as; delay in the preparation of the valuation by the Quantity Surveyor, delay in the authorization of additional work in most of the areas that affected the cash flow, delay in payment, delay due to non-availability of lift and joinery sub-contractor on site, replacement of joinery sub-contractor, change and additional works on; parking area, shower cubicles, doorbells and hot water cylinder, major roof change, additional gypsum, shifting of base and change of specifications for the base of Block A, structural design change and additional steel.
13. The Defendants averred that the 2<sup>nd</sup> Defendant was introduced to the Plaintiff by one, Richard Maina and not by the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> Defendant denied that he received a sum of Kshs. 9,735,000/- from the Plaintiff as interest. The 2<sup>nd</sup> Defendant denied further that he unlawfully obtained the title deed for the suit property and demanded that the Plaintiff signs the sale agreements and transfers for apartments that he had not paid for before releasing the said title deed to the Plaintiff. The 2<sup>nd</sup> Defendant denied obtaining any documents from the Plaintiff fraudulently.
  14. The Defendants averred that the delays in the commencement and completion of the construction works was as a result of the reasons given earlier and that the agreed contractual sum was varied because of the extra works and variations to the contract. The 1<sup>st</sup> Defendant denied receiving a sum of Kshs. 226,859,657/- from the Plaintiff. The 1<sup>st</sup> Defendant averred that the completion period was extended to 30<sup>th</sup> May 2014 in a meeting that was held on 16<sup>th</sup> May 2014 between the 1<sup>st</sup> Defendant and the Plaintiff's agents.
  15. The 1<sup>st</sup> Defendant averred that the Plaintiff unlawfully and without just cause terminated the contract on 31<sup>st</sup> May 2014 and took over the site without the same being handed over to it. The 1<sup>st</sup> Defendant averred that the Plaintiff failed to comply with clause 38.2 of the contract. The 1<sup>st</sup> Defendant averred that the agreement dated 25<sup>th</sup> April 2012 on the basis of which the Plaintiff had claimed a sum of Kshs. 10,000,000/- per month with effect from 30<sup>th</sup> March 2013 for the delay in the completion of the construction works was illegal, null and void for having been obtained fraudulently through duress and coercion. The 1<sup>st</sup> Defendant averred that the said agreement was also overtaken by events through the various extensions of the completion period the last of which was up to 30<sup>th</sup> May 2014. The 1<sup>st</sup> Defendant averred further that the said agreement was punitive and that it could not override clause 43.1 of the contract. The 1<sup>st</sup> Defendant denied breaching the said agreement.
  16. The 2<sup>nd</sup> Defendant denied that he obtained a sum of Kshs. 11,500,000/- by false pretence and that he was liable to the Plaintiff for the same. The 2<sup>nd</sup> Defendant denied further that he unlawfully obtained a title deed for the suit property and that he compelled the Plaintiff to sign sale agreements and sub-leases for apartments that he had not paid for. The 2<sup>nd</sup> Defendant denied owing the Plaintiff a sum of Kshs. 62,127,860/-. The 2<sup>nd</sup> Defendant also denied owing the Plaintiff a sum of Kshs. 14,000,000/- allegedly incurred in bank interest occasioned by the delay that resulted from the 2<sup>nd</sup> Defendant's refusal to release the title deed for the suit property. The 2<sup>nd</sup> Defendant denied that he owed the Plaintiff an aggregate sum of Kshs. 112,150,000/- claimed by the Plaintiff in the plaint.
  17. In its counter-claim, the 1<sup>st</sup> Defendant averred that the Plaintiff breached clauses 30.0, 34.0 and 38.2 of the contract dated 26<sup>th</sup> July 2011. The 1<sup>st</sup> Defendant averred further that the Plaintiff breached the said contract by unlawfully taking over possession of the site without official handover. The 1<sup>st</sup> Defendant averred that as a result of the said breaches of the contract, the 1<sup>st</sup> Defendant suffered loss and damage. The 1<sup>st</sup> Defendant averred that the Plaintiff failed to deposit the retention sum of Kshs. 21,895,218/- in a joint account in the names of the Plaintiff and the 1<sup>st</sup> Defendant in accordance with clause 34.15 of the contract. The 1<sup>st</sup> Defendant averred that the Plaintiff also failed to pay a sum of Kshs. 5,300,000/- due and owing to the 1<sup>st</sup> Defendant for the variation of the contract and extra works as provided for



under clause 30 of the contract. The 1<sup>st</sup> Defendant averred further that the Plaintiff failed to submit the last certificate of payment within 14 days of completion as provided for under clause 34.6 of the contract. The 1<sup>st</sup> Defendant averred that the Plaintiff had also failed to pay a sum of Kshs. 20,595,102/- that was due and owing to the 1<sup>st</sup> Defendant.

18. On his part, the 2<sup>nd</sup> Defendant averred that the Plaintiff had denied him quiet and peaceful possession of apartments B3, B4, B5, B6, A4, A11, A12, C1, C9 and C11 on the suit property in breach of the sale agreements and sub-leases that he entered into with the Plaintiff. The 2<sup>nd</sup> Defendant averred that he had suffered loss and damage as a result of the said breach. The 2<sup>nd</sup> Defendant averred in the alternative that the Plaintiff had failed to deliver possession of the said apartments as a result of which he had suffered loss of rent that he would have earned amounting to a total of Kshs. 17,700,000/ between 30<sup>th</sup> March 2012 to 31<sup>st</sup> July 2014. The 2<sup>nd</sup> Defendant averred that he had also suffered loss of profit from each of the apartments for which he was holding the Plaintiff liable. The 2<sup>nd</sup> Defendant averred that the Plaintiff was also liable in damages in the sum of Kshs. 4,400,000/- for failure to install solar system and intercom on the apartments. The 2<sup>nd</sup> Defendant averred further that the Plaintiff was also liable for the additional extra works done by the owners of the apartments in the sum of Kshs. 33,848,236/-.
19. In their counter-claim, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants sought judgment against the Plaintiff for;
  1. A mandatory injunction compelling the Plaintiff to forthwith return possession of the site to the 1<sup>st</sup> Defendant.
  2. A mandatory injunction compelling the Plaintiff to give access and quiet and peaceful vacant possession of apartment numbers B3, B4, B5, B6, A4, A11, A12, C1, C9 and C11 to the 2<sup>nd</sup> Defendant.
  3. A permanent injunction restraining the Plaintiff from interfering or stopping or barricading the 2<sup>nd</sup> Defendant and/or dealing in any way with apartment numbers B3, B4, B5, B6, A4, A11, A12, C1, C9 and C11 on the suit property or transferring or disposing of the said apartments.
  4. An order that the sum of Kshs. 21,895,218/- held as retention money by the Plaintiff be deposited in a joint account of the advocates on record or as the court may direct within a specified time.
  5. Kshs. 25,895,102/- to the 1<sup>st</sup> Defendant as claimed in paragraph 20(b) and (d) of the counter-claim.
  6. Kshs. 17,700,000/-, 4,400,000/- and Kshs. 33,848,236/- to the 2<sup>nd</sup> Defendant as claimed in paragraphs 23(b), (d) and (e) of the counter-claim. 7. Damages for loss of opportunity, profit or market value for each apartment.
  8. Interest at commercial rates.
  9. Costs.

**Reply to defence and defence to counter-claim:**

20. The Plaintiff filed a reply to the defence and defence to the Defendants' counter-claim, dated 24<sup>th</sup> September 2014. In its reply to defence, the Plaintiff joined issue with the Defendants in their defence save where the Defendants had made admissions. The Plaintiff denied that it breached the contract with the 1<sup>st</sup> Defendant. In response to the 1<sup>st</sup> Defendant's counter-claim, the Plaintiff denied the same in its entirety. The Plaintiff averred that it lawfully took over possession of the suit property upon termination of the 1<sup>st</sup> Defendant's services. On the issue of the retention money, the Plaintiff averred



that it was its obligation to keep the retention money. On the issue extra work and variations, the Plaintiff denied that any extra work was done by the 1<sup>st</sup> Defendant. The Plaintiff averred further that there was no agreement to pay the 1<sup>st</sup> Defendant for extra work done. The Plaintiff averred that in any event there was no completion of the works in accordance with the contract.

21. With regard to the 2<sup>nd</sup> Defendant's counter-claim, the Plaintiff averred that there were no valid agreements of sale between the Plaintiff and the 2<sup>nd</sup> Defendant in respect of apartments A4, B3, B4 and C1 and that no payments were made in respect of apartments B4, B3, B2, C1 and Block D. The Plaintiff averred further that there was no privity of contract between the Plaintiff and the 2<sup>nd</sup> Defendant or the alleged purchasers of apartments A4, A11, A12, B3, B4 and C1. The Plaintiff averred that the 2<sup>nd</sup> Defendant could not purport to represent persons who were not parties to this suit on the strength of a power of attorney held by him.
22. The Plaintiff urged the court to dismiss the Defendants' counter-claims with costs and for judgment to be entered for the Plaintiff as prayed in the plaint.

### **The Plaintiff's evidence:**

23. The Plaintiff called its director, Dr. Benjamin Mbira Gikonyo (PW1) as its sole witness. PW1 stated that the 1<sup>st</sup> Defendant was a contractor engaged by the Plaintiff to put up apartments for it on the suit property while the 2<sup>nd</sup> Defendant was a businessman and a partner of the 1<sup>st</sup> Defendant. PW1 stated that the 2<sup>nd</sup> Defendant was also a buyer of apartments from the Plaintiff. PW1 adopted his witness statement filed in court together with the plaint on 17<sup>th</sup> June 2014 as part of his evidence in chief and produced documents attached to the Plaintiff's list of documents filed in court on 14<sup>th</sup> October 2016 as PEXH.1.
24. PW1 stated that pursuant to the contract dated 26<sup>th</sup> July 2011(the contract), the 1<sup>st</sup> Defendant was to put up 30 apartments at agreed cost of Kshs. 223,894,300/-. PW1 stated that the apartments were revised to 34. He stated that the contract was to commence on 27<sup>th</sup> July 2011 and be completed by 19<sup>th</sup> October 2012. He stated that the contract was not completed as agreed resulting in extra costs. He stated that there was inordinate delay and that at a meeting held at an advocates office with the representatives of the 1<sup>st</sup> Defendant, it was agreed that the contract would be completed by March 2013 failure to which the 1<sup>st</sup> Defendant was to pay to the Plaintiff a sum of Kshs. 10,000,000/- per month as damages. PW1 referred the court to the letter dated 25<sup>th</sup> April 2012 at page 56 of PEXH.1.
25. PW1 stated that the 1<sup>st</sup> defendant did not complete the contract as a greed leaving the Plaintiff with no alternative but to terminate the contract through a letter dated 31<sup>st</sup> May 2014 under clause 38.1 of the contract. PW1 stated that the 1<sup>st</sup> Defendant owed the Plaintiff a sum of Kshs. 140,000,000/- for the delay in the completion of the contact at the rate of Kshs. 10,000,000/- per month from 1<sup>st</sup> April 2013 up to 31<sup>st</sup> May 2014 when the contract was terminated.
26. PW1 stated that as at the date of termination of the 1<sup>st</sup> Defendant's contract, the Plaintiff did not owe the 1<sup>st</sup> Defendant any money for work done. PW1 stated that the Plaintiff had paid all the monies that were certified as due to the 1<sup>st</sup> Defendant. PW1 denied that the Plaintiff owed the 1<sup>st</sup> Defendant the sum of Kshs. 21,895,218 claimed by the 1<sup>st</sup> Defendant in the counter-claim. PW1 stated that the retention money was to be used to correct the defects. PW1 stated that since the 1<sup>st</sup> Defendant's services were terminated; the retention money was used to correct the defects in the apartments. PW1 stated that the project was completed by a different contractor 3 months later after the termination of the 1<sup>st</sup> Defendant's contract.



27. PW1 stated that after the Plaintiff had obtained several bids from potential contractors for the project, one of the Plaintiff's directors Lucy Maina told him that she knew of someone who was interested in purchasing the apartments that the Plaintiff had planned to put up with whom the Plaintiff could partner in the project. PW1 stated that Lucy Maina thereafter introduced the 2<sup>nd</sup> Defendant to the Plaintiff. He stated that at a meeting held with the 2<sup>nd</sup> Defendant, the 2<sup>nd</sup> Defendant told them that he knew the 1<sup>st</sup> Defendant and that he had dealt with it and that it was capable of delivering quality work. PW1 stated that the 1<sup>st</sup> Defendant was one of the bidders but it was not the lowest bidder. PW1 stated that the 2<sup>nd</sup> Defendant assured them that he could negotiate with the 1<sup>st</sup> Defendant to lower its bid to match the lowest bid. PW1 stated that in the course of working with them, they learnt that the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant were partners and that they were working together on other projects.
28. PW1 stated that the 2<sup>nd</sup> Defendant insisted on the 1<sup>st</sup> Defendant getting the contract because the 1<sup>st</sup> Defendant owed him some money which he intended to recover from the payments made to the 1<sup>st</sup> Defendant under the contract. PW1 stated that the Plaintiff's claim against the 2<sup>nd</sup> Defendant was in respect of 8 apartments that he was to purchase from the Plaintiff. PW1 stated that the 2<sup>nd</sup> Defendant was not the purchaser of all the 8 apartments. He stated that some of those apartments were purchased by the 2<sup>nd</sup> Defendant's relatives and friends. He stated that the 2<sup>nd</sup> Defendant purchased 2 apartments namely, apartment B5 and apartment B6. He stated that apartment A12 was purchased by the 2<sup>nd</sup> Defendant's relative, Hitesh Morjaria and apartment B3 by his other relatives Hitesh and Payal Tharkar. He stated that apartment A11 was purchased by Mr. and Mrs. Ashok Shangani. He stated that it was only these apartments A11, B3, B5, B6 and A12 that were in dispute. He stated that the other three apartments were paid for and the Plaintiff executed the necessary agreements for sale and other documents of title. PW1 stated that during the construction, the 2<sup>nd</sup> Defendant introduced several changes to these apartments in dispute that increased the costs and prices of the apartments. The changes were in areas such as bathrooms and kitchen. PW1 stated that the Plaintiff and the 2<sup>nd</sup> Defendant signed separate documents in relation to these apartments that reflected these changes. The Plaintiff stated that the 2<sup>nd</sup> Defendant executed these documents before an advocate after which he took with him all the copies in the pretext that he was going to have them stamped. PW1 stated that the 2<sup>nd</sup> Defendant never returned the documents. He stated that all the changes in these apartments were costed. He stated that the extra cost for apartment A12 was Kshs. 6,000,000/-, for apartment B6 was Kshs. 6,000,000/-, for apartment B5 was Kshs. 6,000,000/-, for apartment A11 was Kshs. 5,500,000/- and for apartment B3 was Kshs. 14,500,000/- which was its full price. He stated that the Plaintiff did not receive any payment for apartment B3. He stated that the 2<sup>nd</sup> Defendant told the Plaintiff that he would pay the purchase price to the 1<sup>st</sup> Defendant for the construction materials. PW1 stated that the payments made by the 2<sup>nd</sup> Defendant could not be accounted for during the costings done by the architect and the quantity surveyor.
29. PW1 stated that the 1<sup>st</sup> Defendant did not have money to start the construction and that the 2<sup>nd</sup> Defendant offered to deposit Kshs. 6,000,000/- in the Plaintiff's account to be released to the contractor. He stated that the 2<sup>nd</sup> Defendant claimed this amount back with interest. He stated that the Plaintiff paid back to the 2<sup>nd</sup> Defendant a total sum of Kshs. 9,750,000/- towards this loan. PW1 stated that the Plaintiff incurred other costs attributable to the 2<sup>nd</sup> Defendant. He stated that the 2<sup>nd</sup> Defendant registered a caveat against the title of the suit property that caused a delay in the bank releasing to the plaintiff the money that the Plaintiff had borrowed from the said bank. PW1 stated that in the processes, the Plaintiff incurred losses in the form of monthly interest of Kshs. 2,000,000/-. PW1 stated that the Plaintiff was claiming Kshs. 14,000,000/- from the 2<sup>nd</sup> Defendant for this loss. PW1 stated that the 2<sup>nd</sup> Defendant insisted that the Plaintiff constructs a swimming pool on the suit



- property and later on changed his mind that the swimming pool be demolished. He stated that on each occasion, the 2<sup>nd</sup> Defendant threatened to sue the Plaintiff. PW1 stated that the Plaintiff spent Kshs. 5,000,000/- to construct and demolish the said swimming pool which amount the Plaintiff was claiming from the 2<sup>nd</sup> Defendant.
30. PW1 stated further that through a conspiracy between the 2<sup>nd</sup> Defendant and his advocate, the 2<sup>nd</sup> Defendant managed to obtain a title deed for the suit property on which the apartments were constructed. PW1 stated that the 2<sup>nd</sup> Defendant used the said title deed to blackmail the Plaintiff. PW2 stated that the 2<sup>nd</sup> Defendant threatened that unless the Plaintiff agreed to transfer the 8 apartments referred to earlier to him, the Plaintiff would not get the title deed back. PW1 stated that under duress following the said blackmail, the Plaintiff wrote to the 2<sup>nd</sup> Defendant's advocate agreeing to have the 8 apartments discharged in the hope that the 2<sup>nd</sup> Defendant would pay for the same later which the 2<sup>nd</sup> Defendant never did. PW1 stated that on account of this act of blackmail, the Plaintiff incurred costs of Kshs. 4,000,000/- in legal fees and other related expenses related to the lifting of the caveats that had been registered against the title by the 2<sup>nd</sup> Defendant. PW1 stated that Block D was not part of the original plan by the Plaintiff. He stated that when the Plaintiff decided to put up Block D, the Plaintiff borrowed Kshs. 18,000,000/- for construction. PW1 stated that the 2<sup>nd</sup> Defendant promised to pay to the Plaintiff the said sum of Kshs. 18,000,000/- after which he would use his own monies to complete the construction of the said Block D and to purchase the whole block. PW1 stated that the 2<sup>nd</sup> Defendant wrote to the Plaintiff's bankers through two law firms undertaking to pay Kshs. 43.5 Million which undertaking was rejected by the bank for the reasons that the terms were unacceptable and secondly that the two law firms were unknown to the bank. PW1 stated that no monies were paid to the bank by the 2<sup>nd</sup> Defendant or his said lawyers whose undertakings were rejected.
31. PW1 stated that while they were negotiating over this Block D in the office of J.G.Wathigo & Co. Advocates, Mr. Wathigo asked PW1 to sign on the last page of an agreement so that when funds became available, he would just finalize the agreement without the necessity of PW1 being asked to go back to his office. PW1 stated that he later learnt that the 2<sup>nd</sup> Defendant went back to Mr. Wathigo's office and took the last page of the agreement that PW1 had signed, put the agreement together and brought the same to court in support of his claim to the 6 apartments in Block D which he never paid for. PW1 stated that in addition to the apartments mentioned earlier, the 2<sup>nd</sup> Defendant had also lodged a claim against the Plaintiff in respect of other apartments some of which were sold to non-existent people who did not make any payment to the Plaintiff. PW1 stated that he reported these claims to the Police. PW1 urged the court to enter judgment for the Plaintiff as prayed in the amended plaint.
32. With regard to the Defendants' counter-claims, PW1 stated that the same were based on fraudulent documentation and urged the court to reject the same. PW1 stated that apart from the apartments he had mentioned earlier, the Plaintiff did not deal with the 2<sup>nd</sup> Defendant in respect of any other apartment.
33. On cross examination, PW1 stated that the Plaintiff had been partially paid for the 8 apartments in dispute between it and the 2<sup>nd</sup> Defendant. He stated that the Plaintiff was paid in full for 3 of the apartments, paid partially for 4 of the apartments and not paid at all for 1 apartment. PW1 stated that the Plaintiff signed the leases for the 8 apartments under duress. PW1 stated that the 2<sup>nd</sup> Defendant was one of the purchasers of the Plaintiff's apartments. He stated that the 2<sup>nd</sup> Defendant also brought other purchasers. He stated that some of the apartments were in the name of the 2<sup>nd</sup> Defendant while others were in the names of third parties. PW1 stated that the Plaintiff had sued the 2<sup>nd</sup> Defendant in respect of all the apartments because the 2<sup>nd</sup> Defendant claimed to have the power to act for the other purchasers. He stated that he signed documents such as leases in respect of the apartments on behalf of



- the Plaintiff. He stated that he was not aware that some of the leases had been registered. He stated that some of the leases were fraudulent. He stated that although he wrote letters acknowledging receipt of payment for the apartments, some of the letters were written at the request of the 2<sup>nd</sup> Defendant and were issued on the understanding that the 2<sup>nd</sup> Defendant would make payment which he never did. He stated that the Plaintiff wrote the letters before receiving the payment.
34. PW1 stated that after the commencement of construction, there were variations that were documented. PW1 admitted that the Plaintiff had not mentioned the variations in its amended plaint. He stated that he mentioned the variations in his witness statement. He stated that the Plaintiff did not have written instructions from the 2<sup>nd</sup> Defendant to carry out the variations. He stated that the instructions from the 2<sup>nd</sup> Defendant were verbal. He stated that the changes were effected, costs incurred and paid for. He stated that he did not have any document containing the variations. He stated that the documents were with the 2<sup>nd</sup> Defendant who refused to release the same. PW1 stated that there were extra costs paid to the 1<sup>st</sup> Defendant and that the certificates were issued in respect thereof and paid. He stated that the Plaintiff paid the contractor in accordance with the terms of the contract. He stated that there were payments made over and above the contract sum. PW1 stated that the caveat that had been placed by the 2<sup>nd</sup> Defendant against the title of the suit property costed the Plaintiff Kshs. 2,000,000/- per month. He stated that the costs consisted of the interest on the money that had not been released to the Plaintiff by the bank. He stated that he did not have a bank statement to support this claim.
35. PW1 reiterated that the 2<sup>nd</sup> Defendant threatened to file a suit if the Plaintiff failed to build a swimming pool. He stated that a similar threat from the 2<sup>nd</sup> Defendant led to the demolition of the said pool. He stated that both threats were verbal. He stated that he spent Kshs. 5,000,000/- on the swimming pool which figure was given to the Plaintiff by the contractor. He stated that the Plaintiff spent Kshs. 4,000,000/- to lift the caveat but had no supporting documentation.
36. PW1 stated that with regard to Block D, the Plaintiff signed only the last pages of the contracts. He stated that the 2<sup>nd</sup> Defendant took the contracts and added the other pages. He stated that the 2<sup>nd</sup> Defendant added even non-existent apartments. He stated that he saw the documents for the first time when the same were filed in court by the 2<sup>nd</sup> Defendant. He stated that the documents were forgeries and that he reported the same to the Police. He stated that he signed the documents in the office of J.G. Wathigo advocate an old friend of the 2<sup>nd</sup> Defendant. He stated that it was the said advocate who told him to sign the last pages of the contracts. PW1 stated that the Plaintiff had an agreement with the 2<sup>nd</sup> Defendant in respect of Block D but the 2<sup>nd</sup> Defendant never made the necessary payment. He stated that the 2<sup>nd</sup> Defendant had come to court to claim what he never paid for. PW1 stated that the Plaintiff did not release the retention money. He stated that the Plaintiff was authorised to utilise the same to cure the defects in the apartments. He stated that the Plaintiff did not pay the sum of Kshs. 4,300,000/- for the variations. He stated that the same was not certified by the architect. He stated that the Plaintiff paid for all the certificates that were received from the architect. In re-examination, PW1 stated that the Defendants had not given the details of any certificate issued by the architect and not paid by the Plaintiff.
37. PW1 was recalled and gave further evidence in chief and was further cross-examined and re-examined. In his further evidence, PW1 adopted his further witness statement as his further evidence in chief. On further cross-examination, PW1 stated that he first met James Wathigo advocate in 2011 when he was acting for the Plaintiff's partners in the project Mr. & Mrs. Wangethi Mwangi who owned the suit property. He stated that at the material time, the said project partners wanted to transfer the suit property to the development company. He denied that James Wathigo was engaged as the



project advocate. He stated that James Wathigo transferred the responsibility that was given to him to another advocate. PW1 stated that James Wathigo gave an undertaking but the same was rejected by the bank. He stated that he was not aware that James Wathigo was to be paid his fees in kind in the form of an apartment. He stated that James Wathigo was not a party to the suit and that he had not particularised acts of fraud or wrong doing alleged against him. PW1 stated that the Plaintiff had not lodged any complaint against James Wathigo and that no proceedings had been brought against him by the Plaintiff. PW1 stated further that the Plaintiff had lodged a complaint against the 2<sup>nd</sup> Defendant with the Police but the 2<sup>nd</sup> Defendant had not been charged.

38. In further re-examination, PW1 stated that James Wathigo was never engaged as an advocate for the Plaintiff. He stated that James Wathigo was an advocate for Mr. and Mrs. Wangethi who were the original owners of the suit property. He stated that it was pursuant to the agreement dated 16<sup>th</sup> December 2013 that James Wathigo gave an undertaking to the bank which was rejected because he was not in their panel of advocates. PW1 stated that the bank did not receive any payment under the said undertaking. He stated that Mr. and Mrs. Wangethi were still shareholders of the Plaintiff. He stated that the advocates for the project were Mulondo, Oundo, Muriuki & Co. Advocates. PW1 stated that the Plaintiff did not sell apartment B2 to James Wathigo neither did it offer the apartment to him for sale.

#### **The Defendant's evidence:**

39. The Defendants called 3 witnesses. The first witness was James Watune Wathigo (DW1). DW1 told the court that he was an advocate of the High Court of Kenya practising in the name and style of J.G.Wathigo & Co. Advocates. DW1 adopted his witness statement dated 30<sup>th</sup> January 2020 as his evidence in chief and produced the documents attached to the statement as DEXH. 1 and DEXH.2. On cross-examination, DW1 stated that he was acting for Mr. and Mrs. Wangethi who were directors and shareholders of the Plaintiff and that his role was to advise them on legal issues relating to the apartments project. He stated that his role continued after the suit property was transferred to the Plaintiff. He stated that apartment B2 was given to him by the Plaintiff in settlement of his fees. He stated that he never raised a fee note. He stated that he had a letter from the directors and shareholders of the Plaintiff in which they acknowledged that he had rendered legal services and that he would be paid in kind with the said apartment B2. He stated that his payment was agreed upon in the course of the project.
40. DW1 stated that the suit property was for a single unit dwelling and that it was necessary to change the user to multi-dwelling units. He stated that Mr. Kakad advocate was an expert in change of user and with the concurrence of his clients, he gave the task of change of user of the suit property to Mr. Kakad. DW1 stated that in the course of the project, apartment B2 was referred to as B4 and that the two were one and the same. He stated that apartment B2 that was given to him in settlement of his fees was during numbering given number B4. DW1 stated that he sold the said apartment B2 to the 2<sup>nd</sup> Defendant at Kshs. 13,500,000/- and that the 2<sup>nd</sup> Defendant paid him the said amount. DW1 stated that the agreement dated 16<sup>th</sup> December 2013 was signed before him. He stated that the 2<sup>nd</sup> Defendant put money on Block D. He stated that the agreement was not fully performed.
41. On re-examination, DW1 stated that in acting for the Wangethis, he was also an advocate for the Plaintiff since the Wangethis were shareholders and directors of the Plaintiff. He reiterated that apartment B2 was given to him for his fees. He stated that the Plaintiff had not sued him over the apartment and that the Plaintiff had confirmed through a letter dated 2<sup>nd</sup> November 2011 witnessed by him (DW1) that apartment B2 had been sold to the 2<sup>nd</sup> Defendant and paid for in full. DW1 stated that the Plaintiffs had not raised any claim in respect of apartment B2 in their plaint.



42. The Defendants' next witness was Bhimji Mawji Rabadia(DW2). DW2 told the court that he was a contractor and that he was carrying out business as Vishnu Builders Company Limited (the 1<sup>st</sup> Defendant). DW2 adopted his witness statement dated 27<sup>th</sup> August 2014 as his evidence in chief and produced the documents attached to his affidavit sworn on 10<sup>th</sup> July 2014 as exhibits(DEXH.3).
43. On cross-examination, DW2 confirmed that the Plaintiff and the 1<sup>st</sup> Defendant entered into the agreement dated 26<sup>th</sup> July 2011(the contract). He also confirmed the terms of the agreement. He stated that after the commencement of the work, the whole design of the building was changed. He stated that the Plaintiff was being given architectural drawings in bits and pieces. He stated that the Plaintiff and the 1<sup>st</sup> Defendant did not enter into a new agreement with regard to these changes. He stated that the 1<sup>st</sup> Defendant was not paid the whole agreed contract sum of Kshs. 223,894,300.20. He stated that the certificates No. 21 and No. 22 that were issued to the 1<sup>st</sup> Defendant by the architect were not paid by the Plaintiff. DW2 stated that the architect was yet to issue the 1<sup>st</sup> Defendant with the final certificate. He stated that one of the certificates was dated 5<sup>th</sup> July 2013 and it was for a sum of Kshs. 9,217,266.02(See page 281 of DEXH.3). He stated that the certificate was sent to the Plaintiff on the same date and it was not settled. He stated that the other certificate was dated 12<sup>th</sup> September 2013 and it was for Kshs. 11,056,746.87(See page 267 of DEXH.3). He stated that the certificate was also delivered to the Plaintiff and was not settled. He stated that in addition to the 1<sup>st</sup> Defendant delivering these certificates to the Plaintiff, the architect was also sending the same directly to the Plaintiff by e-mail. He stated that the 1<sup>st</sup> Defendant had counter-claimed against the Plaintiff for these unpaid certificates, the retention money and the costs of the extra works. DW2 stated that the Plaintiff's contract was not terminated as neither the architect nor the project manager wrote to the Plaintiff on the issue. He stated that the handover of the project was supposed to be on 31<sup>st</sup> May 2014 and that before that the Plaintiff was locked out of the suit property. He stated that the original plan was for 4 floors and that the Plaintiff added a 5<sup>th</sup> floor on all the blocks. He stated that it took time to obtain approval for this additional floor and this caused delay in the works and the architect gave the 1<sup>st</sup> Defendant extension of time. He stated that the Plaintiff was not involved and that the 1<sup>st</sup> Defendant was taking directions from the project consultants. He stated that the 1<sup>st</sup> Defendant did not have a contract with the Plaintiff for these additional works. He stated that it was the consultant/project manager who was giving the 1<sup>st</sup> Defendant directions on these extra works which led to extra costs. He stated that the Plaintiff was involved in the changes and paid part of the extra costs. He stated that the parties used to discuss the delays at the site meetings and that the 1<sup>st</sup> Defendant had agreed to pay to the Plaintiff damages at the rate of Kshs. 10,000,000/- per month for the delay. He stated that after that agreement, more work was added as a result of which the architect gave the 1<sup>st</sup> Defendant extra time. He stated that the 1<sup>st</sup> Defendant had undertaken to finish the works by March 2013 which deadline the 1<sup>st</sup> Defendant did not meet. DW2 stated that the architect certified a total sum of Kshs. 227,067,659.19. He stated that the 1<sup>st</sup> Defendant was paid the said amount less 10% retention sum. He stated that he received the whole amount from the Plaintiff save that the 1<sup>st</sup> Defendant was not issued with the final certificate. He stated that the 1<sup>st</sup> Defendant was locked out of the suit property before completing the work. He stated that in the circumstances, the 1<sup>st</sup> Defendant was unable to quantify the final work done. He stated that the 1<sup>st</sup> Defendant constructed a 5 floor building together with Attic floor. He stated that it was only Block D that he had not completed. He stated that the other blocks had been completed. He stated that he followed the agreed channel for lodging complaints over non-payment. He stated that the 1<sup>st</sup> Defendant was supposed to be paid the retention fees after 6 months upon repair of defects if any. He stated that they had not gone for site inspection since the 1<sup>st</sup> Defendant was locked out of the suit property. He stated that the 1<sup>st</sup> Defendant would not have known if there were any defects to be



- repaired. He stated that there was not much work left by the time the 1<sup>st</sup> Defendant was locked out of the suit property.
44. In re-examination, DW2 stated that the contract was only for Blocks A, B and C up to the 4<sup>th</sup> Floor and attic. He stated that another Block D was added and additional floor. He stated that the cost of the contract had to vary and that clause 30 of the contract provided for variations. He stated that the project consultants were; the architect, the engineer and the quantity surveyor who were all engaged by the Plaintiff and as such were giving instructions on behalf of the Plaintiff. He stated that the delay of the work was due to additional works, a delay on the part of plumbers and those who were dealing with electrical and joinery works who were also engaged by the Plaintiff. He stated that the 1<sup>st</sup> Defendant wrote on 12<sup>th</sup> April 2012 asking for extension in which letter he gave reasons for the delay. He stated that the extension was granted by the architect. He stated that the 1<sup>st</sup> Defendant asked for extension of time from time to time whenever there was a delay and the same was granted by the architect. He stated that the 1<sup>st</sup> Defendant could not have been granted extension if it was at fault. He stated that the letter dated 25<sup>th</sup> April 2012(See page 56, PEXH.1) by the Plaintiff regarding payment of Kshs. 10,000,000/- per month for delay was written before the 1<sup>st</sup> Defendant was granted extension of time. DW2 stated that there were also delays in payment by the Plaintiff. He stated that for each certificate issued by the architect 10% was withheld as retention sum. He stated that the building constructed by the 1<sup>st</sup> Defendant was fully occupied and that the 1<sup>st</sup> Defendant did not receive a notice from the architect regarding any defect in the building neither had he seen evidence of any repairs that were carried out by the Plaintiff. DW2 stated that Plaintiff did not receive a termination notice and was not paid for all the work done.
45. The Defendants last witness was the 2<sup>nd</sup> Defendant, Vijay Morjaria(DW3). The 2<sup>nd</sup> Defendant told the court that he was a businessman. He adopted his witness statement filed on 19<sup>th</sup> June 2017 as his evidence in chief and produced the documents attached to the Defendants' bundle of documents filed in court on 22<sup>nd</sup> March 2017 as DEXH.4. DW3 also produced the documents attached to his affidavit sworn on 9<sup>th</sup> July 2014 and filed on 10<sup>th</sup> July 2014 as DEXH.5.
46. On cross-examination, DW3 told the court that he was an investor in the property sector and had also ventured into construction as at the time of giving evidence. He denied that he was a partner in the 1<sup>st</sup> Defendant. He stated that he came to know the 1<sup>st</sup> Defendant through Mr. Maina who was a father to Ms. Lucie Maina who was one of the directors of the Plaintiff. He stated that it was Ms. Lucie Maina who introduced him to Dr. Gikonyo(PW1). He stated that Dr.Gikonyo and Ms. Lucie Maina were directors of the Plaintiff. DW3 stated that he had an interest in the project the two were involved in as he wanted to purchase an apartment. He stated that when Ms.Lucie Maina (Ms.Maina) and PW1 approached him they wanted him to be a partner in the project. He stated that he did not have funds at the time. He stated that he told them that the only way he could help was to purchase some apartments off-plan. He stated that the two also asked him if he knew of a good contractor. He stated that he had worked with the 1<sup>st</sup> Defendant before and introduced it to them. He stated that he was not a party to the contract between the Plaintiff and the 1<sup>st</sup> Defendant. He stated that he also assisted PW1 and Ms. Maina with money. He stated that the apartments were purchased by him and other people and that he paid a deposit. He stated that they purchased apartments B5, A10 and A9 whose numbers later changed to B6, A11 and A12 respectively. He stated that the purchase price was Kshs.10,000,000/-, 10,500,000/- and Kshs. 11,000,000/- respectively. DW3 stated that they paid a total deposit of Kshs. 3,500,000/- through RTGS.
47. He stated that apartment B5 belonged to him, apartment A10 to Hitesh Morjaria and apartment A9 to Ashok Shangani. He stated that they paid the balance of the purchase price in full in instalments.



DW3 referred the court to the bundle of cheques at pages 57 to 84 of DEXH.4. He stated that the said cheques were for the payments that they made for the 3 apartments and the other apartments. He stated that apart from the 3 apartments, they also purchased apartment B4 which became B5 on 27<sup>th</sup> December 2011 at Kshs. 9,000,000/-. The apartment was purchased by him. He stated that they also purchased apartment B3 in the names of Mitesh Tharkar and Payal Tharkar on 3<sup>rd</sup> May 2013 at Kshs. 14,500,000/-. DW3 referred the court to the agreement at page 106 of DEXH.5. He stated that apartment B3 did not change its number. DW3 stated that apartments B3 and B5 are similar. DW3 stated that he purchased another apartment namely; apartment No. B2 that later changed to B4 from James Wathigo. He stated that the apartment was given to James Wathigo as his legal fees by the Plaintiff. He stated that the apartment was not registered in the name of James Wathigo. He stated that James Wathigo sold the apartment to him and the Plaintiff prepared a lease in his favour. DW3 referred the court to the agreement dated 2<sup>nd</sup> November 2011 between him and Mr. James Wathigo. DW3 stated that he was not aware if James Wathigo had entered into an agreement with the Plaintiff in respect of this apartment. He stated that at that moment he was very familiar with the project and knew what he was purchasing. He stated that the reason why apartment B2 changed to B4 was because Mr. and Mrs. Maina who were the original owners of the suit property wanted apartment B2 and at the request of PW1, he did not mind taking apartment B4. He stated that the numbers of the other apartments changed because of the additional floor that was added. He stated that due to the changes in numbering, the apartments that were earlier purchased as B5, A10 and A9 changed to B6, A11 and A12 respectively. He stated that apartment B4 which he had purchased earlier became B5. He stated that this apartment B4 that changed to B5 had nothing to do with apartment B2 which he surrendered and got another apartment known as B4. DW3 stated that overall, the apartments they purchased were B5, A10, A9, B4, B2 and B3 which later changed to B6, A11, A12, B5 and B4 respectively. He stated that apartment B3 was not given a new number. He stated that the current numbers for the apartments purchased by them were B6, A11, A12, B5, B4 and B3. DW3 stated that they paid for these apartments in full. He stated that Mr. Shah purchased apartments C1 and A4 at a total purchase price of Kshs. 28,000,000/-. He stated that there was an outstanding payment of Kshs. 2,500,000/- to be made by him and that the two apartments were not yet registered in the name of Mr. Shah. He stated that the total payment that they were supposed to make for all the apartments that they purchased save for the one purchased from James Wathigo was Kshs. 83,000,000/- of which they paid Kshs. 80,500,000/- leaving a balance of Kshs. 2,500,000/- payable by Mr. Shah mentioned above. He stated that all the payments were made by RTGS, cheques and interest on loan that he gave to the Plaintiff. DW3 stated that he advanced several loans to the Plaintiff and that the Plaintiff acknowledged receipt of the same. DW3 referred the court to the documents at pages 1, 2, 3, and 5 of DEXH. 4. DW3 stated that it was a term of the said loans that the Plaintiff was to pay to him a sum of Kshs. 600,000/- per month as damages if the loan was not paid in 3 months. He stated that he was given post-dated cheques by the Plaintiff and a letter addressed to the bank to pay him Kshs. 6,000,000/-. DW3 further referred the court to the documents at pages 6 and 11 of DEXH. 4. DW3 stated that the Plaintiff resolved to borrow from him Kshs. 26,000,000/- and offered personal guarantees and a number of apartments as security. He stated that on the strength of these securities, he extended to the Plaintiff a further loan of Kshs. 21,000,000/-. He stated that when he introduced to the Plaintiff a buyer for apartments C7 and C9 he was offered a commission of Kshs. 1,500,000/- and when he introduced a buyer for apartment C10 he was to be given a commission of Kshs. 500,000/-. He stated that when he introduced buyers for apartments C1 and A4, he was promised additional sum of Kshs. 1,500,000/-. He stated that all these build up to the sum of Kshs. 80,500,000/- that he had mentioned earlier as having been paid. DW3 referred the court to a letter at page 24 of DEXH.4 addressed to the bank to pay him Kshs. 1,000,000/- which was monthly interest that was due to him of the loan of Kshs. 21,000,000/- that he advanced to the Plaintiff. He stated that he was given many such letters together with post-dated cheques. In this



regard, DW3 referred the court to the documents at pages 85 to 89 of DEXH.4. He stated that at page 33 of DEXH. 4 is a letter by the Plaintiff to the effect that he had paid for apartments B6, A11 and A12 in full. DW3 stated that at page 36 of DEXH.4 is a letter that was instructing him to collect some money to reimburse himself. He stated that a certificate of payment had been issued in favour of the 1<sup>st</sup> Defendant but the Plaintiff had no money. He stated that he paid the 1<sup>st</sup> Defendant Kshs. 2,000,000/- and was asked to recover the amount from the 1<sup>st</sup> Defendant when it would ultimately be paid by the Plaintiff. He stated that there was also a commission of Kshs. 1,500,000/- that he was asked to collect himself. DW3 stated that the third parties to whom he made payments were not complaining. DW3 stated that he had not made any claim in respect of Block D.

48. In re-examination, DW3 stated that all the apartments in his counter-claim were paid for save for apartments C1 and A4 in respect of which there was an outstanding sum of Kshs. 2,500,000/-. He stated that he was ready and willing to pay the said amount to the Plaintiff. He stated that of the 8 apartments in dispute, 5 were already registered in their names. He stated that apartments C1, A4 and B4 were not registered in their names because they were not discharged. He stated that he was not asking for what he had not paid for from the Plaintiff.
49. After the close of evidence, the parties made closing submissions in writing.

#### **The Plaintiffs' submissions:**

50. The Plaintiff filed its submissions dated 1<sup>st</sup> April 2022. The Plaintiff submitted that the 1<sup>st</sup> Defendant wanted payment in advance contrary to the terms of the contract and introduced the 2<sup>nd</sup> Defendant to the Plaintiff who advanced to the 1<sup>st</sup> Defendant a sum of Kshs. 9,735,000/- together with interest to enable the 1<sup>st</sup> Defendant commence work. The Plaintiff submitted that it paid back to the 2<sup>nd</sup> Defendant the said sum of Kshs. 9,735,000/- together with interest. The Plaintiff submitted that in order to secure the repayment of the money advanced to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant, the Plaintiff gave the 2<sup>nd</sup> Defendant apartments to hold as lien pending the repayment of the said money. The Plaintiff submitted that the 2<sup>nd</sup> Defendant held on to the said apartments and claimed that the same were owned by him.
51. The Plaintiff submitted that it did not execute any agreement for sale or lease in favour of the 2<sup>nd</sup> Defendant and its associates in respect of apartments C1, A4 and B4. The Plaintiff submitted that the leases registered in favour of the 2<sup>nd</sup> Defendant in respect of the said apartments were fraudulent in that the apartments were either not paid for at all or were paid for in part. The Plaintiff reiterated the particulars of the 2<sup>nd</sup> Defendant's alleged fraud pleaded in the plaint. The Plaintiff submitted that the alleged fraud was committed while the title for the suit property was moved from the firm of James Wathigo advocate to the firm of P.J.Kakad & Co. Advocates. The Plaintiff submitted that it was at this time that caveats were registered against the said title and the leases for apartments A11, A12, B5, B6, B3, C9 and C11 registered in favour of the 2<sup>nd</sup> Defendant. The Plaintiff submitted that James Wathigo acted against the interest of his clients, Mr. & Mrs. Wangethi and took no action against the unauthorized use of the title for the suit property. The Plaintiff submitted that he instead collaborated with the 2<sup>nd</sup> Defendant to defraud the Plaintiff.
52. The Plaintiff submitted that James Wathigo was not given apartment B2 as his fees and that apartments did not change numbers. The Plaintiff submitted that apartment B2 did not change to B4. The Plaintiff submitted that although the 2<sup>nd</sup> Defendant claimed to have purchased apartments worth Kshs. 172,500,000/-, the evidence of payment placed before the court shows that the 2<sup>nd</sup> Defendant paid only a sum of Kshs. 37,500,000/- leaving a balance of Kshs. 125,000,000/- due and payable to the Plaintiff. The Plaintiff submitted that with regard to Block D, a meeting was held at the office of James Wathigo



on 9<sup>th</sup> December 2013 at which the 2<sup>nd</sup> Defendant offered to purchase a number of apartments. The Plaintiff submitted that James Wathigo who claimed to be an old friend of the 2<sup>nd</sup> Defendant agreed to issue a legal undertaking from his law firm to the bankers of the Plaintiff for the payment of a sum of Kshs. 43,500,000/- to cover the costs involved in the transaction. The Plaintiff submitted that the 2<sup>nd</sup> Defendant was to pay to the Plaintiff among others a sum of Kshs. 18,000,000/- that the Plaintiff had borrowed and spent on the construction of Block D up to that point.

53. The Plaintiff submitted that subject to the issuance and acceptance of the said undertaking by James Wathigo, the Plaintiff was to undertake partial discharges of a number of apartments. The Plaintiff averred that the said sum of Kshs. 43,500,000/- was not paid since the bank rejected the undertaking by James Wathigo and refused to discharge the apartments. The Plaintiff submitted that during the said meeting of 9<sup>th</sup> December 2013, James Wathigo printed the execution pages of the sale agreements and leases for the apartments that were to be discharged and convinced the Plaintiff's directors to sign the same. The Plaintiff submitted that no payment was made by the 2<sup>nd</sup> Defendant since the undertaking was rejected as aforesaid and the said sale agreements and leases executed in the office of James Wathigo were used to defraud the Plaintiff of the apartments. The Plaintiff submitted that the documents were used by the 2<sup>nd</sup> Defendant to claim apartments that he did not pay for. The Plaintiff submitted that the 2<sup>nd</sup> Defendant admitted in evidence that he did not pay for any apartment in Block D.
54. The Plaintiff submitted that as part of his blackmail, the 2<sup>nd</sup> Defendant put a caveat on the title of the suit property which stopped the development thereof until the Plaintiff and the bank discharged all the apartments that he was interested in. The Plaintiff submitted that the said caveat that caused delays in the project was in place between June 2012 to January 2013; a period of 7 months. The Plaintiff submitted that this caused it a total loss of Kshs. 14,000,000/- being the interest that it was charged at the rate of Kshs. 2,000,000/- per month. The Plaintiff referred the court to a copy of the title deed at pages 28 to 32 of the Plaintiff's further list of documents. The Plaintiff submitted that it was entitled to judgment for this sum of Kshs. 14,000,000/-. The Plaintiff also referred the court to the letter from P.K Kakad Advocates dated 5<sup>th</sup> November 2012 at pages 26 and 27 of the Plaintiff's further list of documents in which the said advocates made it clear that the 2<sup>nd</sup> Defendant would not release the title for the suit property until the bank gave an irrevocable undertaking to release the apartments.
55. The Plaintiff submitted that the apartments in dispute were apartments A12 purchased by Hitesh Morjaria, B6 purchased by Vijay Morjaria, B5 purchased by Vijay Morjaria, B3 purchased by Mitesh and Payal Thakkar and A12 purchased by Ashok Shangani in respect of which a total sum of Kshs. 36,000,000/- was paid leaving a total balance of Kshs. 38,000,000/-. The Plaintiff submitted that the purchasers of these apartments refused to pay the balance of the purchase price because they wanted the 1<sup>st</sup> Defendant to carry out various modifications in the apartments that were carried out by the 1<sup>st</sup> Defendant and paid for by the Plaintiff. The Plaintiff submitted that the transfer and registration of leases in respect of these apartments were obtained through theft of title and blackmail and must be reversed by the court.
56. The Plaintiff submitted that the owners of apartments A12, A11, B5 and B6 represented by the 2<sup>nd</sup> Defendant owed the Plaintiff a total sum of Kshs. 23,500,000/- while the purchaser of apartment B3 owed it Kshs. 14,500,000/-. The Plaintiff submitted further that the 2<sup>nd</sup> Defendant owed him a further sum of Kshs. 14,000,000/- on account of the caveat and interest and a sum of Kshs. 19,000,000/- being interest on the outstanding amount. The Plaintiff submitted further that the 2<sup>nd</sup> Defendant also owed the Plaintiff a sum of Kshs. 9,735,000/- being a refund of the money paid to the 2<sup>nd</sup> Defendant for a loan allegedly advanced by the 2<sup>nd</sup> Defendant to the 1<sup>st</sup> Defendant to commence work. The Plaintiff submitted that it was also entitled to a sum of Kshs. 5,000,000/- for the swimming pool that was



- constructed and demolished at the instigation of the 2<sup>nd</sup> Defendant. The Plaintiff submitted that it was also entitled to legal costs in the sum of Kshs. 4,000,000/-. The Plaintiff submitted that it was also entitled to interest on the total amount claimed in the sum of Kshs. 64,000,000/- making the total amount due to it from the 2<sup>nd</sup> Defendant Kshs. 144,000,000/-.
57. The Plaintiff submitted that apartments C9 and C11 were purchased by Ramesh Thakkar who paid for the same in full. The Plaintiff submitted that it did not enter into any transaction with the persons claimed by the 2<sup>nd</sup> Defendant to have purchased apartments C1 and A4. The Plaintiff submitted that it did not also receive any payment from them. The Plaintiff submitted further that the leases purportedly issued by the Plaintiff in respect of apartments D1 and D6 were fraudulent as the two apartments did not exist.
58. With regard to its claim against the 1<sup>st</sup> Defendant, the Plaintiff submitted that the agreed contract sum was Kshs. 201,000,000/- that was later adjusted to Kshs. 223,894,300/-. The Plaintiff submitted that the Plaintiff paid to the 1<sup>st</sup> Defendant a total sum of Kshs. 227,067,659.19. The Plaintiff submitted that the contract commenced on 27<sup>th</sup> July 2011 and was to last for 66 weeks with a practical completion date of 19<sup>th</sup> October 2012. The Plaintiff submitted that the payments to the 1<sup>st</sup> Defendant were to be made against an interim certificate issued by the architect.
59. The Plaintiff submitted that due to the delay in the construction work, the 1<sup>st</sup> Defendant agreed on 24<sup>th</sup> April 2012 to complete the work by 30<sup>th</sup> March 2013 failure to which it will pay to the Plaintiff a sum of Kshs. 10,000,000/- monthly as damages until completion. The Plaintiff referred the court to the said agreement at page 56 of PEXH.1. The Plaintiff submitted that the 1<sup>st</sup> Defendant did not complete the work by 30<sup>th</sup> March 2013 and had not done so 14 months later. The Plaintiff submitted that it was entitled to a total of Kshs. 140,000,000/- from the 1<sup>st</sup> Defendant as damages for the delay. The Plaintiff submitted that it was also entitled to additional sum of Kshs. 7,000,000/- for the delay in accordance with the original contract under which it was entitled to Kshs. 500,000/- per month as delay cost.
60. The Plaintiff submitted that the 1<sup>st</sup> Defendant admitted receiving the said sum of Kshs. 227,067,659.19 which was over and above the contract sum. The Plaintiff submitted that the 1<sup>st</sup> Defendant was overpaid to the tune of Kshs. 3,000,000/- and as such no further payment was due from the Plaintiff to the 1<sup>st</sup> Defendant. The Plaintiff submitted that in addition to the said sum of Kshs. 227,067,659.19, there was a further sum of Kshs. 21,012,300/- paid to and on behalf of the 1<sup>st</sup> Defendant which were not part of the certificates issued by the architect. The Plaintiff submitted that the only certificates issued by the architect were Nos. 1 to 20. The Plaintiff submitted that certificates No. 21 and No. 22 for the main contract and No. 3 for Block D were never issued. The Plaintiff submitted that it did not owe the 1<sup>st</sup> Defendant any money.
61. The Plaintiff submitted that it had proved its claims against the Defendants. The Plaintiff submitted that it had proved that the 2<sup>nd</sup> Defendant defrauded it and that the 2<sup>nd</sup> Defendant's claim was fraudulent. The Plaintiff submitted that the 2<sup>nd</sup> Defendant having been refunded the payment he made to the 1<sup>st</sup> Defendant to commence the construction work, he had no right to lay a claim to the apartments that were given to him to hold as lien. The Plaintiff submitted that it had cited various incidences that demonstrated the 2<sup>nd</sup> Defendant's illegal conduct. The Plaintiff cited Black's Law Dictionary, 9<sup>th</sup> Edition, Arthi Highway Developers Ltd. v. West End Butchery Limited & 6 Others [2015]eKLR and Rahemtullah Omar & another v. Musa Hersi Gahiye & 5 others[2014]eKLR in support of the foregoing submissions. The Plaintiff submitted that its witness was categorical that the Plaintiff was arm-twisted to sign the acknowledgments relied on by the 2<sup>nd</sup> Defendant as evidence



- of payment for the apartments claimed by the 2<sup>nd</sup> Defendant. The Plaintiff submitted that the 2<sup>nd</sup> Defendant did not place before the court evidence of the alleged payments.
62. With regard to the 1<sup>st</sup> Defendant's counter-claim, the Plaintiff submitted that its relationship with the 1<sup>st</sup> Defendant was strictly guided by the Agreement and Conditions of Contract for Building Works dated 26<sup>th</sup> July 2011 (the contract). The Plaintiff submitted that the rights and obligations of the parties were set out in the contract. The Plaintiff submitted that the 1<sup>st</sup> Defendant was not entitled to the retention money. The Plaintiff submitted that the issue of retention money was to be considered after a joint inspection of the project and the issuance by the architect of the final certificate and certificate of practical completion. The Plaintiff submitted that the joint inspection of the site was not carried out and as such a certificate of practical completion was not issued. The Plaintiff submitted that the stage at which the Plaintiff was obligated to pay the retention money to the 1<sup>st</sup> Defendant had not been reached. The Plaintiff submitted that it would be unfair to require the Plaintiff to deposit the retention money in a joint account at this stage since the project was taken over and completed by another contractor.
63. With regard to the sum of Kshs. 5,300,000/- claimed by the 1<sup>st</sup> Defendant for the variations and extras, the Plaintiff submitted that under clause 30.14 of the contract, approval of the Plaintiff was required before any variation or extra work was done. The Plaintiff submitted that its approval was not sought for the variations and extras the costs of which were claimed by the 1<sup>st</sup> Defendant. The Plaintiff submitted that since the value of the extra work claimed exceeded 0.01% of the contract price, the same was not payable. In this regard, the Plaintiff referred to the e-mail dated 24<sup>th</sup> June 2014 from the architect at page 53 of DEXH.3.
64. With regard to the claim for Kshs. 20,595,102.00 by the 1<sup>st</sup> Defendant as money due and owing under the contract, the Plaintiff submitted that certificate No. 21 was yet to be prepared and that the certification sought was for Kshs. 11,816,880.53. The Plaintiff submitted that there was also valuation No. 22 for Kshs. 7,521,672.62 that was not certified for payment. The Plaintiff referred the court to page 64 of DEXH.3, pages 136 to 173 of DEXH. 3 and pages 105 to 134 of DEXH3. The Plaintiff submitted that the 1<sup>st</sup> Defendant had not made any claim in respect of certificates issued by the architect or certified valuations. The Plaintiff submitted that it was only to make payment against a certificate of payment issued by the architect and that the court had no jurisdiction to certify valuations. The Plaintiff submitted that under clause 38.5, the Plaintiff had a right to employ and pay other persons to carry out and complete the works and rectify any defects. The Plaintiff submitted that the 1<sup>st</sup> Defendant was not entitled to payment for works done by another contractor. The Plaintiff submitted that the project consultants were independent contractors and were not agents of the Plaintiff.
65. On the alleged failure to submit the last certificate of payment within 14 days from the date of completion pursuant to clause 34.6 of the contract, the Plaintiff submitted that it was not its role to issue a final certificate or any certificate for that matter. The Plaintiff submitted that clause 34.6 of the contract provided for simple interest on the delayed/unpaid certificate. The Plaintiff submitted that the 1<sup>st</sup> Defendant had not produced any certificate that was not paid by the Plaintiff for the purposes of computing interest on the delayed payment. The Plaintiff submitted that no payment was due to the 1<sup>st</sup> Defendant for the certificates issued for alleged work done in Block D. The Plaintiff submitted that the evidence adduced in court showed that the 1<sup>st</sup> Defendant did not do any work related to Block D.
66. With regard to the 2<sup>nd</sup> Defendant's counter-claim, the Plaintiff framed a number of issues for determination. The first was whether any consideration was paid for the apartments claimed by the 2<sup>nd</sup> Defendant. On this issue, the Plaintiff submitted that the 2<sup>nd</sup> Defendant's claim was in respect of apartments B3, B4/B2, B5, B6, A4, A11, A12, C1, C9 and C11. With regard to apartment B2 also known as B4 which the 2<sup>nd</sup> Defendant claimed to have purchased from James Gatune Wathigo advocate



- to whom it was given by the Plaintiff as his legal fees, the Plaintiff submitted that no evidence was tendered showing that James Wathigo rendered any services to the Plaintiff. The Plaintiff submitted that there were no instruction notes or fee-note raised by the said advocate. The Plaintiff submitted further that there was no agreement between the Plaintiff and James Wathigo through which the apartment was given to the said advocate as his fees. The Plaintiff submitted further that there was no agreement or lease to support the transfer of the apartment by the Plaintiff to James Wathigo.
67. The Plaintiff submitted that in the agreement for sale dated 2<sup>nd</sup> November 2011 between the 2<sup>nd</sup> Defendant and James Wathigo in respect of apartment B2 at pages 90 to 93 of DEXH.4, James Wathigo sold the apartment to the 2<sup>nd</sup> Defendant at Kshs. 13,500,000/- as the beneficial owner thereof. The Plaintiff submitted that there is another agreement at pages 94 to 106 of DEXH. 4 allegedly between the Plaintiff and the 2<sup>nd</sup> Defendant over the same apartment B2 in which the Plaintiff sold the apartment to the 2<sup>nd</sup> Defendant at Kshs. 13,500,000/-. The Plaintiff submitted that this agreement did not refer at all to James Wathigo. The Plaintiff submitted that at pages 192 to 228 of DEXH.5 is another sale agreement dated 19<sup>th</sup> December 2013 and a lease over apartment B2. In this agreement the consideration is given as Kshs. 15,000,000/-. The Plaintiff submitted that these documents contradict those referred to earlier. The Plaintiff submitted that the 2<sup>nd</sup> Defendant was misleading the court on the alleged acquisition of apartment B2. The Plaintiff averred that all these contradictory documents are alleged to have been signed by the Plaintiff. The Plaintiff submitted that no evidence was placed before the court showing that the 2<sup>nd</sup> Defendant paid the purchase price for apartment B2 to James Wathigo. The Plaintiff submitted that James Wathigo failed to prove that apartment B2 was given to him by the Plaintiff. The Plaintiff submitted that in the circumstances, James Wathigo had no title in the apartment to transfer to the 2<sup>nd</sup> Defendant. In support of this submission, the Plaintiff cited *Rico Kinyariro Kariuki v. Renate Wolff & another*[2018]eKLR.
68. With regard to apartment B3, the Plaintiff submitted that the sale agreement for the same was not dated and the consideration was given as Kshs. 14,500,000/-. The Plaintiff submitted that the lease in respect of this apartment is dated 3<sup>rd</sup> May 2013 in favour of Mitesh and Payal Thakkar and the consideration for the lease is given as Kshs. 14,000,000/-. The court was referred to pages 121 to 137 of DEXH. 5, page 155 of DEXH.4 and pages 107 to 120 of DEXH. 5. The Plaintiff submitted that there was also acknowledgment of payment of Kshs. 14,500,000/- at page 31 of DEXH.4. The Plaintiff submitted that no payment was received for this apartment and that the 2<sup>nd</sup> Defendant produced no evidence of payment. The Plaintiff submitted that having rejected the acknowledgment of payment, the 2<sup>nd</sup> Defendant and the registered owners of the apartment were under a duty to adduce evidence in support of the payment which they failed to do.
69. With regard to apartment B4, the Plaintiff submitted that the sale agreement is dated 27<sup>th</sup> December 2011 between the Plaintiff and Hitesh Morjaria and the consideration is given as Kshs. 9,000,000/-(See pages 26 to 39 of DEXH.5). The Plaintiff submitted that this sale agreement contradicts the evidence given by the 2<sup>nd</sup> Defendant and DW1 in which they claimed that apartment B2 was swapped with apartment B4. The Plaintiff submitted that the lease for this apartment is stamped but not registered (See pages 88 to 104 of DEXH.5). The Plaintiff submitted that no payment was received for this apartment and that the 2<sup>nd</sup> Defendant produced no evidence of payment. The Plaintiff submitted that the 2<sup>nd</sup> Defendant did not also produce evidence of payment of stamp duty that would have led to the registration of the apartment in his favour.
70. For apartments B6, A11 and A12, the Plaintiff submitted that on page 33 of DEXH.4 is an acknowledgement of receipt of payment of Kshs. 3,000,000/- from the 2<sup>nd</sup> Defendant in full and final payment for all the 3 apartments. The Plaintiff submitted that it was paid a sum of Kshs. 9,000,000/-



for apartment B6 leaving a balance of Kshs. 6,000,000/- which came about due to a change of design that was paid for by the Plaintiff.

71. With regard to apartments A4 and C1, the Plaintiff submitted that in a letter dated 16<sup>th</sup> April 2013(See page 173 of DEXH.5), the Plaintiff and the 2<sup>nd</sup> Defendant agreed on the settlement of friendly loans. The Plaintiff submitted that part of this agreement was that the Plaintiff would refund to the 2<sup>nd</sup> Defendant a sum of Kshs. 22,000,000/- if apartments A4 and C1 were not completed and transferred to the 2<sup>nd</sup> Defendant and that the loan of Kshs. 22,000,000/- from the 2<sup>nd</sup> Defendant would be converted to deposits towards the purchase of these apartments. The Plaintiff submitted that in the circumstances, no payment was made for these apartments. The Plaintiff submitted that the 2<sup>nd</sup> Defendant did not prove the existence of the said loan of Kshs. 22,000,000/-. The Plaintiff submitted that since the 2<sup>nd</sup> Defendant and the purported purchasers Nakrai Ratilalchand Shah and Niketan Ratilal Shah did not produce evidence of purchase of apartment A4 as ordered by the court on 1<sup>st</sup> July 2014, the same was sold by the Plaintiff and registered in the name of a third party on 29<sup>th</sup> April 2016. For apartment C1, the Plaintiff submitted that in the lease at pages 140 to 156 of DEXH. 5 in favour of Kankrai Ratilalchand Shah and Niketan Ratilal Shah, the consideration for the apartment is given as Kshs. 12,000,000/-. The Plaintiff submitted that no evidence of payment of the said amount was produced by the 2<sup>nd</sup> Defendant and the purported purchasers. The Plaintiff submitted that the apartment is still registered in the name of the Plaintiff and that the 2<sup>nd</sup> Defendant had no basis for claiming the apartment.
72. With regard to apartments B5, A10 and A9, the Plaintiff referred the court to the sale agreements at pages 10 to 24 of DEXH.5 and the letter of offer at page 25 of the same exhibit in favour of Hitesh Morjaria. The Plaintiff submitted that for apartment B5, it received a sum of Kshs. 9,000,000/- leaving a balance of Kshs. 6,000,000/- due to change in design. For apartments A10 and A9, the Plaintiff submitted that the 2<sup>nd</sup> Defendant had not raised any claim in respect thereof.
73. With regard to apartment A11, the Plaintiff submitted that the lease in respect thereof was registered in favour of Hitesh Morjaria (See pages 40 to 55 of DEXH.5). The Plaintiff submitted that it received a sum of Kshs. 9,000,000/- against the agreed purchase price of Kshs. 10,000,000/-. The Plaintiff submitted that due to changes that were made to the apartments at the instance of the 2<sup>nd</sup> Defendant, the balance payable for the apartment is Kshs. 5,000,000/- due to increased costs.
74. With regard to apartment A12, the Plaintiff submitted that there is a registered lease in favour of Ashok Dhirajlal Sanghani and Sujat Ashok Sanghani and that the agreed consideration was Kshs. 10,500,000/-. The Plaintiff submitted that it received a sum of Kshs. 9,000,000/- in respect of this apartment leaving a balance of Kshs. 1,500,000/-. The Plaintiff submitted that due to change in design made on the instructions of the 2<sup>nd</sup> Defendant, the balance payable for this apartment was Kshs. 4,500,000/-. With regard to apartments C9 and C7, the Plaintiff submitted that the same were sold to Ramesh Thakkar and/or nominee on 17<sup>th</sup> January 2012 at a total consideration of Kshs. 36,000,000/- (See pages 223 to 231 of DEXH.5). The Plaintiff submitted that apartment C9 is registered in the name of Ramesh Thakkar and Anila Thakkar. The Plaintiff submitted that it was paid in full for the two apartments by the purchasers thereof and it had no claim regarding the same. The Plaintiff submitted that the 2<sup>nd</sup> Defendant had no basis for his claim over apartment C9 as he had no power of attorney from the purchasers.
75. With regard to apartment C11, the Plaintiff submitted that the purchasers of this apartment had filed a separate suit against the Plaintiff and the dispute over the same was settled. The Plaintiff submitted that the 2<sup>nd</sup> Defendant had no right to lodge another claim in respect of the apartment. The Plaintiff submitted that the 2<sup>nd</sup> Defendant only had a power of attorney to act for particular purchasers and in



respect of particular apartments the particulars of which are in the documents attached to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' defence and counter-claim.

76. The Plaintiff submitted further that in the agreement dated 16<sup>th</sup> December 2013 between the Plaintiff, the 2<sup>nd</sup> Defendant and James Wathigo for Mr. & Mrs. Wangethi(See pages 271 to 272 of DEXH.5), the parties agreed on how all the outstanding payments were to be settled. The Plaintiff submitted that it was agreed that the payment due to the Plaintiff was Kshs. 50,000,000/- of which a sum of Kshs. 43,500,000/- was to be paid to the Plaintiff on the strength of an undertaking that was to be given by J.G. Wathigo & Co. Advocates to PW1 to enable the Plaintiff to fulfil its obligations and to complete the project and Kshs. 7,000,000/- was to be deducted/recovered from the retention money due to the 1<sup>st</sup> Defendant. The Plaintiff submitted that the said agreement confirmed several facts that it had submitted on more particularly the apartments that had not been paid for and the fact that apartment B2 was not given to James Wathigo in settlement of his fees. The Plaintiff submitted that according to the said agreement, as at the date of the agreement, a total sum of Kshs. 25,500,000/- was due and payable to the Plaintiff for the apartments claimed by the 2<sup>nd</sup> Defendant herein. The Plaintiff submitted that J.G.Wathigo's undertaking was not accepted by the bank and no further payment was made to the Plaintiff in respect of the said apartments. The Plaintiff submitted that the said professional undertaking was not enforceable as it was not acted upon by either party. The Plaintiff submitted that the undertaking was of no effect.
77. With regard to Block D, the Plaintiff submitted that the claim in respect thereof was introduced by the 2<sup>nd</sup> Defendant in his witness statement and that the claim was abandoned by the 2<sup>nd</sup> Defendant in his defence since it was not part of his claim in the defence and counter-claim. The Plaintiff submitted that it did not execute any lease in respect of Block D and that the 2<sup>nd</sup> Defendant did not make any payment for the same. The Plaintiff submitted that the 2<sup>nd</sup> Defendant's claim in respect of Block D had no basis having admitted that he did not make any payment in respect of Block D.
78. In conclusion, the Plaintiff submitted that it had proved its case against the Defendants and that the Defendants' claim against it was not proved.

#### **The 1<sup>st</sup> and 2<sup>nd</sup> Defendants' submissions:**

79. In their submissions dated 4<sup>th</sup> May 2022, the Defendants framed the following issues for determination by the court;
1. Whether there was a breach of the contract dated 26<sup>th</sup> July 2011 and if so, by whom?
  2. Who is the legal owner of the Apartments numbers B6, A11, A12, B2, B4, B5, B3, C1, A4, C9 and C11?
  3. Whether the Plaintiff has established fraud on the Part of the 2<sup>nd</sup> Defendant.
  4. Whether the Defendants are entitled to the prayers sought.
  5. Who should bear the costs of the suit?

#### **Whether there was a breach of the contract dated 26<sup>th</sup> July 2011 and if so, by whom?**

80. The Defendants submitted that the Plaintiff and the 1<sup>st</sup> Defendant entered into a legally binding contract dated 26<sup>th</sup> July 2011 for the construction of residential apartments for the Plaintiff, Ringsview Apartment Limited at a contractual sum of Kshs. 223,894,300.20. The Defendants submitted that the contract was for a period of 64 weeks and the date of practical completion was 19<sup>th</sup> October 2012. The Defendants submitted that amongst the terms of the contract was an obligation



on the Plaintiff/Employer to make financial arrangements to ensure payments of certificates as and when they fell due.

81. The Defendants submitted that the 1<sup>st</sup> Defendant commenced and dutifully executed its part of the contract and raised various interim certificates over the course of the project. The Defendants submitted that clause 34.5 of the contract required that once the contractor presented an interim payment certificate to the employer, the contractor was entitled to payment within fourteen days.
82. The Defendants submitted that contrary to the above provision, the Plaintiff on several occasions failed and/neglected to make good the payment for the certificates and was therefore in blatant breach of the contract. The Defendants submitted that the 1<sup>st</sup> Defendant had given a breakdown of all payments received from the Plaintiff vis-a-vis the certificates raised in the bundle of documents attached to the Replying Affidavit of Bhimji Rabadia (DEXH.3) at pages 102 to 104. The Defendants submitted that a balance of Kshs. 42,490,320.48 remained unpaid to the 1<sup>st</sup> Defendant.
83. The Defendants submitted that this breach forced the 1<sup>st</sup> Defendant to write various letters to the Plaintiff/Employer pleading with it to release the money rightfully owed to it in full and on time to enable a smooth flow of the works. The Defendants referred the court to the letters at pages 70 and 78 of DEXH. 3 to the Project Manager and the Architect complaining of delays in payments and dishonoured cheques issued by the Plaintiff thus leading to slow progress of the works. The Defendants submitted that the Project Manager acknowledged receipt of the letter addressed to him through an email dated 29<sup>th</sup> November 2013 in which he informed all the sub-contractors and main contractor that it was in talks with the employer over the issue of payment and would advise. The Defendants submitted that instead of looking into the said issue, the Plaintiff through a letter dated 31<sup>st</sup> May 2014 opted to terminate the contract citing delays as the sole reason for termination. The Defendants submitted that the said termination was made in bad faith and without following the due process. The Defendants submitted that the delay in completion of the works was as a result of no fault of the 1<sup>st</sup> Defendant and that the same was attributable to the actions of the Plaintiff and its agents.
84. The Defendants submitted that the Plaintiff made various variations to the scope of work outlined in the Bill of Quantities specifications which significantly changed the dynamics of the contract. The Defendants submitted that the particulars of the changes were outlined in paragraph 2 of the 1<sup>st</sup> Defendant's witness statement of Bhimji Rabadia dated 24<sup>th</sup> August 2014. The Defendants submitted that the variations included change of the structural design in all the column bases which set back the contract by 6 months, change of elevation and, addition of a swimming pool and a gym area in Block D.
85. The Defendants submitted that as a result of these changes to the original plan, there were delays in the initial phases of implementation which went for as long as 6 months in some instances. The Defendants submitted that there was need to get approvals from the then Nairobi City Council for the additional construction works particularly of the 5<sup>th</sup> floor which took a total of 8 weeks.
86. The Defendants submitted that the Project Engineer who was an agent of the Plaintiff kept making changes to the contract thereby causing delays from the original completion period. The Defendants referred the court to the letter dated 8<sup>th</sup> December 2011 annexed to the 1<sup>st</sup> Defendant's Replying Affidavit of Bhimji Rabadia sworn on 29<sup>th</sup> July 2014(DEXH3) that was addressed to the Plaintiff. The Defendants submitted that, in the letter, it was stated clearly that the major reasons for delays were delayed structural drawings and amendments on them, as well as delays in payment of the sums certified. The Defendants submitted that due to these changes, the 1<sup>st</sup> Defendant was issued with various extensions of time. The Defendants submitted that in the letter dated 21<sup>st</sup> June 2012 at page 100 of DEXH.3 from Achitekton Services, it was acknowledged that the delays were occasioned by the



revision of both the Architectural and Structural designs and as such, the 1<sup>st</sup> Defendant was granted an extension of time for 15 weeks up to 31<sup>st</sup> January 2013.

87. The Defendants submitted that this was further revised and an additional 17 weeks extension granted until 31<sup>st</sup> May 2013 through a letter dated 15<sup>th</sup> January 2013 at page 101 of DEXH.3. The Defendants submitted that this extension was necessitated by the modification of the design to include additional typical floor thereby increasing the scope of work, a fact that was recognized by the Architect. The Defendants submitted that the 1<sup>st</sup> Defendant applied for a further extension of time which was granted through a letter dated 18<sup>th</sup> June 2013 at page 98 of DEXH. 3. The Defendants submitted that the completion date for Blocks A, B and C was extended to 26<sup>th</sup> July 2013 and that of Block D was extended to 30<sup>th</sup> August 2013.
88. The Defendants submitted that in addition to the foregoing, the 1<sup>st</sup> Defendant's witness, Bhimji Rabadia (DW2) testified that the delays were also caused by certain factors beyond the control of the 1<sup>st</sup> Defendant such as bad weather conditions. The Defendants referred the court to a Clerk of Works Report by the Plaintiff at pages 17 to 19 of DEXH.3 which showed a breakdown of the total hours lost due to rainfall between the year 2011 to 2013.
89. The Defendants submitted that in exercise of caution the 1<sup>st</sup> Defendant once again applied for extension of time through a letter dated 5<sup>th</sup> June 2013 in which it explained the causes of delay and issued supporting documents. The Defendants gave among the reasons for extension loss of time due to rains and election period and addition of tiles to the walls. The Defendants submitted that the 1<sup>st</sup> Defendant also raised the issue of termination of a sub-contract agreement for the kitchen and office which affected the entire joinery fittings. The Defendants submitted that the Plaintiff having been fully satisfied with these reasons, granted a time extension.
90. The Defendants submitted that the delays were also caused by the Sub- contractors nominated by the Plaintiff which had a general effect on the whole project. The Defendants submitted that the 1<sup>st</sup> Defendant complained of these delays severally during meetings and through email correspondence. In one of the meetings held on 1<sup>st</sup> August 2013, minutes of which is part of DEXH.3, the delays were attributed to the subcontractors. The reasons for the delays were given as; Hwansung have not resumed work, aluminium subcontractor not yet on site, Lift subcontractor yet to resume mechanical installations on Block B and lack of enough scaffolding holding progress on finishes in Block A and B. The Defendants submitted that the subcontractors were reminded to work within the main contractor's programme. The Defendants submitted that there was no doubt that the sub-contractors contributed to the delays in the completion of works and not the 1<sup>st</sup> Defendant as alleged by the Plaintiff.
91. The Defendants submitted that the Plaintiff had made a claim that the 1<sup>st</sup> Defendant owed it a sum of Kshs. 140,000,000/= as damages which was calculated at the rate of Kshs. 10,000,000 per month for the delay in completion of the project. The Defendants submitted that this claim arose from a meeting that was held on the 25<sup>th</sup> April 2012 between the 1<sup>st</sup> Defendant and the Plaintiff where it was agreed that the 1<sup>st</sup> Defendant was to complete the works by 30<sup>th</sup> March 2013, failing which damages shall accrue at Kshs. 10,000,000 per month.
92. The Defendants submitted that the Plaintiff conveniently omitted the fact that an extension of time was granted on the 18<sup>th</sup> June 2013 through which the completion period was extended from 30<sup>th</sup> March 2013 to 26<sup>th</sup> July 2013. The Defendants submitted that due to this further extension of the completion period, the conditions set on 25<sup>th</sup> April 2012 for default were overtaken by events and could not be invoked. The Defendant submitted that by granting an extension of time, the Plaintiff was satisfied



that valid reasons existed that delayed the completion of the project. The Defendants submitted that the Plaintiff waived the right to enforce the agreement of 25<sup>th</sup> April 2012. The Defendants submitted that any reference to the said agreement was therefore null and void. The Defendants referred the court to the extension of 18<sup>th</sup> June 2013 at page 284 of DEXH.3.

93. On the issue of the valuation of the works done, the Defendants submitted that clause 34 of the contract mandated the Quantity Surveyor to value the works done by the contractor including variation works within 7 days of the request and the Architect to issue a payment certificate within seven days of the date of receipt of the Quantity Surveyor's valuation. The Defendants submitted that the 1<sup>st</sup> Defendant submitted its application for valuation of certificate number 21 on 17<sup>th</sup> March 2014 for the work done as well as extra work. This application however went unanswered prompting the 1<sup>st</sup> Defendant to make several follow ups as evidenced by correspondence at pages 60 and 61 of DEXH.3. The Defendants submitted that the 1<sup>st</sup> Defendant kept asking the Plaintiff through its consultants to issue valuation for the said certificate and additional work as late as 17<sup>th</sup> June 2014, nearly 9 weeks later.
94. The Defendants submitted that the Plaintiff's claim that it was not liable to make payment of the sum due to the 1<sup>st</sup> Defendant since the amount claimed under certificate No. 21 had not been certified or approved by the Plaintiff was an old trick meant to deprive the contractor of the fruits of its labour. The Defendants submitted that the 1<sup>st</sup> Defendant dutifully wrote to the Plaintiff's architect inviting him to verify the works done so as to avoid any issues of overpayment. The Defendants referred the court to the email correspondence from the Plaintiff's said agent at pages 52 and 53 of DEXH.3 requesting for the Plaintiff's approval for the extra works done. The Defendants submitted that it was absurd for the Plaintiff to refuse making the payment due to the 1<sup>st</sup> Defendant on account of its own misdeeds. The Defendants submitted that the Plaintiff should be held accountable for failure to approve the works, value and issue payment certificates as well as failure to pay the sums owed to the 1<sup>st</sup> Defendant.
95. The Defendants submitted that clause 30.7 of the contract required that the Plaintiff/Employer adjusts the contract price in light of variations but the Plaintiff refused and/or neglected to make adjustments to the contract price and as such the Plaintiff was in breach of the said contract. The Defendants referred the court to the letters at pages 81 and 83 of DEXH. 3 which the 1<sup>st</sup> Defendant wrote to the Plaintiff requesting that the contract sum be updated due to the additional works that they were instructed to undertake after the signing of the contract.
96. The Defendants submitted that the Plaintiff refused and/or neglected to abide by the provisions of clause 34.15 of the contract that required it to deposit in a joint interest earning bank account with the 1<sup>st</sup> Defendant the retention money and was therefore in breach of the contract. The Defendants submitted that owing to conduct of the Plaintiff, the 1<sup>st</sup> Defendant through a letter to the Plaintiff dated 7<sup>th</sup> June 2013 requested that it gives a written assurance that the 1<sup>st</sup> Defendant would be paid on time and in full (See page 43 of DEXH.3)
97. The Defendants submitted further that through a letter dated 17<sup>th</sup> June 2013, the Plaintiff gave an undertaking that the retention money would be paid on time and in full in accordance with clause 34.0 of the contract. The Defendants submitted that the retention money due to the 1<sup>st</sup> Defendant was to be released on the issuance of the certificate of practical completion. The Defendants submitted that this was impractical as the Plaintiff had already ignored and/or refused to value the works done for the purposes of the final certificate as shown above thus crippling the project's progress. The Defendants submitted that instead of rectifying the breach, the Plaintiff went on to assign the contract to another contractor and wrongfully withheld the retention money owed to the 1<sup>st</sup> Defendant.



98. The Defendants submitted that the Plaintiff went against its undertaking and wrongfully withheld the retention money owed to the 1<sup>st</sup> Defendant while it was in breach of contract and was indebted to the 1<sup>st</sup> Defendant. The Defendants submitted that such acts by the Plaintiff were oppressive and were made in a bid to cripple the financial muscle of the 1<sup>st</sup> Defendant so as to defeat its ability to pursue legal claim against it.

**Who is the legal owner of apartments B6, A11, A12, B2, B4, B5, B3, C1, A4, C9 and C11?**

99. Apartments originally known as B5, A10 and A9 and currently known as B6, A11 and A12.

100. The Defendants submitted that the 2<sup>nd</sup> Defendant, Vijay Morjaria in his evidence told the court of his working relationship with the directors of the Plaintiff, Ringsview Apartments Limited and explained how he was convinced to purchase apartments off plan and also to get his friends to purchase the apartments. The Defendants submitted that the 2<sup>nd</sup> Defendant testified that on 18<sup>th</sup> April 2011, he together with his colleague, Hitesh Morjaria entered into a sale agreement with the Plaintiff for the purchase of duplex apartments B5, A10 and A9 at a consideration of Kshs. 31,500,000/= in respect of which a deposit was paid. The Defendants referred the court to pages 10 to 25 of DEXH.5 for copies of the sale agreement and a letter of offer.

101. The Defendants submitted that during the course of the construction, the Plaintiff caused an additional floor to be added to the project and that this additional floor altered the numbering of the apartments as a result of which apartment B5 changed to B6, A10 to A11 and A9 to A12. In this regard, the Defendants referred the court to the e-mail dated 12<sup>th</sup> November 2012 from Lucie Maina at page 18 of the Plaintiff's additional bundle of documents dated 27<sup>th</sup> November 2020 in which Lucie Maina, a director of the Plaintiff stated in part as follows:

“We are adding an additional floor at the Ringsview Apartment Project in Kileleshwa. As a result, the apartment numbers for the eight units have changed. Through this email, I am confirming the correct apartment numbers to be B3, B5, B6, A10, A11, A12, C9 and C11 and not Unit/Apartment Numbers B5, A10, A9, B4, B2, C9, C7 and C2 as earlier advised.”

102. The Defendants submitted that by a letter dated 22<sup>nd</sup> November 2012 (See page 33 of DEXH.4), the Plaintiff acknowledged receipt of the sum of Kshs. 3,000,000/- from Vijay Morjaria in full and final payment for apartment number B6, A11 and A12. The Defendants submitted that in this letter, the Plaintiff took cognizance of the fact that the apartment numbers had changed and acknowledged payment of the purchase price for the same.

103. The Defendants submitted that following that acknowledgment, the parties executed lease agreements using the new apartment numbers as follows;

- i. Lease over apartment B6 dated 3<sup>rd</sup> May 2013 from Ringsview Apartment to Vijay Morjaria.
- ii. Lease over apartment A11 dated 3<sup>rd</sup> May 2013 from Ringsview Apartment Limited to Hitesh Morjaria.
- iii. Lease over apartment A12 dated 3<sup>rd</sup> May 2013 from Ringsview Apartments Limited and Ringsview Apartment Management Limited to Ashok Dhirajlal Sanghani and Sujata Ashok Sanghani.

104. The Defendants referred the court to copies of the said leases at pages 40 to 87 of DEXH.5. The Defendants submitted that a copy of the title for the suit property at page 31 of the Plaintiff's additional bundle of documents dated 27<sup>th</sup> November 2020 shows that apartment A11 is registered in the name of



Hitesh Morjaria, apartment A12 in the names of Ashok Dhirajlal Sanghani and Sujata Ashok Sanghani and apartment B6 in the name of Vijay Morjaria. The Defendants submitted that the apartments were registered in the names of the said purchasers on 12<sup>th</sup> July 2013 who were subsequently issued with share certificates reflecting their shares in Ringsview Apartment Management Company Limited on 8<sup>th</sup> August 2013. The Defendants referred the court to the copies of the said share certificates at pages 242, 243 and 245 of DEXH. 4.

105. The Defendants submitted that clause 2.1.3 of the sale agreement between the parties provided that the purchaser shall pay Kshs. 3,000,000/- on the completion date. The Defendants submitted that this amount was paid gradually leaving a balance of Kshs. 500,000/- only outstanding, a fact that was acknowledged in the reconciliation of the accounts done by all the parties on 13<sup>th</sup> December 2013. The Defendants submitted that the 2<sup>nd</sup> Defendant remained able and willing to pay the said sum of Kshs, 500,000/- upon completion.
106. The Defendants submitted that the 2<sup>nd</sup> Defendant had established how the 2<sup>nd</sup> Defendant and his associates whom he legally represents pursuant to the power of attorney dated 3<sup>rd</sup> July 2014 (filed together with the Defendants' defence and Counterclaim at pages 105 to 107 thereof) acquired the aforesaid apartments.

#### **Apartment B4 formerly known as Apartment B2.**

107. The Defendants submitted that James Gatune Wathigo advocate was retained by Mr. and Mrs. Wangethi to provide legal advice during the sale and construction of Ringsview Apartments Limited. They submitted that Mr. and Mrs. Wangethi were the owners of the suit property on which the apartments' project was being undertaken. The Defendants submitted that the duties of James Gatune Wathigo advocate continued even after the suit property was transferred to the Plaintiff and he was representing the directors of the Plaintiff. The Defendants submitted that the directors of the Plaintiff gave James Gatune Wathigo advocate apartment B2 as payment for his legal fees. The Defendants submitted that James Gatune Wathigo advocate who did not want to keep the apartment sold the same to the 2<sup>nd</sup> Defendant with the full knowledge of the directors of the Plaintiff and was paid the full purchase price of Kshs. 13,500,000/- by the 2<sup>nd</sup> Defendant. The Defendants referred the court to the sale agreement between the two at page 90 of DEXH.4. The Defendants submitted that the Plaintiff confirmed through a letter dated 2<sup>nd</sup> November 2011 (See page 7 of DEXH.4) that apartment B2 was sold to the 2<sup>nd</sup> Defendant and the same had been fully paid for.
108. The Defendants submitted that in his evidence, the 2<sup>nd</sup> Defendant stated that he requested the Plaintiff to give him Apartment B4 instead of B2 because he wanted all the apartments he had bought to be on the same floor, a request the Plaintiff willingly accepted. The Defendants submitted further that through a letter dated 3<sup>rd</sup> June 2014 from J.G Wathigo Advocate to P.J Kakad & Co. Advocates, it was indicated that apartment B2 was swapped for Apartment B4 and P.J Kakad & Co. Advocates was instructed to proceed and pursue a partial discharge for apartment B4. The court was referred to page 56 of DEXH. 4 in this regard.
109. The Defendants submitted that the Plaintiff thereafter executed a lease dated 3<sup>rd</sup> May 2013 for the apartment number B4 in favour of the 2<sup>nd</sup> Defendant. The Defendants submitted that it was clear that the 2<sup>nd</sup> Defendant purchased apartment B2 which was later swapped for apartment B4 for value and was therefore the legal owner thereof.



#### **Apartment C1 and A4.**

110. The Defendants submitted that the Plaintiff had requested for a loan of Kshs.22,000,000/- from the 2<sup>nd</sup> Defendant to be paid back on 28<sup>th</sup> February,2013. The Defendant submitted that the Plaintiff was unable to repay the loan and interests on time, and as such, it wrote to the 2<sup>nd</sup> Defendant on the 16<sup>th</sup> of April, 2013 (See letter at page 39 of the DEXH.4) requesting that the loan be settled as follows;
- a) That the sum of Kshs. 22 million be converted into a deposit for apartments C1 and A4 of which it acknowledged receipt.
  - b) That if the apartments C1 and A4 were not completed and transferred to the 2<sup>nd</sup> Defendant, the directors of the Plaintiff undertook and guaranteed to refund the said deposit to the 2<sup>nd</sup> Defendant.
111. The Defendants submitted that the Plaintiff was estopped from claiming any further payments for the abovementioned apartments having given them to the 2<sup>nd</sup> Defendant in settlement of the said friendly loan of Kshs. 22,000,000/- owed to the 2<sup>nd</sup> Defendant.
112. The Defendants submitted that the 2<sup>nd</sup> Defendant was approached by Kanakrai Ratilal Chand Shah who was interested in purchasing apartments C1 and A4 which were being sold at Kshs. 14,000,000/- each. The Defendants submitted that the 2<sup>nd</sup> Defendant was paid the full purchase price by the said Kanakrai Ratilal Chand Shah. The Defendants submitted that the Plaintiff's claim that the purchasers of the two apartments ought to have presented evidence to show payment to itself or to the 2<sup>nd</sup> Defendant was unfounded as the 2<sup>nd</sup> Defendant explained how he acquired the said apartments.
113. The Defendants submitted that the Plaintiff's director, Dr. Mbira Gikonyo (PW1) sent an email on 18<sup>th</sup> December 2013 (See page 44 of DEXH. 4) to P.J Kakad Advocates to the effect that an agreement had been reached and the Plaintiff had agreed to execute partial discharges, sale agreements and leases with regard to apartments C10, B4, C1 and A4. The Defendants submitted that the firm of P.J Kakad Advocates went ahead to prepare and register leases for the said apartments and particularly for apartments C1 and A4 in favour of Kanakrai Ratilal Chand Shah on the said instructions of the Plaintiff.
114. The Defendants submitted that the agreements and leases presented before the court showed without doubt that Kanakrai Ratilal Chand Shah was the true legal owner of apartments C1 and A4 and as such was entitled to the rights incidental thereto. The Defendants submitted that any purported sale of the apartments to a third party as suggested by the Plaintiff in its submissions at paragraph 4.2 (e) (ii) was null and void as one cannot sell what he does not own.

#### **Duplex Apartments; Formerly C9 and C7, currently known as C11 and C9.**

115. The Defendants submitted that on 19<sup>th</sup> January 2012, the Plaintiff entered into a sale agreement for apartments numbers C9 and C7 with Ramesh Thakkar (See pages 223 to 235 of DEXH.5). The Defendants submitted that pursuant to the said agreement, the parties executed two leases in respect of the apartments both dated 3<sup>rd</sup> May 2013 in favour of Ramesh Thakkar and Anila Ramesh Thakkar. The Defendants referred the court to the leases at pages 236 to 252 of DEXH.5. The Defendants submitted that the Plaintiff had in its submissions admitted receipt of Kshs. 36,000,000/- for the two apartments. The Defendants submitted that the 2<sup>nd</sup> Defendant had no claim over the apartments save for its wish that Ramesh Thakkar and Anila Ramesh Thakkar be declared as the owners of the two apartments.



### **Apartment B3.**

116. With regard to apartment B3, the Defendants submitted that a lease agreement was entered into between the Plaintiff and, Mitesh Nitinbhai Thakkar and Payal Mitesh Thakkar at a consideration of Kshs. 14,500,000/=. The Defendants submitted that the lease was registered in favour of the purchasers (See pages 121 to 137 of DEXH.5). The Defendants submitted further that the Plaintiff also acknowledged receipt of the purchase price for the apartment through its letter dated 30<sup>th</sup> October 2012 (See page 38 of DEXH.5). The Defendants submitted that the Plaintiff was in the circumstances estopped from claiming any more money for the apartments.

### **Block D.**

117. With regard to Block D, the Defendants admitted the meeting that was held by all the parties involved in the project on 9<sup>th</sup> December 2013 and the minutes of the said meeting dated 16<sup>th</sup> December 2016. The Defendants submitted that at the said meeting, the parties reconciled all the pending accounts relating to the Defendants and agreed on the said reconciliation. The Defendants submitted that following the said reconciliation that also included Block D, it was agreed that the payment due to the Plaintiff was Kshs. 50,500,000/- of which a sum of Kshs. 7,000,000/- was to be deducted from the retention money due to the 1<sup>st</sup> Defendant and the sum of Kshs. 43,500,000/- was to be secured by a professional undertaking from J.G.Wathigo & Co. Advocates to Dr. Gikonyo(PW1). The Defendants submitted that the said reconciliation of accounts captured the position of all the then pending payments due by the Defendants and his associates to the Plaintiff. The Defendants submitted that the reconciliation also captured apartment B2 in respect of which the 2<sup>nd</sup> Defendant was to pay a sum of Kshs. 15,000,000/- the agreement in respect of which was drawn and executed on 19<sup>th</sup> December 2013(See pages 192 to 206 of DEXH.5). The Defendants submitted that part of the reconciliation was the agreement for sale of the entire Block D executed by the parties on 19<sup>th</sup> December 2013(See pages 274 to 288 of DEXH.5).

118. The Defendants submitted that in fulfilment of the said agreement arrived at following the said reconciliation of accounts, the firm of J.G. Wathigo & Co. Advocates issued a professional undertaking to I & M Bank dated 19<sup>th</sup> December 2013 to pay a sum of Kshs. 43,500,000/-. The Defendant submitted that the Plaintiff on its part did not act on its part of the agreement claiming that the undertaking was defective. The Defendants submitted that out of the said sum of Kshs. 43,500,000/- that the 2<sup>nd</sup> Defendant was to pay to the Plaintiff, only Kshs. 10,500,000/- was owed to the Plaintiff for other accounts. The Defendants submitted that the sum of Kshs. 33,000,000/- was for the purchase of the whole of Block D and apartment B2. The Defendants submitted that there was no mention of Kshs. 172,500,000/- claimed by the Plaintiff.

### **The legality of the agreements in respect of the apartments.**

119. The Defendants submitted that the Plaintiff's claim that the agreements that it entered into with the 2<sup>nd</sup> Defendant and its associates in respect of the apartments in dispute were void was meant to evade its obligations. The Defendants submitted that the sale agreements and leases between the Plaintiff and the 2<sup>nd</sup> Defendant and his associates with respect to the apartments aforesaid were valid and binding upon the parties thereto and should be enforced by the court. The Defendants submitted that the said agreements were valid in all material respects. The Defendants submitted that the said agreements were executed by the Plaintiff's directors willingly before an advocate. The Defendants submitted that a party cannot be allowed to run away from the terms of its agreement. The Defendants submitted that they should be shielded from the obvious breach by the Plaintiff of the said agreements. In support



of this submission, the Defendants referred the court to *Jeremiah Mucheru Ndibui v. Davis Gishure Ngugi* [2019] eKLR and *Shah v. Guilders International Bank Ltd.* [2003] KLR.

### **Registration of the Caveat.**

120. The Defendants submitted that any person who has a right to obtain interest in land, whether such right is contractual or otherwise; has a right to lodge a caution with the registrar which caution might restrict registration of dispositions in accordance with the provisions of section 71 of the *Land Registration Act* 2012. The Defendants submitted that under the said provisions of the *Land Registration Act*, the person lodging the caution is under no obligation whatsoever to inform the proprietor of the land of the intention to register the caution neither is such person under any obligation to obtain consent from the proprietor of the land upon which caution is to be registered.
121. The Defendants submitted that the 2<sup>nd</sup> Defendant exercised his rights when he registered the caveat complained of by the Plaintiff and did not need the permission of the Plaintiff before doing so. The Defendants submitted that the action by the 2<sup>nd</sup> Defendant to place a caveat on the suit property was in protection of its constitutional right to ownership of property.
122. The Defendants submitted that section 72 of the *Land Registration Act* 2012 places obligation upon the registrar to give notice in writing to the proprietor whose land is affected by a caution. The Defendants submitted that the claim that the 2<sup>nd</sup> Defendant did not inform the Plaintiff that it had registered a caveat against the title of the suit property was baseless and as such the Plaintiff's claim that it should be awarded the costs for lifting the caveat was similarly unfounded and should be dismissed.

### **Whether the Plaintiff has established the fraud alleged against the 2<sup>nd</sup> Defendant.**

123. The Defendants submitted that the Plaintiff had alleged that; the 2<sup>nd</sup> Defendant obtained the title deed for L.R No. 4858/11(the suit property) illegally, hid it from the Plaintiff and refused to release the same unless the Plaintiff signed the sale agreements and sub-leases for apartments which the 2<sup>nd</sup> Defendant had not paid for. The Defendants submitted that the Plaintiff sought a declaration that the leases to apartments C1 and A4 were fraudulently registered through blackmail and an order for the cancellation of the same.
124. The Defendants cited sections 107 and 109 of the *Evidence Act* Chapter 80 Laws of Kenya and submitted that the burden was upon the Plaintiff to prove that the 2<sup>nd</sup> Defendant acquired the said apartments fraudulently. The Defendants submitted that the burden in this case rested fully on the Plaintiff and at no time did it shift to the 2<sup>nd</sup> Defendant. The Defendants cited several authorities on the standard of proof of fraud among them; *Rop Albert (Suing as the representative of the estate of Francis Kiprop Sanga Deceased) & Another v. Gladys Koskey & 3 Others* [2018] eKLR, *Paul Muira & another v. Jane Kendi Ikinyua & 2 others* [2014] eKLR, *Mutsonga v. Nyati 1984* (KLR) 425 and *Koinange & 13 Others v. Koinange* [1986] KLR 23.
125. The Defendants submitted that given the seriousness of an allegation of fraud, a person alleging it must present sufficient evidence to prove the existence of same. The Defendants submitted that it is not enough to simply particularize allegations of fraud in pleadings. They submitted that the allegations must be proved to a standard higher than that on a balance of probabilities. In support of this submission, the Defendants relied on *Gabriel S. Chepkwony v. Gidion Nzioki Mbili & another* [2018] eKLR where the court observed that:

“When a person alleges fraud, this is a serious issue which is criminal in nature and it does not only require the particulars to be listed but must be specifically proved. How do you prove



that a transaction was fraudulent? Do you just shout from the roof top that a transaction is fraudulent or you engage the relevant investigative agencies to help in unearthing the act?”

126. The Defendants submitted that the Plaintiff reported the alleged fraud to the Police who investigated the matter and cleared the 2<sup>nd</sup> Defendant of any wrongdoing. The Defendants referred the court to a letter dated 22<sup>nd</sup> November 2016 from the Directorate of Criminal Investigations(DCI) at page 250 of DEXH.5. The Defendants submitted that the effect of the said letter from the DCI was that the 2<sup>nd</sup> Defendant was not involved in any act of fraud. The Defendants submitted that the allegations of fraud were made maliciously and in bad faith to enable the Plaintiff to evade its contractual obligations. The Defendants submitted that the title deed for the suit property was all along in the custody of James Watune Wathigo advocate(DW1) to whom the same was deposited by Mr. and Mrs. Wangethi who were the original owners of the suit property. The Defendants submitted that on the instructions of Mr. and Mrs. Wangethi, James Watune Wathigo advocate(DW1) forwarded the title deed to P.J Kakad advocate who was to transfer the property to the Plaintiff and to obtain a change of user. The Defendants submitted that the title deed was thereafter returned to James Watune Wathigo advocate's office. The Defendants submitted that at no time did the 2<sup>nd</sup> Defendant get the said title deed into his possession and as such the issue of the 2<sup>nd</sup> Defendant using the same to black mail the Plaintiff into transferring apartments C1 and A4 to the 2<sup>nd</sup> Defendant had no basis. The Defendants submitted further that no complaints had been made with the relevant professional bodies against the conduct of James Gatune Wathigo and P.J Kakad Advocate. The Defendants submitted that the allegations made against the said advocates of collusion and acting without instructions had no basis in the circumstances. The Defendants submitted that the evidence of fraud placed before the court by the Plaintiff did not meet the threshold established by the authorities cited earlier. The Defendants urged the court to find that the Plaintiff had not discharged the burden of proof of fraud alleged against the Defendants. The Defendants submitted that apartments A4, A11, A12, B3, B4, B5, B6 and C1 had been registered in the names of the 2<sup>nd</sup> Defendant and the other purchasers he introduced to the Plaintiff. The Defendants submitted that the 2<sup>nd</sup> Defendant having established that the 2<sup>nd</sup> Defendant and his associates acquired the said apartments lawfully and the Plaintiff having failed to prove fraud alleged against the 2<sup>nd</sup> Defendant, the titles held by the 2<sup>nd</sup> Defendant and his associates were indefeasible.
127. In support of this submission, the Defendants relied on sections 24(b) and 26 of the [Land Registration Act](#) 2012 and *Margaret Njeri Wachira v. Eliud Waweru Njenga*[2018]eKLR. The Defendants urged the court to declare the 2<sup>nd</sup> Defendant as the rightful owner of apartments B3, B4, B5, B6, A4, A11, A12 and C1.

#### **Whether the Defendants are entitled to the other reliefs sought.**

128. The Defendants submitted that since they had demonstrated that the contract dated 26<sup>th</sup> January 2011 was illegally terminated by the Plaintiff, the 1<sup>st</sup> Defendant was entitled to the return of possession of the site so that it could complete the works as per the contract.
129. The Defendants submitted that the 2<sup>nd</sup> Defendant had demonstrated that he acquired apartments B3, A11, A12, C1 and A4 lawfully and as such he was the indefeasible owner thereof and entitled to enjoy all rights and privileges appurtenant thereto. The Defendants submitted further that having established pursuant to the power of attorney on record the ownership of apartments B4, B5 and B6, the 2<sup>nd</sup> Defendant was entitled to the 2<sup>nd</sup> prayer in which he was seeking a mandatory injunction compelling the Plaintiff to give access and quiet peaceful possession to the 2<sup>nd</sup> Defendant and the



- purchasers of apartments B3, B4, B5, B6, A4, A11, A12 and C1. The Defendants also submitted that they were entitled to the prohibitory permanent injunction sought against the Plaintiff.
130. The Defendants submitted further that the 2<sup>nd</sup> Defendant was a businessman and that he purchased the apartments with a view to selling the same after making some improvements. The Defendants submitted that the actions of the Plaintiff and its agents of interfering with the said apartments made it impossible for the 2<sup>nd</sup> Defendant to sell or lease any of the apartments. The Defendants submitted that the 2<sup>nd</sup> Defendant was entitled to general damages for lost opportunity and profit and in the alternative, the market value for each of the apartments belonging to the 2<sup>nd</sup> Defendant.
131. The Defendants submitted further that the 2<sup>nd</sup> Defendant was entitled to a sum of Kshs. 17,700,000/- being the total estimated loss of income he had suffered from being unlawfully restrained from accessing the subject properties. The Defendants submitted that this claim was based on clause 10.1.4 of the sale agreements of the apartments which provided for damages in the event the purchaser was not granted possession of apartments on the completion date. The Defendants submitted that the amount claimed is particularized in paragraph 23(b) of the Defence and Counterclaim.
132. On the issue of costs, the Defendants cited Halbury's Laws of England, 4<sup>th</sup> Edition (Re-issue), [2010] Vol. 10, para 16 where the authors have stated as follows:
- “The Court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the Court, a party has no right to costs unless and until the Court awards them to him and the Court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice”.
133. The Defendants also relied on Cecilia Karuru Ngayu v. Barclays Bank of Kenya & another [2016] eKLR where the court adopted the decision in Republic v. Rosemary Wairimu Munene, Ex-Parte Applicant and Ihururu Dairy Farmers Co-operative Society Ltd where it was held that:
- “The issue of costs is at the discretion of the court as provided under the above section. The basic rule on attribution of costs is that costs follow the event..... It is well recognized that the principle costs follow the event is not to be used to penalize the losing party; rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”
134. In conclusion, the Defendants submitted that the Plaintiff's claim was contradictory in that on one hand, the Plaintiff was seeking Kshs. 118,500,000/- allegedly owed to it by the 2<sup>nd</sup> Defendant in respect of several apartments sold to him by the Plaintiff while on the other hand, the Plaintiff is seeking the cancellation of the titles in respect of apartments A11, A12, B3, B5 and B6 for the reason that the apartments were acquired fraudulently. The Defendants submitted that the Plaintiff cannot have it both ways; seeking the recovery of Kshs. 118,500,000/- and the cancellation of the titles on account of alleged fraud. The Defendants urged the court to dismiss the Plaintiff's claim and to enter judgment for the Defendants as prayed in their counter-claim.

### **Analysis and determination.**

135. From the pleadings, the following in my view are the issues arising for determination in this suit and the counter-claim;



1. Whether the 1<sup>st</sup> Defendant breached the contract dated 26<sup>th</sup> July 2011 between the 1<sup>st</sup> Defendant and the Plaintiff by failing to complete the construction works within the agreed period.
2. Whether the Plaintiff is entitled to the sum of Kshs. 140,000,000/- at the rate of Kshs. 10,000,000/- per month from 30<sup>th</sup> March 2013 up to 31<sup>st</sup> May 2014 as agreed damages for the 1<sup>st</sup> Defendant's delay in accordance with the agreement dated 25<sup>th</sup> April 2012.
3. Whether the 2<sup>nd</sup> Defendant unlawfully obtained and refused to release the title deed for L.R No. 4858/11(the suit property) unless Plaintiff signed sale agreements and sub-leases for apartments that had not been paid for by the 2<sup>nd</sup> Defendant and if so, whether the Plaintiff suffered loss to the tune of Kshs. 14,000,000/- which the Plaintiff is entitled to recover from the 2<sup>nd</sup> Defendant as a result of the said unlawful action by the 2<sup>nd</sup> Defendant.
4. Whether the 2<sup>nd</sup> Defendant caused apartments C1, A4 and B4 to be registered in his name fraudulently without paying for the same.
5. Whether the Plaintiff is entitled to the sum of Kshs. 18,500,000/- from the 2<sup>nd</sup> Defendant in respect of apartments A9, A10, B6 and B5.
6. Whether the Plaintiff is entitled to the sum of Kshs. 29,000,000/- from the 2<sup>nd</sup> Defendant in respect of apartments B4 and B3.
7. Whether the Plaintiff is entitled to the sum of Kshs. 10,500,000/- from the 2<sup>nd</sup> Defendant in respect of apartments C1 and C4.
8. Whether the Plaintiff is entitled to the sum of Kshs. 11,500,000/- comprising of the sum of Kshs. 6,000,000/- that the 2<sup>nd</sup> Defendant received from the Plaintiff's buyers of the apartments promising to incorporate additional features in the apartments like swimming pool and gymnasium which the 2<sup>nd</sup> Defendant did not remit to the Plaintiff and a sum of Kshs. 5,500,000/- which the 2<sup>nd</sup> Defendant received from potential buyers that he also never remitted to the Plaintiff.
9. Whether the Plaintiff is entitled to the sum of Kshs. 9,750,000/- that was paid to the 2<sup>nd</sup> Defendant in cash.
10. Whether the Plaintiff is entitled to the sum of Kshs. 8,000,000/- from the 2<sup>nd</sup> Defendant being the balance of the purchase price for apartment C7.
11. Whether the Plaintiff is entitled to the sum of Kshs. 3,000,000/- being the balance of the purchase price for apartment C10.
12. Whether the Plaintiff is entitled to the sum of Kshs. 5,000,000/- from the 2<sup>nd</sup> Defendant being the costs of the swimming pool that was built and demolished at the instance of the 2<sup>nd</sup> Defendant.
13. Whether the Plaintiff is entitled to the sum of Kshs. 2,900,000/- from the 2<sup>nd</sup> Defendant being the legal costs incurred in the removal of caveats and in the sale agreements.
14. Whether the Plaintiff is entitled to the other reliefs sought in the plaint.
15. Whether the termination of the contract between the Plaintiff and the 1<sup>st</sup> Defendant by the Plaintiff on 31<sup>st</sup> May 2014 was unlawful.



16. Whether the 1<sup>st</sup> Defendant is entitled to the sum of Kshs. 5,300,000/- from the Plaintiff arising from the variations of contract and extra work.
17. Whether the 1<sup>st</sup> Defendant is entitled to the sum of Kshs. 20,295,102/- from the Plaintiff as monies due and owing.
18. Whether the Plaintiff has denied the 2<sup>nd</sup> Defendant quiet access and peaceful possession of apartments B3, B4, B5, B6, A4, A11, A12, C1, C9 and C11 in breach of the sale agreements and sub-leases between the Plaintiff and the 2<sup>nd</sup> Defendant in respect of the said apartments.
19. Whether the 2<sup>nd</sup> Defendant has suffered loss to the tune of Kshs. 17,700,000/- as a result of the said acts by the Plaintiff in relation to the said apartments and Block D.
20. Whether the 2<sup>nd</sup> Defendant is entitled to the sum of Kshs. 4,400,000/- from the Plaintiff for the Plaintiff's failure to install solar system and intercom.
21. Whether the 2<sup>nd</sup> Defendant is entitled to the sum of Kshs. 33,848,236/- from the Plaintiff for additional works that were done by the apartment owners.
22. Whether the Defendants are entitled to the other reliefs sought in the counter-claim.
23. Who is liable for the costs of the suit and the counter-claim?

**Whether the 1<sup>st</sup> Defendant breached the contract dated 26<sup>th</sup> July 2011 between the 1<sup>st</sup> Defendant and the Plaintiff by failing to complete the construction works within the agreed period.**

136. It is common ground that under the contract dated 26<sup>th</sup> July 2011, the construction of the apartments on the suit property was to commence on 27<sup>th</sup> July 2011 and was to be completed on 19<sup>th</sup> October 2012. It is also common ground that for various reasons, the completion date for the project was extended from time to time with the last extension being given on 16<sup>th</sup> May 2014. According to that extension, the 1<sup>st</sup> defendant was to complete the works by 30<sup>th</sup> May 2014 in default of which the Plaintiff was to be at liberty to terminate the contract. It is not disputed that the 1<sup>st</sup> Defendant did not complete the construction works by 30<sup>th</sup> May 2014. The 1<sup>st</sup> Defendant had put forward several reasons for its failure to complete the works as agreed. I have noted from the evidence on record that those reasons were taken into account and informed the various extensions that were extended to the 1<sup>st</sup> Defendant. It is my finding therefore that the 1<sup>st</sup> Defendant breached the contract dated 26<sup>th</sup> July 2011 by failing to complete the works within the agreed timeline.

**Whether the Plaintiff is entitled to the sum of Kshs. 140,000,000/- at the rate of Kshs. 10,000,000/- per month from 30<sup>th</sup> March 2013 up to 31<sup>st</sup> May 2014 as agreed damages for the 1<sup>st</sup> Defendant's delay in accordance with the agreement dated 25<sup>th</sup> April 2012.**

137. I am in agreement with the 1<sup>st</sup> Defendant that this payment is not due to the Plaintiff. The claim is based on the agreement between the Plaintiff and the 1<sup>st</sup> Defendant made on 24<sup>th</sup> April 2012 under which the 1<sup>st</sup> Defendant agreed to pay to the Plaintiff agreed damages of Kshs. 10,000,000/- per month with effect from 1<sup>st</sup> April 2013 if the construction of the apartments was not completed by March 2013. I am in agreement with the 1<sup>st</sup> Defendant that the Plaintiff waived its rights under the agreement made on 24<sup>th</sup> April 2012 and evidenced by the letter dated 25<sup>th</sup> April 2012 when it agreed to extend the completion period from time to time after the 1<sup>st</sup> Defendant failed to complete the construction by 31<sup>st</sup> March 2013 with the last of such extensions being granted on 16<sup>th</sup> May 2014. The Plaintiff having extended the completion period until 30<sup>th</sup> May 2014 cannot be permitted to go back to the agreement



of 24<sup>th</sup> April 2012 to claim damages from the 1<sup>st</sup> Defendant. The damages were payable for breach and by extending the completion period, the breach was waived and similarly the consequential damages. It is therefore my finding that the sum of Kshs. 140,000,000/- claimed by the Plaintiff from the 1<sup>st</sup> Defendant as damages for failure to complete the construction by 31<sup>st</sup> March 2013 is not payable.

**Whether the 2<sup>nd</sup> Defendant unlawfully obtained and refused to release the title deed for L.R No. 4858/11(the suit property) unless Plaintiff signed sale agreements and sub-leases for apartments that had not been paid for by the 2<sup>nd</sup> Defendant and if so, whether the Plaintiff suffered loss to the tune of Kshs. 14,000,000/- which the Plaintiff is entitled to recover from the 2<sup>nd</sup> Defendant as a result of the said unlawful action by the 2<sup>nd</sup> Defendant.**

138. It is common ground that L.R No. 4858/11(the suit property) was originally owned by Mr. Wangethi Mwangi and Mrs. Lizzie Wangui Wangethi (hereinafter referred to as “the Wangethis”). It is also common ground that the Wangethis were being represented by J.G. Wathigo & Company Advocates and that the Wangethis handed over to the said firm the Grant No. I.R. 91673 (the title deed) in respect of the suit property at the point when the suit property was to be transferred to the Plaintiff. Apart from their names being mentioned severally by both parties, the Wangethis never participated in these proceedings either as parties or witnesses. It has therefore not come out clearly as to the instructions that they gave to J.G. Wathigo & Company Advocates in relation to the said title deed save for the instructions for the property to be transferred to the Plaintiff and the user thereof being changed. The fact that J.G.Wathigo & Co. Advocates was initially acting only for the Wangethis is clear from the letter dated 7<sup>th</sup> July 2011 addressed to P.J.Kakad & Co. Advocates by J.G.Wathigo & Co. Advocates (DEXH.2) through which the latter forwarded to the former the said title deed on the instructions of the Wangethis so that P.J.Kakad & Co. Advocates could register the transfer of the suit property in favour of the Plaintiff and also complete the change of user from a single dwelling house to multi-dwelling house. According to the letter, the title deed was forwarded to P.J.Kakad & Co. Advocates on certain undertakings that the firm was to give to J.G.Wathigo & Company Advocates. This shows that J.G.Wathigo & Company Advocates and P.J.Kakad & Co. Advocates were acting for different clients or protecting different interests. In a letter dated 1<sup>st</sup> April 2012 by P.J.Kakad & Co. Advocates to Kiruti & Co. Advocates(at page 55 of PEXH.1), P.J.Kakad & Co. Advocates when called upon to release the said title deed indicated that the firm held the same on the undertaking it had given to the firm of J.G.Wathigo & Company Advocates. It is not very clear from the evidence on record on whose behalf P.J.Kakad & Co. Advocates was acting. In the letter (DEXH.2) referred to above, there is indication that his fee was to be paid by the 2<sup>nd</sup> Defendant which means he may have been acting for the 2<sup>nd</sup> Defendant. What is clear however is that the title deed for the suit property was handed over to J.G.Wathigo & Company Advocates by the Wangethis and that the same was to be dealt with in accordance with the Wangethis’ instructions. I have seen in the Plaintiff’s additional bundle of documents a copy of an e-mail dated 29<sup>th</sup> May 2012 from Mr. Wangethi Mwangi to Dr. Mbira Gikonyo(PW1) in which he reprimanded PW1 over his e-mail dated 24<sup>th</sup> May 2012 to J.G. Wathigo over the alleged release of the title deed for the suit property to the 2<sup>nd</sup> Defendant. In the e-mail, Mr. Wangethi Mwangi assured PW1 that the title was in the possession of J.G. Wathigo & Co. Advocates. From the evidence on record (See the letter at page 429 of DEXH.5), the title deed was released to I&M Bank Advocates, Kiruti & Company Advocates by P.J.Kakad & Company Advocates on 14<sup>th</sup> November 2012 having been authorized to do so by J.G. Wathigo & Co. Advocates through a letter dated 24<sup>th</sup> August 2012(See page 426 of DEXH.5).
139. From the foregoing, there is no evidence that the 2<sup>nd</sup> Defendant unlawfully obtained and refused to release the title deed for L.R No. 4858/11(the suit property) unless the Plaintiff signed sale agreements



and sub-leases for apartments that the 2<sup>nd</sup> Defendant had not been paid for. I am of the view that if indeed the 2<sup>nd</sup> Defendant unlawfully obtained the title deed for the suit property, the issue should have been taken up by the Wangethis with their advocates, J.G. Wathigo & Co. Advocates to whom they had delivered the said title. There is no evidence that the Wangethis raised such issue with J.G. Wathigo & Co. Advocates. In the circumstances, I am not satisfied that the Plaintiff has proved that the 2<sup>nd</sup> Defendant obtained and held the titled deed for the suit property illegally. The Plaintiff is therefore not entitled to the alleged loss suffered by the Plaintiff in the sum of Kshs. 14,000,000/- as a result of the alleged illegal retention of the said title deed by the 2<sup>nd</sup> Defendant. In any event, the Plaintiff did not prove how the said sum of Kshs. 14,000,000/- claimed was arrived at. There is no evidence in the form of a certificate from the bank or otherwise showing that the Plaintiff paid the said amount as interest. It is my finding that the Plaintiff is not entitled to the said sum of Kshs. 14,000,000/-.

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

140. The Plaintiff has contended that it did not execute any agreement of sale or lease in favour of the 2<sup>nd</sup> Defendant and its associates in respect of apartments C1, A4 and B4 and that the leases executed in favour of the 2<sup>nd</sup> Defendant for the said apartments were fraudulent. The Plaintiff has contended that no payments were made for the apartments and if any was made, it was part payment.
141. With regard to apartments C1 and A4, the Plaintiff has claimed that an agreement was reached between the Plaintiff and the 2<sup>nd</sup> Defendant on 16<sup>th</sup> April 2013 in which a loan of Kshs. 22,000,000/- that had been advanced to the Plaintiff by the 2<sup>nd</sup> Defendant was converted to a deposit for the purchase of apartments C1 and A4. It was also part of the agreement that the Plaintiff would refund to the 2<sup>nd</sup> Defendant the said sum of Kshs. 22,000,000/- if apartments C1 and A4 were not completed and transferred to the 2<sup>nd</sup> Defendant. The Plaintiff has contended that in the circumstances, no payment was made for these apartments. The Plaintiff has contended that the 2<sup>nd</sup> Defendant did not prove the existence of the said loan of Kshs. 22,000,000/-.
142. For apartment C1, the Plaintiff has contended that in the lease at pages 140 to 156 of DEXH. 5 in favour of Kankrai Ratilalchand Shah and Niketan Ratilal Shah, the consideration for the apartment is given as Kshs. 12,000,000/-. The Plaintiff has contended that no evidence of payment of the said amount has been produced by the 2<sup>nd</sup> Defendant and the purported purchasers. The Plaintiff has contended that the apartment is still registered in the name of the Plaintiff and that the 2<sup>nd</sup> Defendant has no basis for claiming the same.
143. In their response, the Defendants have contended that the Plaintiff had requested for a loan of Kshs. 22,000,000/- from the 2<sup>nd</sup> Defendant to be paid back on 28<sup>th</sup> February 2013. The Defendants have contended that the Plaintiff was unable to repay the said loan and interests on time, and as such, it wrote to the 2<sup>nd</sup> Defendant on the 16<sup>th</sup> April 2013 (See letter at page 39 of the DEXH.4) requesting that the loan be converted to a deposit for apartments C1 and A4 which the 2<sup>nd</sup> Defendant accepted.
144. The Defendants have contended that the 2<sup>nd</sup> Defendant was approached by Kanakrai Ratilal Chand Shah who was interested in purchasing apartments C1 and A4 which were being sold at Kshs. 14,000,000/- each. The Defendants have contended that the said apartments were sold by the 2<sup>nd</sup> Defendant to Kanakrai Ratilal Chand Shah and the 2<sup>nd</sup> Defendant was paid the full purchase price. The Defendants have contended that the Plaintiff's claim that the purchasers of the two apartments ought to have presented evidence to show payment to itself or to the 2<sup>nd</sup> Defendant was unfounded as the 2<sup>nd</sup> Defendant has explained how he acquired the said apartments.



145. With regard to apartment B4, the Plaintiff has denied that apartment B2 was given to James Wathigo by the Plaintiff in settlement of his fees. The Plaintiff has also denied that the number for apartment B2 changed to B4. The Plaintiff has contended that in the sale agreement dated 27<sup>th</sup> December 2011 between the Plaintiff and Hitesh Morjaria the consideration for apartment B4 is given as Kshs. 9,000,000/- (See pages 26 to 39 of DEXH.5). The Plaintiff has contended that this sale agreement contradicts the evidence given by the 2<sup>nd</sup> Defendant and DW1 in which they have claimed that apartment B2 was swapped for apartment B4. The Plaintiff has contended that no payment was received for this apartment B4 and that the 2<sup>nd</sup> Defendant produced no evidence of payment.
146. In response to the foregoing, the Defendants have contended that the directors of the Plaintiff gave James Gatune Wathigo apartment B2 as payment for his legal fees. The Defendants have contended that James Gatune Wathigo advocate did not want to keep the apartment and as such sold the same to the 2<sup>nd</sup> Defendant with the full knowledge of the directors of the Plaintiff and was paid the full purchase price of Kshs. 13,500,000/- by the 2<sup>nd</sup> Defendant. The Defendants have contended that the Plaintiff confirmed through a letter dated 2<sup>nd</sup> November 2011 that apartment B2 was sold to the 2<sup>nd</sup> Defendant and that the same was paid for in full.
147. In the agreement dated 16<sup>th</sup> December 2013 between the Plaintiff, the 2<sup>nd</sup> Defendant and Mr. and Mrs. Wangethi (Wangethis), the parties agreed that in respect of apartments C1 and A4, there was an outstanding sum of Kshs. 2,500,000/- due and payable to the Plaintiff. For apartment B4, it was agreed that there was an outstanding sum of Kshs. 500,000/- due and payable to the Plaintiff on account of apartments B6, A11, A12 and B4. I am convinced upon perusing the agreements dated 16<sup>th</sup> April 2013 and 16<sup>th</sup> December 2013 that the 2<sup>nd</sup> Defendant paid a sum of Kshs. 22,000,000/- as a deposit for apartments C1 and A4 and that as at 16<sup>th</sup> December 2013 there was a sum of Kshs. 2,500,000/- only due to the Plaintiff in respect of apartments C1 and A4. The Plaintiff has not persuaded me that the leases dated 20<sup>th</sup> November 2013 in respect of apartments C1 and A4 were fraudulent. In the agreement dated 16<sup>th</sup> April 2013 (page 173 of DEXH. 5), the Plaintiff admitted that the 2<sup>nd</sup> Defendant had advanced to it a loan of Kshs. 22,000,000/- and agreed that the loan be converted to a deposit for apartments C1 and A4. The leases in respect of apartments C1 and A4 were executed thereafter by the Plaintiff in favour of Kanakrai Ratilal Shah and Niketan Ratilal Shah. In the agreement dated 16<sup>th</sup> December 2013 entered into by the parties subsequent to the agreement dated 16<sup>th</sup> April 2013 and the leases dated 20<sup>th</sup> November 2013, the Plaintiff admitted that the only outstanding amount in respect of apartments C1 and A4 was Kshs. 2,500,000/-. The Plaintiff did not at all raise the issue of fraud. It is my finding that no fraud has been proved in respect of the agreement and leases executed by the Plaintiff for apartments C1 and A4.
148. With regard to apartment B4, I am in agreement with the 2<sup>nd</sup> Defendant that due to the additional one floor that was added to the building that was being put up on the suit property, the numbers assigned to some apartments changed. There is however no evidence placed before the court showing that apartment B2 changed to B4 or that apartment B2 was swapped for apartment B4 for whatever reason. There is also no evidence that the Plaintiff gave J.G.Wathigo Advocate apartment B2 as payment for his legal fees. There is no evidence of an agreement between the Plaintiff and J.G.Wathigo Advocate to that effect. There is also no evidence that J.G.Wathigo Advocate owned apartment B2 before he purportedly sold the same to the 2<sup>nd</sup> Defendant. What the 2<sup>nd</sup> Defendant produced in court as evidence of ownership of apartment B2 by J.G.Wathigo Advocate was a letter dated 3<sup>rd</sup> June 2014 from J.G.Wathigo Advocate to P.J.Kakad & Co. Advocates confirming that the 2<sup>nd</sup> Defendant had purchased apartment B2 from him and that the apartment was swapped for apartment B4. There is also the agreement for sale between J.G.Wathigo Advocate and the 2<sup>nd</sup> Defendant dated 2<sup>nd</sup> November 2011. According to the agreement



dated 27<sup>th</sup> December 2011 between the Plaintiff and Hitesh Morjaria and Vijay Morjaria (page 26 DEXH.5), the Plaintiff sold apartment B4 to the Morjarias at Kshs. 9,000,000/-. The Plaintiff is also said to have acknowledged the sale of the apartment to the 2<sup>nd</sup> Defendant on 2<sup>nd</sup> November 2011. According to the lease in respect of the same apartment dated 3<sup>rd</sup> May 2013 between the same parties, the stand premium is given as Kshs. 14,000,000/-. It is not clear here why the 2<sup>nd</sup> Defendant would have purchased the apartment again from the Plaintiff on 27<sup>th</sup> December 2011 having purchased the same from J.G.Wathigo on 2<sup>nd</sup> November 2011. I have also noted from the agreement between the parties made on 16<sup>th</sup> December 2013 that apartments B2 and B4 are listed separately and that for apartment B4 there was an outstanding payment of Kshs. 500,000/- to cover the balances for apartments B6, A11, A12 and B4 while for apartment B2, there was an outstanding amount of Kshs. 15,000,000/-. It is my finding from the foregoing that apartments B2 and B4 are separate apartments and that apartment B2 was not swapped for apartment B4 as there is no evidence to that effect. It is also my finding that there is no proof that J.G.Wathigo Advocate owned apartment B2 or that the same was given to him by the Plaintiff.

149. There is also no evidence in support of the Plaintiff's contention that the sale agreement dated 27<sup>th</sup> December 2011 between the Plaintiff and Hitesh Morjaria and Vijay Morjaria in respect of apartment B4 was fraudulent. The agreement was drawn by the firm of Mulondo, Oundo, Muriuki & Company Advocates which was acting for the Plaintiff. The agreement was executed by the directors of the Plaintiff. The Plaintiff has also not denied executing the agreement dated 16<sup>th</sup> December 2013 in which it agreed to discharge apartment B4 on receipt of a sum of Kshs. 500,000/- to cover the balances in respect of apartments B6, A11, A12 and B4. It is therefore my finding that the 2<sup>nd</sup> Defendant lawfully purchased apartment B4 from the Plaintiff and that there was an outstanding amount of Kshs. 125,000/-(1/4 of Kshs. 500,000/-) to be paid by the 2<sup>nd</sup> Defendant to cover the amount due on that apartment.
150. I wish to add that there is no evidence before the court showing that the leases in respect of apartments C1, A4 and B4 have been registered. The issue of the same having been registered fraudulently does not therefore arise.

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

151. The Plaintiff has contended that it received a sum of Kshs. 9,000,000/- as the purchase price for apartment B5 leaving a balance of Kshs. 6,000,000/- which arose due to change in design. The Plaintiff has contended further that it was paid a sum of Kshs. 9,000,000/- for apartment B6 leaving a balance of Kshs. 6,000,000/- which also came about due to a change of design that was paid for by the Plaintiff. For apartments A10 and A9, the Plaintiff has contended that the 2<sup>nd</sup> Defendant has not raised any claim in respect thereof.
152. On their part, the Defendants have contended that the 2<sup>nd</sup> Defendant together with Hitesh Morjaria entered into a sale agreement dated 18<sup>th</sup> April 2011 with the Plaintiff for the purchase of duplex apartments B5, A10 and A9 at a consideration of Kshs. 31,500,000/= and paid a deposit. The Defendants have submitted that in the course of construction, the numbering of the apartments were changed as a result of which apartment B5 changed to B6, A10 to A11 and A9 to A12. The Defendants have contended that by a letter dated 22<sup>nd</sup> November 2012, the Plaintiff acknowledged receipt of a sum of Kshs. 3,000,000/- from the 2<sup>nd</sup> Defendant in full and final payment for apartment number B6, A11 and A12. The Defendants have contended that the Plaintiff was aware that the apartment numbers had changed and acknowledged payment of the purchase price for the same.



153. The Defendants have contended that the Plaintiff thereafter executed; a lease over apartment B6(B5) dated 3<sup>rd</sup> May 2013 in favour of the 2<sup>nd</sup> Defendant, a lease over apartment A11(A10) dated 3<sup>rd</sup> May 2013 in favour of Hitesh Morjaria and a lease over apartment A12(A9) dated 3<sup>rd</sup> May 2013 in favour of Ashok Dhirajlal Sanghani and Sujata Ashok Sanghani. The Defendants have contended that the leases over the said apartments were all registered on 12<sup>th</sup> July 2013.
154. The Defendants have contended that clause 2.1.3 of the sale agreement between the parties in respect of the said apartments provided that the purchasers were to pay Kshs. 3,000,000/- on the completion date. The Defendants have contended that this amount was paid gradually and only a balance of Kshs. 500,000/- remains outstanding, a fact that was acknowledged in the reconciliation of accounts done by the parties and captured in the agreement dated 16<sup>th</sup> December 2013. The Defendants contended that the 2<sup>nd</sup> Defendant remains able and willing to pay the said sum of Kshs, 500,000/- upon completion.
155. From the evidence on record, I am satisfied that the Plaintiff sold to Hitesh Morjaria and the 2<sup>nd</sup> Defendant apartments A9, A10 and B5 (A12, A11 and B6) on 18<sup>th</sup> April 2011 following an offer that was made by the Plaintiff to Hitesh Morjaria and the 2<sup>nd</sup> Defendant on 2<sup>nd</sup> March 2011. I am in agreement with the 2<sup>nd</sup> Defendant that apartment numbers for apartment A9, A10 and B5 changed to A12, A11 and B6 respectively. In view of the terms of the agreement between the parties dated 16<sup>th</sup> December 2013, I am in agreement with the 2<sup>nd</sup> Defendant that only a sum of Kshs. 375,000/-(3/4 of Kshs. 500,000/-) remains due and payable by the 2<sup>nd</sup> Defendant and Hitesh Morjaria in respect of apartments A9(A12), A10(A11) and B5(B6). The Plaintiff which had acknowledged receipt of the full purchase price in a letter dated 22<sup>nd</sup> November 2012 claims the additional sum of Kshs. 18,500,000/- on account of change of design of the apartments. The Plaintiff has not proved this claim. The Plaintiff has not established that the 2<sup>nd</sup> Defendant and Hitesh Morjaria are liable to pay for the said changes. Furthermore, neither the changes nor the costings thereof were submitted in evidence.
156. Apart from apartment B5 that was sold to Hitesh Morjaria and the 2<sup>nd</sup> Defendant that changed to apartment B6 referred to above in respect of which I have found that there is a total sum of Kshs. 375,000/- (for apartments A9(A12), A10(A11), B5(B6) due and owing to the Plaintiff, I am not satisfied that there was any other apartment B5 that was sold to Hitesh Morjaria and the 2<sup>nd</sup> Defendant for Kshs. 11,000,000/- and in respect of which a sum of Kshs. 9,000,000/- was paid leaving a balance of Kshs. 6,000,000/-. If there was such an apartment, then I believe that it can only be what the 2<sup>nd</sup> defendant referred to in his evidence as apartment B4 that the 2<sup>nd</sup> Defendant and Hitesh Morjaria purchased on 27<sup>th</sup> December 2011(See the sale agreement at page 26 and lease at page 89 of DEXH. 5) which I have referred to earlier. The 2<sup>nd</sup> defendant had led evidence that apart from apartment B2 that he swapped for apartment B4, the 2<sup>nd</sup> defendant and Hitesh Morjaria had also purchased apartment originally numbered B4 whose number changed to B5. It appears that it is this apartment B4 that the Plaintiff has referred to as apartment B5. I have held that only a sum of Kshs. 125,000/-(1/4 of Kshs. 500,000/-) is due and payable on account of apartment B5(B4). It is worth noting that the sum of Kshs. 6,000,000/- claimed by the Plaintiff as the balance due under this apartment B5(former B4) is not mentioned in the agreement dated 16<sup>th</sup> December 2013 as due and payable to the Plaintiff.

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

157. The Plaintiff has contended that the purchaser of apartment B3 owes the Plaintiff Kshs. 14,500,000/-. The Plaintiff has contended that the sale agreement for the apartment is not dated and the consideration is given as Kshs. 14,500,000/-. The Plaintiff has submitted that the lease in respect of



- the apartment is dated 3<sup>rd</sup> May 2013 and the same is in favour of Mitesh and Payal Thakkar. The Plaintiff has contended that the consideration for the lease is given as Kshs. 14,000,000/-. The Plaintiff has contended that there is also acknowledgment of payment of Kshs. 14,500,000/-. The Plaintiff has contended that no payment was received for this apartment and that the 2<sup>nd</sup> Defendant produced no evidence of payment.
158. With regard to apartment B4, the Plaintiff has contended that there is a sale agreement dated 27<sup>th</sup> December 2011 between the Plaintiff and, Hitesh Morjaria and the 2<sup>nd</sup> Defendant. The Plaintiff has contended that the consideration is given in the agreement as Kshs. 9,000,000/-. The Plaintiff has contended that this sale agreement contradicts the evidence given by the 2<sup>nd</sup> Defendant and DW1 in which they have claimed that apartment B2 was swapped for apartment B4. The Plaintiff has contended that no payment was received for this apartment.
159. On their part, the Defendants have contended that a lease agreement was entered into between the Plaintiff and, Mitesh Nitinbhai Thakkar and Payal Mitesh Thakkar in respect of apartment B3 at a consideration of Kshs. 14,500,000/=. The Defendants have contended that the lease was registered in favour of the purchasers. The Defendants have contended that the Plaintiff also acknowledged receipt of the purchase price for the apartment. The Defendants have contended that the Plaintiff is in the circumstances estopped from claiming more money for the apartment.
160. With regard to apartment B4, the Defendants have reiterated that the directors of the Plaintiff gave apartment B2 that was swapped for apartment B4 to James Gatune Wathigo advocate. The Defendants have reiterated further that James Gatune Wathigo advocate sold the apartment to the 2<sup>nd</sup> Defendant for Kshs. 13,500,000/- and was paid in full by the 2<sup>nd</sup> Defendant.
161. With regard to apartment B3, I am satisfied from the evidence on record that the apartment was sold by the Plaintiff to Mitesh Nitinbhai Thakkar and Payal Mitesh Thakkar at a consideration of Kshs. 14,500,000/- and that the Plaintiff was paid the said sum of Kshs. 14,500,000/- by the duo on or about 30<sup>th</sup> October 2012. The apartment is not one of those in respect of which there was an outstanding payment as at the date of the agreement between the parties made on 16<sup>th</sup> December 2013. There is no evidence that the Plaintiff executed the agreement of sale, the acknowledgment of payment and the lease in respect of the apartment dated 3<sup>rd</sup> May 2013 through duress or misrepresentation. The Plaintiff was not the weaker party in the transaction and I cannot understand why the Plaintiff could not seek redress in court to avert the alleged blackmail. The payment for the apartment was acknowledged through a letter dated 30<sup>th</sup> October 2012 while the lease in respect of the apartment was registered on 12<sup>th</sup> July 2013. This suit was filed on 17<sup>th</sup> June 2014. I wonder why the Plaintiff would wait for almost 1½ years after acknowledging receipt of payment and almost 1 year after registration of the lease to claim that it was blackmailed to acknowledge the payment that it never received and that it signed the lease without consideration. It is my finding that the apartment was paid for in full and no more payment is due to the Plaintiff in respect of apartment B3.
162. For apartment B4, I have already made a finding that apartment B2 and B4 are separate and distinct apartments and that the Plaintiff did not give apartment B2 to J.G.Wathigo advocate in settlement of his fees. I have also held that the number for this apartment B4 was subsequently changed to apartment B5 in respect of which the plaintiff also raised a claim. Since there is no relationship between apartment B2 and apartment B4, the 2<sup>nd</sup> Defendant and Hitesh Morjaria are bound by the agreement dated 27<sup>th</sup> December 2011 between them and the Plaintiff to pay the consideration of Kshs. 9,000,000/- in respect of apartment B4. As mentioned earlier, according to the agreement between the parties dated 16<sup>th</sup> December 2013, the 2<sup>nd</sup> Defendant owed the Plaintiff a sum of Kshs. 500,000/- that was to cover the balances in respect of apartments B6, A11, A12 and B4. It is my finding therefore that the Plaintiff is



not entitled to the sum of Kshs. 29,000,000/- claimed as due in respect of apartments B3 and B4. The Plaintiff is not entitled to any payment for apartment B3 while for apartment B4, the amount due is Kshs. 125,000/- (¼ of Kshs. 500,000/-).

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

163. I have stated earlier in the judgment that upon perusing the agreements dated 16<sup>th</sup> April 2013 and 16<sup>th</sup> December 2013, I am convinced that the 2<sup>nd</sup> Defendant paid a sum of Kshs. 22,000,000/- as a deposit for apartments C1 and A4 and that as at 16<sup>th</sup> December 2013 there was a sum of Kshs. 2,500,000/- only due and payable to the Plaintiff in respect of apartments C1 and A4. In the circumstances, it is my finding that there is no basis for the Plaintiff's claim for Kshs. 10,500,000/- in respect of these apartments.

**Whether the Plaintiff is entitled to the sum of Kshs. 11,500,000/- from the 2<sup>nd</sup> Defendant comprising of Kshs. 6,000,000/- received by the 2<sup>nd</sup> Defendant from the Plaintiff's buyers of the apartments promising to incorporate additional features in the apartments like swimming pool and gymnasium which the 2<sup>nd</sup> Defendant did not remit to the Plaintiff and the sum of Kshs. 5,500,000/- which the 2<sup>nd</sup> Defendant received from potential buyers that he also never remitted to the Plaintiff.**

164. In his evidence, PW1 claimed that the 2<sup>nd</sup> Defendant obtained a sum of Kshs. 6,000,000/- from persons who wished to purchase apartments from the Plaintiff promising them that he was capable of adding additional features to the suit property such as swimming pool and a gym. PW1 stated that the 2<sup>nd</sup> Defendant did not remit this amount to the Plaintiff. PW1 claimed further that the 2<sup>nd</sup> Defendant received a further sum of Kshs. 5,500,000/- from two buyers of the apartments that he also failed to remit to the Plaintiff. PW1 did not give the particulars of these payments. The names of the persons from whom the 2<sup>nd</sup> Defendant received the alleged payments were not pleaded in the plaint nor the details of the amounts received from each and when the same was received. Some names are given in the further witness statement and amounts mentioned but without particulars of what the payments were for, when they were made and evidence of payment. Due to the foregoing, I find the Plaintiff's claim for Kshs. 11,500,000/- not proved.

**Whether the Plaintiff is entitled to the sum of Kshs. 9,750,000/- that was paid to the 2<sup>nd</sup> Defendant in cash.**

165. PW1 stated in his evidence that the Plaintiff paid to the 2<sup>nd</sup> Defendant a total sum of Kshs. 9,735,000/- in cash in repayment of the loan that the 2<sup>nd</sup> Defendant had advanced to the Plaintiff. PW1 stated that the 2<sup>nd</sup> Defendant refused to acknowledge receipt of these cash payments. In its plaint, the Plaintiff claimed from the 2<sup>nd</sup> Defendant a sum of Kshs. 9,750,000/- being cash payments received from the Plaintiff. Again, no particulars of these payments were given in the plaint or in evidence. PW1 did not tell the court when the payments were made and where. There was also no explanation why a large sum of Kshs. 9,750,000/- would be paid in cash. It is my finding that this claim for Kshs. 9,750,000/- was also not proved. The claim is not maintainable in the circumstances.

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

166. The Plaintiff has contended that apartments C9 and C7 were sold to Ramesh Thakkar and/or nominee on 19<sup>th</sup> January 2012 at a total consideration of Kshs. 36,000,000/-. The Plaintiff has contended that



apartment C9 is registered in the name of Ramesh Thakkar and Anila Thakkar. The Plaintiff has contended that it was paid in full for the two apartments by the purchasers thereof and it has no claim regarding the same. The Plaintiff has contended that the 2<sup>nd</sup> Defendant has no basis for his claim in respect of apartment C9 as he has no power of attorney from the purchasers.

167. The Defendants on their part have contended that the Plaintiff had in its submissions admitted receipt of Kshs. 36,000,000/- for the two apartments; C9 and C7. The Defendants have submitted that the 2<sup>nd</sup> Defendant has no claim over the apartments save for his wish that Ramesh Thakkar and Anila Ramesh Thakkar be declared as the owners of the two apartments.
168. In view of the position taken by both parties in their submissions, there is no basis for the Plaintiff's claim for Kshs. 8,000,000/- in respect of apartment C7.

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

169. The Plaintiff did not make submissions in respect of this claim. The Defendants on the other hand only mentioned apartment C10 in passing. I have not seen a sale agreement or a lease in respect of this apartment. I have however noted from the agreement dated 16<sup>th</sup> December 2013 that there was an outstanding amount of Kshs. 3,000,000/- due and payable by the 2<sup>nd</sup> Defendant to the Plaintiff in respect of this apartment. The Plaintiff is entitled to this amount in the circumstances.

**Whether the Plaintiff is entitled to the sum of Kshs. 5,000,000/- from the 2<sup>nd</sup> Defendant being the costs of the swimming pool that was built and demolished at the instance of the 2<sup>nd</sup> Defendant.**

170. In his evidence, PW1 stated that the 2<sup>nd</sup> Defendant took money from some of the purchasers of the apartments promising that he would put up a swimming pool and a gym in the suit property. PW1 stated that after the swimming pool was put up, the 2<sup>nd</sup> Defendant insisted that the same be demolished thereby occasioning a loss of Kshs. 3,500,000/- to the Plaintiff. In its plaint, the Plaintiff claimed a sum of Kshs. 5,000,000/- as the loss suffered for putting up and demolishing the swimming pool. The evidence tendered by the Plaintiff regarding the loss and the quantum of loss pleaded differ. In any event, no evidence was placed before the court showing that the alleged swimming pool was constructed on the instructions of the 2<sup>nd</sup> Defendant and that the 2<sup>nd</sup> Defendant ordered its demolition. The court was also not told why the 2<sup>nd</sup> Defendant wanted the swimming pool demolished. The costs of the construction of the swimming pool was not given neither did the Plaintiff tender evidence of the costs for its demolition. It is therefore not clear how the figures of Kshs. 3,500,000/- and Kshs. 5,000,000/- were arrived at. It is my finding in the circumstances that this claim is not proved by the Plaintiff.

**Whether the Plaintiff is entitled to the sum of Kshs. 2,900,000/- from the 2<sup>nd</sup> Defendant being legal costs incurred in caveats and sale agreements.**

171. No particulars of this claim of Kshs. 2,900,000/- were given by the plaintiff. No fee notes/invoices or evidence of payment thereof were tendered in evidence. The Plaintiff did not demonstrate that the caveat that was lodged by the 2<sup>nd</sup> Defendant against the title of the suit property was unlawful. The 2<sup>nd</sup> Defendant was a purchaser of several apartments put up on the suit property that had not been transferred to him. I am in agreement with the 2<sup>nd</sup> Defendant's submission that it had sufficient interest in the suit property to support a caveat. In any event, if the Plaintiff felt that the caveat was wrongfully put against the title, it had a right to seek its removal which it never did. The claim is also made in



respect of “sale agreements”. It has not been established how the 2<sup>nd</sup> Defendant is liable for the costs that the Plaintiff may have spent on the said sale agreements. I find this claim not proved.

### **Whether the Plaintiff is entitled to the other reliefs sought in the plaint.**

172. I have at the beginning of this judgment set out in detail the reliefs sought by the Plaintiff. I have already made a finding that the 1<sup>st</sup> Defendant breached the contract dated 26<sup>th</sup> July 2011 by failing to complete the construction work within the agreed timeline. The parties had agreed that if the 1<sup>st</sup> Defendant failed to complete the construction by 30<sup>th</sup> May 2014, the Plaintiff would be entitled to terminate the contract. Following the 1<sup>st</sup> Defendant’s failure to complete the said works by 30<sup>th</sup> May 2014, the Plaintiff terminated the contract through a letter of termination dated 31<sup>st</sup> May 2014. The termination was in the circumstances lawful. Since the 1<sup>st</sup> Defendant’s services had been terminated, it was supposed to handover the site to the Plaintiff together with whatever was on site save for its equipment and machinery in accordance with clause 38.4.1 of the contract. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants had no right in the circumstances to barricade the entry to the apartments and to take away the keys of the apartments save for those keys that may have been handed over to the 2<sup>nd</sup> Defendant for those apartments that were purchased by the 2<sup>nd</sup> Defendant and his associates and for which payment had been made or in respect of which they were entitled to be in possession pursuant to the various agreements of sale between the parties.
173. Due to the foregoing, the Plaintiff is entitled to a mandatory injunction compelling the Defendants to return the keys for the apartments on the suit property save for those apartments the court has held to have been purchased and paid for by the 2<sup>nd</sup> Defendant and his associates and those that the 2<sup>nd</sup> Defendant and his associates are entitled to remain in possession pursuant to the terms of the agreements of sale between the parties. The Plaintiff is also entitled to an injunction to restrain the Defendants from selling, transferring or charging the apartments on the suit property save for the apartments the court has held to have been purchased and paid for by the 2<sup>nd</sup> Defendant and his associates. The Plaintiff is also entitled to an injunction to restrain the Defendants from interfering with the Plaintiff’s possession of the said apartments save for the apartments purchased and paid for by the 2<sup>nd</sup> Defendant and his associates.
174. As for the claim for Kshs. 140,000,000/- I have held that the Plaintiff is not entitled to the same. As for the claim for Kshs. 112,150,000/-, I have held that the Plaintiff is only entitled to a total sum of Kshs. 6,000,000/- the particulars of which are as follows: The Plaintiff is entitled to a sum of Kshs. 375,000/- being the balance of the purchase price for apartments A9(A12), A10(A11) and B5(B6), Kshs. 125,000/- being the balance of the purchase price for apartment B4, Kshs. 2,500,000/- being the balance of the purchase price for apartments C1 and A4 and Kshs. 3,000,000/- being the balance of the purchase price for apartment C10 making a total of Kshs. 6,000,000/-. I have held that the Plaintiff is not entitled to any payment claimed in respect of apartments B3, C7 and C9. I have also rejected the Plaintiff’s claim in respect of buyer’s funds, interest at bank, funds paid to the 2<sup>nd</sup> Defendant in cash, the costs for constructing and demolishing the swimming pool and legal costs on caveats and sale agreements.
175. I have held earlier that the Plaintiff failed to prove that the leases for apartments C1, A4 and B4 were issued and registered through blackmail and fraud. In the plaint, the Plaintiff has claimed the balance of the purchase price alleged to be due on these apartments. As correctly submitted by the Defendants, the Plaintiff cannot claim the balance of the purchase price on alleged fraudulent leases. Having found that fraud in the execution of the said leases and their registration were not proved, I find no basis for declaring the registration of the leases for those apartments fraudulent and for cancelling the same.



**Whether the termination of the contract between the Plaintiff and the 1<sup>st</sup> Defendant by the Plaintiff on 31<sup>st</sup> May 2014 was unlawful.**

176. I have already determined this issue. I have found that the 1<sup>st</sup> Defendant breached the contract between it and the Plaintiff and as such the Plaintiff was entitled to terminate the contract. I am satisfied that the termination notice dated 31<sup>st</sup> May 2014 that was served upon the 1<sup>st</sup> Defendant complied with clause 38.2 of the contract. Before that notice was issued, the 1<sup>st</sup> Defendant had been given 14 days notice by the project architect to complete the works that were remaining. The Plaintiff's notice of termination was given within 14 days after the expiry of the architect's notice. The termination of the contract was therefore lawful.

**Whether the 1<sup>st</sup> Defendant is entitled to the sum of Kshs. 5,300,000/- from the Plaintiff due to variations of contract and extra work.**

177. It is not clear how this amount was arrived at. The claim is in the nature of special damages. It ought to have been pleaded with necessary particulars and strictly proved. I am in agreement with the 1<sup>st</sup> Defendant that 1<sup>st</sup> Defendant did extra work and was entitled to be paid for the same. It has however not been explained how this sum of Kshs. 5,300,000/- for extra work was arrived at. There is no valuation to support the same or the particulars of the work that was done. I have noted from the record that some of the extra work was done at the request of the 2<sup>nd</sup> Defendant in respect of "his apartments". It is not clear therefore what extra work was done on account of the Plaintiff and what was done for the 2<sup>nd</sup> Defendant. Save for stating that the amount was for variations and extra work, the 1<sup>st</sup> Defendant said no more. It is my finding that the claim has not been proved and as such is not payable.

**Whether the 1<sup>st</sup> Defendant is entitled to the sum of Kshs. 20,295,102/- from the Plaintiff as monies due and owing.**

178. This claim is said to be for the amount due and owing to the 1<sup>st</sup> Defendant on the contract. As at the time the 1<sup>st</sup> Defendant's services were terminated on 31<sup>st</sup> May 2014, the 1<sup>st</sup> Defendant was on site and was proceeding with the work. As at that stage, the 1<sup>st</sup> Defendant was entitled to an interim payment certificate for the work done as at 30<sup>th</sup> May 2014 and a final certificate after the completion of the remaining works. Before the Plaintiff handed over the work to another contractor, it had a duty to ensure that an interim payment certificate was prepared for the work done by the 1<sup>st</sup> Defendant as at the time of termination of its contract in accordance with clause 38.4.2 of the contract. After the work was completed by whichever contractor, the 1<sup>st</sup> Defendant would then be issued with the final certificate of payment. I have seen in the evidence produced by the 1<sup>st</sup> Defendant that it made several requests to the project quantity surveyor to value the work that it had done for the purposes of interim certificate No. 21 which requests were not attended to. From its statement of account at page 102 of DEXH. 3, the 1<sup>st</sup> Defendant has claimed a sum of Kshs. 11,816,880/- for interim certificate No. 21 and a sum of Kshs. 7, 521,672.00 for the final certificate No. 22 making a total of Kshs. 19,338,552/-. The Plaintiff has contended that these certificates which are based on the valuations made by the 1<sup>st</sup> Defendant are not payable because they were not certified by the project Quantity Surveyor and Architect. The Plaintiff has contended that the said Quantity Surveyor and Architect were not its agents but independent contractors and as such it was not answerable for their actions and omissions. It is common ground that the project was completed and the apartments occupied. I am of the view that it would be unfair to deny the 1<sup>st</sup> Defendant payment for the work done as a result of the failure on the part of the Plaintiff to have the work done by the 1<sup>st</sup> Defendant valued and certified by the Quantity Surveyor and the Architect employed by the Plaintiff in accordance with the terms of the contract between the parties.



The project Quantity Surveyor and the Architect were employed by the Plaintiff and as such took instructions from it. The Plaintiff cannot therefore claim that it is not liable for the said Quantity Surveyor's and Architect's failure to certify the work done by the 1<sup>st</sup> Defendant after the termination of its contract. Due to the failure on the part of the Plaintiff to have the work done by the 1<sup>st</sup> Defendant valued and the certificates issued after the termination of the 1<sup>st</sup> Defendant's services and in the absence of any evidence challenging the valuation done by the 1<sup>st</sup> Defendant and an opportunity to carry out valuation due to changed circumstances, it is my finding that the 1<sup>st</sup> Defendant is entitled to a sum of Kshs. 19,338,552/- claimed under certificates No. 21 and 22 that were not certified by the Quantity Surveyor and Architect. The extra amount of Kshs. 956,550/- claimed by the 1<sup>st</sup> Defendant has not been proved and as such is not payable.

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

179. From my analysis of the parties' respective cases earlier, I have found that apartments A9(A12), A10(A11), B5(B6), B4(B5), C1, A4 and C10 have not been paid for in full by the 2<sup>nd</sup> Defendant and his associates while apartments B3, C7(C11) and C9 have been paid for in full. In the circumstances, the 2<sup>nd</sup> Defendant could not expect quiet possession of apartments A9(A12), A10(A11), B5(B6), B4(B5), C1, A4 and C10 in respect of which he had not finished payment. For apartments C9 and C11, the 2<sup>nd</sup> Defendant informed the court that he had no claim in respect thereof. It follows that the only apartment in respect of which the 2<sup>nd</sup> Defendant was entitled to quiet possession is apartment B3.

**Whether the 2<sup>nd</sup> Defendant has suffered loss to the tune of Kshs. 17,700,000/- which the Plaintiff is liable for as a result of the said acts of the Plaintiff in relation to the said apartments and Block D.**

180. At the trial, the 2<sup>nd</sup> Defendant told the court that he had no claim over Block D. With regard to the apartments referred to above, the only loss that the 2<sup>nd</sup> Defendant can claim is in respect of apartment B3. The 2<sup>nd</sup> defendant has claimed a sum of Kshs. 1,360,000/- as damages in respect of apartment B3. The 2<sup>nd</sup> Defendant's associates having paid for apartment B3 in full, the Plaintiff had no reasonable cause for denying them quiet possession thereof. The 2<sup>nd</sup> Defendant's said associates have been kept out of the property for several years. They are entitled to damages. The Plaintiff has not contended that the amount of damages claimed for the apartment is unreasonable. I will ward the 2<sup>nd</sup> Defendant a sum of Kshs. 1,360,000/- as damages suffered for loss of use of the property.

**Whether the 2<sup>nd</sup> Defendant is entitled to the sum of Kshs. 4,400,000/- from the Plaintiff for the Plaintiff's failure to install solar system and intercom.**

181. No basis was laid for this claim. No agreement was placed before the court between the Plaintiff and the 2<sup>nd</sup> Defendant for the installation of solar system and intercom. There was also no evidence of payment made to the Plaintiff for that purpose. I find no merit in this claim for Kshs. 4,400,000/-.

**Whether the 2<sup>nd</sup> Defendant is entitled to the sum of Kshs. 33,848,236/- from the Plaintiff for additional works that were undertaken by the apartment owners.**

182. Like the earlier claim for Kshs. 4,400,000/- this claim was not proved. No particulars of the additional works were given neither were the apartments and the owners thereof disclosed. The breakdown of the



claimed sum of said sum of Kshs. 33,848,236/- was also not given and the evidence that such costs was incurred. I find no basis for this claim. The 2<sup>nd</sup> Defendant is not entitled to amount claimed.

#### **Whether the Defendants are entitled to the other reliefs sought in the counter-claim.**

183. I have set out earlier in the judgment, the reliefs claimed in the Defendants' counter-claim. As I mentioned earlier, it is common ground that the construction works have been completed. In the circumstances, it would serve no purpose returning possession of the site to the 1<sup>st</sup> Defendant. In any event, I have held that the 1<sup>st</sup> Defendant's contract was lawfully terminated. The 1<sup>st</sup> Defendant is therefore not entitled to go back to the site of the project that has been completed as there is nothing left for it to do there. For an order compelling the Plaintiff to give the 2<sup>nd</sup> Defendant access and peaceful vacant possession of apartments B3, B4, B5, B6, A4, A11, A12, C1, C9 and C11. As I stated earlier, the 2<sup>nd</sup> Defendant has not paid for A9(A12), A10(A11), B5(B6), B4(B5), C1 and A4 in full while the claim in respect of apartments C9 and C11 was abandoned as the dispute over the same had been resolved directly between the Plaintiff and the purchasers thereof. The 2<sup>nd</sup> Defendant is not entitled to possession of apartments A9(A12), A10(A11), B5(B6), B4(B5), C1 and A4 until they clear the outstanding balances save where the contracts between the parties provide to the contrary. The only apartment whose possession he is entitled to is apartments B3. The 2<sup>nd</sup> Defendant is however entitled to an injunction to restrain the Plaintiff from selling, charging or disposing of apartments A9(A12), A10(A11), B5(B6), B4(B5), C1 and A4 in respect of which they had entered into sale agreements with the Plaintiff and made payments on account of the purchase price. With regard to the retention money, since the project has been completed, it will serve no purpose to deposit the retention money in a joint bank account in the names of the advocates on record for the parties. Since no justification has been given by the Plaintiff for the continued holding of the retention money, I will order that the same be released by the Plaintiff to the 1<sup>st</sup> Defendant forthwith. The claim for damages, lost opportunity or profit was not established. The Defendants are not entitled to the same. I have dealt with the Defendants' other claims earlier; it is not necessary to repeat the same here.

#### **Who is liable for the costs of the suit and the counter-claim?**

184. From the foregoing findings, there is no outright winner in this dispute. Section 27 of the [Civil Procedure Act](#) gives the court unfettered discretion on the issue of costs. In the circumstances of this case, I will order each party to bear its own costs.

#### **Conclusion:**

185. In conclusion, I hereby make the following final orders in the matter;

1. The 1<sup>st</sup> Defendant shall return forthwith all the keys to the residential apartments on L.R No. 4858/11 known as Ringsview Apartments if the same are still in its possession save as otherwise indicated in this judgment.
2. The 2<sup>nd</sup> Defendant is restrained from charging, selling, disposing of or transferring apartments A12(A9), A11(A10), B6(B5), B4(B5), C1, A4 and C10 on L.R No. 4858/11 known as Ringsview Apartments until the 2<sup>nd</sup> Defendant and his associates clear the outstanding balances due to the Plaintiff on the same as determined by the court in this judgment.
3. An injunction is issued restraining the Defendants jointly and severally from dealing with or in any other way interfering with the possession and quiet enjoyment of the residential apartments on L.R No. 4858/11 known as Ringsview Apartments save for those apartments



that were purchased by the 2<sup>nd</sup> Defendant and his associates for which payments have been made in full or are in the process of being made in full in terms of this judgment.

4. Kshs. 375,000/- is awarded to the Plaintiff against the 2<sup>nd</sup> Defendant being the balance of the purchase price due on apartments A9(A12), A10(A11) and B5(B6).
5. Kshs. 125,000/- is awarded to the Plaintiff against the 2<sup>nd</sup> Defendant being the balance of the purchase price due on apartment B4(B5).
6. Kshs. 2,500,000/ is awarded to the Plaintiff against the 2<sup>nd</sup> Defendant being the balance of the purchase price due on apartments C1 and A4.
7. Kshs. 3,000,000/- is awarded to the Plaintiff against the 2<sup>nd</sup> Defendant being the balance of the purchase price due on apartment C10.
8. The Plaintiff shall give to the 2<sup>nd</sup> Defendant and his associates access to and quiet vacant possession of apartments B3 forthwith and apartments A12(A9), A11(A10), B6(B5), B4(B5), C1, A4 and C10 as soon as the 2<sup>nd</sup> Defendant and his associates pay the balances of the purchase price due in respect thereof in terms of orders 4, 5, 6 and 7 above.
9. An injunction is issued restraining the Plaintiff from charging, selling, transferring or dealing in any other manner with apartments B3 and, with apartments A12(A9), A11(A10), B6(B5), B4(B5), C1, A4 and C10 for a period of 45 days from the date hereof within which the 2<sup>nd</sup> Defendant and his associates shall pay the balance of the purchase price due in respect thereof in terms of orders 4, 5, 6 and 7 above.
10. Kshs. 21,895,218/- is awarded to the 1<sup>st</sup> Defendant against the Plaintiff being the retention money.
11. Kshs. 19,338,552/- is awarded to the 1<sup>st</sup> Defendant against the Plaintiff being the sum due and owing by the Plaintiff to the 1<sup>st</sup> Defendant on the contract dated 26<sup>th</sup> July 2011.
12. Kshs. 1,360,000/- is awarded to the 2<sup>nd</sup> Defendant against the Plaintiff as damages for loss of use of apartment B3.
13. The payments referred to in orders 4, 5, 6, 7, 10, 11 and 12 above shall be made within 45 days from the date hereof.
14. Interest shall accrue on the amounts awarded to all the parties herein at court rates at the expiry of 45 days from the date hereof until payment in full.
15. Each party shall bear its own costs of the suit and the counter-claim.

**DELIVERED AND DATED AT KISUMU ON THIS 9<sup>TH</sup> DAY OF FEBRUARY 2023**

**S.OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Ngonde for the Plaintiff

Ms. Ashioya h/b for Dr. Mutubwa for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

