Spectacular Properties Limited (Formerly trading as Aspire Properties Limited) & another v Markem Management Limited & 2 others (Civil Case E359 of 2020) [2025] KEHC 13445 (KLR) (Commercial and Tax) (25 September 2025) (Judgment)

Neutral citation: [2025] KEHC 13445 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

CIVIL CASE E359 OF 2020

PM MULWA, J

SEPTEMBER 25, 2025

BETWEEN

SPECTACULAR PROPERTIES LIMITED (FORMERLY TRADING AS ASPIRE PROPERTIES LIMITED) ..... 1ST PLAINTIFF

PROPERTY ARENA LIMITED ..... 2ND PLAINTIFF

AND

MARKEM MANAGEMENT LIMITED ..... 1ST DEFENDANT

KISINDE HOLDING INVESTMENT COMPANY LIMITED .... 2ND DEFENDANT

SOUTHERN OASIS DEVELOPMENT LIMITED ..... 3RD DEFENDANT

JUDGMENT

1. By the plaint dated 9th September 2020 and amended on 6th July 2021 the Plaintiffs seek that judgment be entered against the Defendants jointly and severally for:

    i. Transfer and registration of apartment B3 to the 1st Plaintiff or the 2nd Plaintiff.

    ii. In the alternative a sum of Kshs. 25, 000,000.00 be paid to the 1st Plaintiff or the 2nd Plaintiff.

    iii. Loss of monthly rental income from apartment B3 at a monthly rent of Kshs. 120,000.00 per month to be paid to either of the Plaintiffs from 1st August 2018 till payment in full.

    iv. Kshs. 4,500,000.00 being 50% of Kshs. 9,000,000.00 received by the 1st Defendant on 5th December 2017.

v. An order restraining the Defendants from demanding refund of commissions from the Plaintiffs.

vi. Costs of the suit.

vii. Any other relief this Honourable court may deem fit.

2. The Plaintiffs' case, as gleaned from the Amended Plaint and the evidence adduced, is that the 2nd Plaintiff is a limited liability company duly incorporated and engaged in the real estate business. It has three directors and shareholders, namely, Belinda Goes, Mohammed Abbas and Karim Nizakali. Mr. Karim Nizakali was the contact director who handled the transactions leading to the dispute herein. The 1st Plaintiff, on the other hand, was the entity involved in the execution and completion of the transaction documents forming the subject matter of this suit. The 2nd Defendant was at all material times the owner of the parcel of land known as L.R. No. 209 21870 (Original No. 209 7311), hereinafter "the suit property," which it intended to develop.

3. It is the Plaintiffs' contention that in or about 2014, the 2nd Plaintiff, through Mr. Karim, was approached by officials of the 2nd Defendant to lend its expertise and recommend a suitable project management consultant for the proposed development on the suit property. Pursuant thereto, the 2nd Plaintiff introduced the 1st Defendant to the 2nd Defendant for consideration. The 2nd Defendant thereafter engaged the 1st Defendant, and the two executed a Joint Venture Agreement (JVA) for the development of a project known as Southern Oasis, comprising 32 residential apartments. Under the JVA, the 1st and 2nd Defendants were entitled to profits from the project upon completion, at the ratio of 30:70 respectively.

4. The Plaintiffs further assert that in his capacity as project development manager, the 1st Defendant appointed the 2nd Plaintiff as the sole selling agent of the project, mandated to advertise, negotiate and prepare letters of offer in respect of all the apartments. For this work, the 2nd Plaintiff was entitled to a commission of 2.5% plus VAT of the sale price of each apartment. The Plaintiffs aver that this entitlement extended even to cases where a unit was retained by the developer. In addition, the JVA required the 1st Defendant to source and appoint qualified personnel to further the objectives of the project, and pursuant to this role, the 1st Defendant appointed Mr. Karim of the 2nd Plaintiff to sit as a member of the project's Executive Committee.

5. It is further pleaded that there existed an oral agreement between the 1st Defendant and the 2nd Plaintiff, under which the 1st Defendant undertook to share with the 2nd Plaintiff 50% of its 30% profit entitlement under the JVA, in consideration of the introduction made by the 2nd Plaintiff. Upon conclusion of the project, the 1st Defendant's profit share fell due, thereby crystallizing the Plaintiffs' entitlement. The Plaintiffs rely on minutes of an Executive Committee meeting held on 29th August 2018, wherein it was agreed that the 1st Defendant's profit share would be paid in kind by way of conversion into Apartments B3 and B4, and that Apartment B3 would be allocated to the Plaintiffs. The Plaintiffs aver that despite the 1st Defendant's instructions that Apartment B3 be issued in favour of the 1st Plaintiff, no such transfer has been effected to date.

6. The Plaintiffs further contend that the 1st Defendant subsequently entered into a Dissolution and Termination Agreement with the 2nd and 3rd Defendants. Clause 2(1.5) of that agreement allegedly required the Plaintiffs to refund to the 3rd Defendant the sum of Kshs. 2,175,000.00, being alleged overpayment of commissions on three apartments retained by the 2nd and 3rd Defendants. The Plaintiffs argue that this stipulation was irregular and oppressive, and that the 1st Defendant acted in breach by permitting the substitution of Apartment B3 with Apartment A1. The Plaintiffs maintain that

Apartment A1 was of lesser value compared to B3, and that the 1st Defendant thereby violated the agreement. Moreover, under the terms of the Dissolution and Termination Agreement, Apartment A1 was only to be transferred to the selling agent upon refund of the said commission, which condition the Plaintiffs argue is unlawful. They assert that the subsequent demands by the 2nd and 3rd Defendants for refund constitute harassment and intimidation.

7. Finally, the Plaintiffs aver that the 1st Defendant received a sum of Kshs. 9,000,000.00 as part of its profit share entitlement under the JVA, of which the Plaintiffs were entitled to Kshs. 4,500,000.00 being 50%. They contend that the 1st Defendant has failed to remit the said amount, thereby causing them loss and damage for which they seek judgment.

8. The 1st Defendant filed a Statement of Defence dated 15th October 2020 and amended on 13th September 2021. It denied the averments of the Plaint. The 1st Defendant averred that although it was aware the 2nd Defendant intended to develop apartments on the suit property, it was not privy to the discussions between the Plaintiffs and the 2nd Defendant. While it conceded that the 2nd Plaintiff introduced it to the 2nd Defendant, the 1st Defendant maintained that any engagement with the 2nd Plaintiff was limited to its appointment as selling agent pursuant to a letter dated 1st October 2014 issued on behalf of the 2nd Defendant. Under that arrangement, the 2nd Plaintiff was to be paid commissions, which the 1st Defendant contends were duly settled in full.

9. The 1st Defendant further averred that the Plaintiffs were not privy to the Joint Venture Agreement or the Supplemental and Variation Agreement entered between itself and the 2nd Defendant, and thus could not found any claims upon them. It asserted that if indeed there were oral understandings between the Plaintiffs and itself, such could not override the terms of the JVA, which was binding only between the parties to it. The 1st Defendant denied the existence of any binding oral agreement requiring it to share profits with the Plaintiffs.

10. It was the 1st Defendant's case that while discussions were held on 29th August 2018 concerning allocation of apartments in lieu of profits, no resolution was passed, confirmed, or adopted converting profits into Apartments B3 and B4. The 1st Defendant denied that Apartment B3 was ever allocated to it, or that it had capacity to allocate the same to the Plaintiffs. It contended that no enforceable contract existed between it and the Plaintiffs, and that the Plaintiffs had failed to establish breach of any binding obligation.

11. The 1st Defendant also denied that the Dissolution and Termination Agreement executed between itself and the 2nd and 3rd Defendants conferred any rights upon the Plaintiffs. It averred that the Plaintiffs were not parties to those discussions, and that it was not acting as their agent. The 1st Defendant maintained that all discussions touching on allocation of apartments remained inconclusive, and therefore no enforceable rights accrued to the Plaintiffs.

12. The 2nd Defendant filed its Statement of Defence dated 27th October 2020 and amended on 21st July 2021. It denied the Plaintiffs' averments in toto. The 2nd Defendant averred that it engaged the 1st Defendant as project manager under the JVA, and had no contractual relationship with the Plaintiffs. It contended that the appointment of the 2nd Plaintiff as selling agent was undertaken by the 1st Defendant, and that any commission due thereunder was payable by the 1st Defendant, not by itself.

13. The 2nd Defendant further maintained that it was a stranger to the alleged arrangement of converting the 1st Defendant's profit share into Apartments B3 and B4, or of any instructions that Apartment B3 be issued to the Plaintiffs. It asserted that no cause of action had been disclosed against it, and that it had been improperly joined to these proceedings.

14. The 3rd Defendant also filed a Statement of Defence dated 27th October 2020 and amended on 21st July 2021. It similarly denied the Plaintiffs' claims. The 3rd Defendant averred that while it had advertised its real estate development, it was not privy to any contract between the Plaintiffs and the 1st Defendant. It disowned any knowledge of the alleged conversion of profits into apartment allocations or instructions regarding Apartment B3.

15. The 3rd Defendant further maintained that at all material times, the Plaintiffs were aware that it had not engaged them as selling agents and had no contractual obligations towards them. It therefore asserted that no reasonable cause of action had been disclosed against it, and prayed that the suit against it be struck out with costs.

16. At the hearing of the suit, the Plaintiffs called one witness who testified on their behalf. The Defendants, on their part, each called one witness. All the witnesses adopted their respective witness statements, which substantially reiterated the averments set out in the Amended Plaint and the Amended Statements of Defence. The witnesses were thereafter subjected to cross-examination.

17. Upon the close of the oral hearing, the parties filed written submissions which the Court has carefully considered together with the pleadings and the evidence adduced.

Analysis and determination

18. Having considered the Amended Plaint, the Statements of Defence, the evidence adduced by the parties, and their respective submissions, the Court is of the view that the following issues arise for determination:

    i. Whether the Plaintiffs have established a binding contract with any of the Defendants.

    ii. If issue (i) is answered in the affirmative, whether the Defendants were in breach of the contract.

    iii. Whether the Plaintiffs have established any cause of action against the 2nd and 3rd Defendants, or whether they were improperly joined to the proceedings.

    iv. Whether the Plaintiffs are entitled to the orders and reliefs sought in the Amended Plaint.

    v. Who should bear the costs of the suit.

Whether the Plaintiffs have established a binding contract with any of the Defendants

19. The Plaintiffs contended that the 2nd Plaintiff introduced the 1st Defendant to the 2nd Defendant, leading to the Joint Venture Agreement. They argued that, in consideration thereof, it was orally agreed that the Plaintiffs would share in the 1st Defendant's 30% profit entitlement. They further relied on minutes of an Executive Committee meeting of 29th August 2018, which allegedly allocated Apartment B3 to them in lieu of monetary profit. Their case was that the said arrangement, though not reduced into writing, was enforceable under the doctrine of part performance as codified under section 3(3) of the *akn ke act 1960 43 Law of Contract Act*, Cap 23.

20. The courts have repeatedly affirmed that oral contracts are valid contracts if they meet the essential elements of contract formation: offer, acceptance, consideration, capacity, and intention to create legal relations. In Muriithi v Muriithi [1988] KLR 123, the Court held:

> "Contracts may be made orally or in writing; the essential element is that there is mutual consent to the terms of the agreement and consideration moving from one party to the other."

21. Certain contracts, however, are statutorily required to be in writing. Notably, disposition of interest in land. The Defendants denied the existence of any enforceable agreement. Their case was that the Joint Venture Agreement was exclusively between the 1st and 2nd Defendants, and that there was no contractual nexus with the Plaintiffs. They further invoked section 3(3) of the *akn ke act 1960 43 Law of Contract Act*, which requires that contracts for the disposition of an interest in land must be in writing, signed by the parties thereto, and attested.

22. Section 3(3) of the *akn ke act 1960 43 Law of Contract Act* provides in mandatory terms that:

> " No suit shall be brought upon a contract for the disposition of an interest in land unless:
>
> a. the contract upon which the suit is founded:
>
> i. is in writing;
>
> ii. is signed by all the parties thereto; and
>
> iii. the signature of each party signing has been attested by a witness who is present when the contract was signed."

23. In Nelson Kivuvani v Yuda Komora & Another [1997] eKLR, the Court held:

> " An agreement for the sale of land which is not in writing, signed and attested to as required by law is void for all purposes and unenforceable. No action can be founded on such an agreement."

24. The above decision remains good law. Reliance on oral promises and meeting minutes cannot override the statutory command of section 3(3).

25. I have also considered whether the doctrine of part performance can save the Plaintiffs. The doctrine is well recognized: see Mwangi & Another v Mwangi [1986] KLR 328, where the Court held that acts of part performance must be unequivocally referable to the contract alleged. In this case, the Plaintiffs' acts of introducing parties and participating in marketing and sales are equally explicable as ordinary agency functions, for which they were separately remunerated by commission. No credible evidence was produced of transfer, possession, or other unequivocal acts referable to Apartment B3. The alleged resolution was neither adopted nor signed. I am therefore not persuaded that the doctrine of part performance applies.

26. The Plaintiffs further argued that substitution of Apartment B3 with Apartment A1, and tying the same to refund of Kshs. 2,175,000.00, amounted to breach of contract. However, the Court notes that any rights the Plaintiffs may have flowed from the 1st Defendant, whose obligations were later restructured under the dissolution agreement. The Plaintiffs cannot approbate and reprobate: they cannot accept commissions under one arrangement while rejecting the attendant conditions. The substitution was therefore valid and not unlawful.

27. Having found that the Plaintiffs did not establish an enforceable contract in respect of Apartment B3 under section 3(3) of the *akn ke act 1960 43 Law of Contract Act*, the allegation of breach must necessarily be considered in that context. Breach presupposes the existence of a valid and binding agreement imposing obligations on the parties. Where no such agreement is proved, the question of breach does not arise.

28. The doctrine of privity is settled. A contract cannot confer rights or impose obligations arising under it on any person except the parties to it. In Agricultural Finance Corporation v Lengetia Ltd & Jack Mwangi [1985] KLR 765 the Court of Appeal (Madan, Kneller & Nyarangi JJA) held:

> " As a general rule, a contract affects only the parties to it; it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it."

29. Applying that principle, the Joint Venture Agreement between the 1st and 2nd Defendants cannot be enforced by the Plaintiffs, who were neither signatories nor expressly conferred rights thereunder. Even if, arguendo, the Court were to assume that some form of understanding existed between the Plaintiffs and the 1st Defendant, the evidence shows that the arrangement was subsequently restructured. The minutes of 29th August 2018 were never formally adopted; instead, the Defendants executed dissolution and termination agreements which altered their rights and obligations. The Plaintiffs, having received and acknowledged full commission under the agency relationship, cannot now resile from that position. As the Court of Appeal stated in Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR:

> " A party cannot be allowed to blow hot and cold, to approbate and reprobate, or to accept and reject the same instrument. That is against the principles of equity."

30. The Court is also guided by the principle stated in National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, where the Court of Appeal emphasized:

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

31. Accordingly, the Court finds that the Plaintiffs have failed to demonstrate any breach of contract on the part of the Defendants. The claim based on alleged substitution of Apartment B3 with Apartment A1 must therefore fail.

> Whether the Plaintiffs have established any cause of action against the 2nd and 3rd Defendants, or whether they were improperly joined to the proceedings

32. A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint (see Waki JA., in Attorney General & Ministry of State for Immigration & Registrar of Persons v Andrew Maina Githinji & Zachary Mugo Kamunjiga [2016] KECA 817 (KLR)].

33. The Plaintiffs sought reliefs against all Defendants jointly and severally. However, the pleadings and evidence on record show that the appointment of the Plaintiffs as sole selling agents was done by the 1st Defendant, who was project manager under the Joint Venture Agreement. The 2nd and 3rd Defendants were not privy to the said appointment, or that they issued any instructions to the Plaintiffs regarding commission or allocation of apartments.

34. It is trite law, as restated in Agricultural Finance Corporation v Lengetia Ltd (supra) that only a person who is party to a contract can sue or be sued upon it. The Plaintiffs have not demonstrated any contractual nexus with the 2nd and 3rd Defendants in relation to commission, profit-sharing, or

allocation of apartments. The Court is therefore persuaded that no reasonable cause of action lies against the 2nd and 3rd Defendants, and the suit against them is misconceived.

Whether the Plaintiffs are entitled to the orders and reliefs sought in the Amended Plaint

35. The Plaintiffs prayed, in the first instance, for transfer of Apartment B3 or, in the alternative, payment of Kshs. 25,000,000.00, together with monthly rental income, a share of profits amounting to Kshs. 4,500,000.00, and an injunction restraining the Defendants from demanding refund of Kshs. 2,175,000.00 alleged overpaid commission.

36. With respect to Apartment B3, the Plaintiffs placed reliance on the minutes of a meeting held on 29th August 2018 which, according to them, crystallized the alleged oral agreement that they would take Apartment B3 in lieu of the 1st Defendant's profit share. The Defendants disputed this, asserting that no binding resolution was ever adopted, nor was any agreement reduced into writing and executed. The law is clear that a contract must be clear, definite, and enforceable in its terms, that courts cannot rewrite contracts for the parties; they can only enforce what is clear and binding. In the present case, no executed agreement, signed resolution, or other documentary proof was placed before the Court to demonstrate that Apartment B3 was validly allocated to the Plaintiffs. Accordingly, this prayer must fail.

37. In the alternative, the Plaintiffs sought Kshs. 25,000,000.00 said to represent the value of Apartment B3. However, they produced no valuation report or evidence of any agreed consideration between the parties to support this figure. The law requires strict proof of special damages or quantified claims. Without such proof, the Court cannot pluck a figure from the air. The claim for Kshs. 25,000,000.00 is therefore unproved and equally fails.

38. The Plaintiffs further prayed for monthly rental income of Kshs. 120,000.00 from 1st August 2018 on the basis that they were entitled to Apartment B3. Having already found that no enforceable right to Apartment B3 was established, it follows as a matter of course that this consequential claim for rental income has no foundation and must also fail.

39. On the claim for Kshs. 4,500,000.00 alleged to represent the Plaintiffs' share of profits, the Plaintiffs asserted that there existed an oral agreement with the 1st Defendant that they would share in its 30% profit entitlement under the Joint Venture Agreement. The 1st Defendant denied this, and indeed the Joint Venture Agreement on record is exclusively between the 1st and 2nd Defendants. On the evidence before the Court, the Plaintiffs were not parties to the Joint Venture Agreement. Their claim for a profit share, premised on the 1st Defendant's 30% entitlement under that contract, is therefore untenable in law.

40. The final substantive relief sought was an injunction restraining the Defendants from demanding refund of Kshs. 2,175,000.00 allegedly overpaid to the Plaintiffs as commission. The Plaintiffs maintained that they were duly appointed as sole selling agents, fully performed their mandate, and were paid commission at the agreed rate of 2.5% on each unit sold. They argued that the demand for refund was baseless, malicious, and oppressive, particularly because they had no control over the developer's decision to retain certain units.

41. The Defendants, on their part, contended that three apartments were retained by the 2nd and 3rd Defendants and thus did not qualify as "sales." They argued that the Plaintiffs had been overpaid on that account and were obliged, under the dissolution agreement, to refund Kshs. 2,175,000.00.

42. The Court has carefully considered the rival positions. It is an admitted fact that the Plaintiffs were fully paid their commission at the agreed rate. Once an agent's commission is earned upon the issuance

of letters of offer and acceptance by purchasers, the entitlement crystallizes and cannot be clawed back merely because the principal later elects to retain certain units. This position finds support in Kenya Commercial Bank Ltd v Popatlal Madhavji & Another [2019] eKLR, where the Court held that payments made in fulfilment of contractual obligations cannot subsequently be reversed without a fresh agreement between the parties. In the absence of clear contractual terms providing for claw-back, the Court finds that the Defendants had no lawful basis to demand refund of Kshs. 2,175,000.00 already paid to the Plaintiffs as commission.

43. Under Section 27 of the *akn ke act 1924 3 Civil Procedure Act*, costs follow the event unless the Court directs otherwise. The Plaintiffs have failed on their substantive claims but succeeded only in resisting the refund of commission against the 1st Defendant. In the circumstances, I direct that each party shall bear its own costs.

Final Orders

44. For the foregoing reasons, I enter judgment as follows:

i. The Plaintiffs' claims for transfer of Apartment B3, alternative payment of Kshs. 25,000,000.00, monthly rental income, and Kshs. 4,500,000.00 as share of profits are dismissed .

ii. It is hereby declared that the 1st Defendant has no lawful basis to demand refund of commission already paid to the Plaintiffs.

iii. The suit against the 2nd and 3rd Defendants is dismissed for want of reasonable cause of action.

iv. Each party shall bear its own costs.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF SEPTEMBER 2025.

PETER M. MULWA

JUDGE

In the presence of:

Ms. Wairimu Kinyanjui for Plaintiffs

Mr. Gitau h b for Mr. Muriithi for 1st Defendant

Mr. Bundotich for 2nd & 3rd Defendants

Court Assistant : Carlos