



**Franciscans of our Lady of Good Counsel Registered Trustees v
Kigonde t/a Align Architects & 2 others (Civil Case 274 of 2018)
[2025] KEHC 15360 (KLR) (Commercial and Tax) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 15360 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 274 OF 2018
PM MULWA, J
OCTOBER 30, 2025**

BETWEEN

**FRANCISCANS OF OUR LADY OF GOOD COUNSEL REGISTERED
TRUSTEES PLAINTIFF**

AND

SAMUEL KIGONDU T/A ALIGN ARCHITECTS 1ST DEFENDANT

ENGINEER ZIPPORAH ROTICH 2ND DEFENDANT

KILIMANJARO CONSTRUCTION LIMITED 3RD DEFENDANT

JUDGMENT

1. The Plaintiff instituted this case against the Defendants vide a plaint dated 9th July 2018 seeking judgment against the Defendants for:
 - i. Payment of the contract sum of Kshs. 78,000,000/=.
 - ii. In the alternative, a mandatory order compelling the defendants to pull down the condemned structure and put another similar strong structure according to the expected construction standards in line with the initial contract at their costs.
 - iii. Damages for breach of contract.
 - iv. Damages for breach of the user
 - v. Costs of the suit and interest.



2. The Plaintiff's case, as discerned from the pleadings, is that it is the registered proprietor of all that parcel of land known as L.R. No. 14750/26, situated in Athi River. It avers that on or about 11th October 2009, it entered into a consultancy agreement with the 1st Defendant for the design and development of a Covenant House on the said property. The agreement encompassed not only the construction of the main building but also the provision of associated external services including utilities, water supply, foul sewer systems, storm drainage, service roads, parking, telephone connectivity, and electrical service supply and distribution, including street lighting.
3. Under the terms of the said consultancy agreement, the 1st Defendant was tasked with assembling and coordinating the design team comprising the project architects, quantity surveyors, civil and structural engineers, electrical and mechanical engineers, and landscape architects, all to be appointed in consultation with the Plaintiff. Pursuant to that arrangement, the 2nd Defendant was appointed as the structural engineer, while the 3rd Defendant was engaged as the main contractor for the execution of the project.
4. The Plaintiff avers that construction commenced in August 2011 and that the building was completed and handed over to it on or about 19th November 2011. However, immediately upon handover, the Plaintiff observed extensive structural defects, including visible cracks on the walls and other latent defects which, upon inspection, were found to compromise the structural integrity of the building. The Plaintiff attributes these defects to negligent and unprofessional performance on the part of the Defendants, in particular, to structural designs that failed to take into account the soil composition of the property, coupled with poor workmanship during construction.
5. It is the Plaintiff's case that, despite several requests and reminders, the 1st Defendant failed or neglected to undertake adequate remedial measures. The 2nd Defendant initially prepared a report acknowledging the presence of structural defects and proposed certain remedial works, which the Plaintiff rejected as insufficient and unsatisfactory. The Plaintiff subsequently sought a second opinion from an independent consultant, who attributed the defects primarily to poor workmanship and design flaws.
6. Following consultative meetings among the parties, certain remedial works were undertaken. However, the Plaintiff avers that soon after completion of those works, the same cracks and defects reappeared, demonstrating that the underlying structural issues had not been resolved. The Plaintiff contends that the actions and omissions of the Defendants, collectively and individually, constitute a fundamental breach of the consultancy agreement, and that they are jointly and severally liable for the resultant loss and damage.
7. The Plaintiff further avers that, upon obtaining further professional advice, it was informed that the building is structurally unsound and requires to be demolished and reconstructed afresh at an estimated cost of Kenya Shillings Seventy-Eight Million (Kshs. 78,000,000/=). It therefore seeks compensation for the said loss, together with general damages for breach of contract, costs of the suit, and any other relief that the Court may deem just and equitable to grant.
8. The 1st Defendant filed its Statement of Defence dated 14th August 2018, wherein it denied the contents of the Plaintiff's claim in their entirety. It contends that its obligation under the consultancy agreement was limited to making recommendations to the Plaintiff, who retained the discretion to accept or reject such recommendations. It is the 1st Defendant's case that the recommendations made were therefore not binding upon the Plaintiff.
9. The 1st Defendant further avers that under the terms of the contract, the Plaintiff had the ultimate authority to appoint or decline to appoint any party as it deemed fit. It asserts that in its capacity



as an architect, it performed its professional duties diligently and in accordance with the applicable standards, and therefore cannot be held liable for any alleged negligence on the part of the other contracting parties. It is further contended that although the 1st Defendant was aware of the meeting held to address remedial defects, it did not play any role in or contribute to the said defects.

10. The 2nd Defendant filed its Statement of Defence dated 2nd October 2018, in which it equally denied the averments contained in the Plaintiff. It avers that at the time of handing over the building, there were no visible cracks or structural defects. The 2nd Defendant denies that the alleged defects were occasioned by any fault in the structural design or failure to account for soil composition, or that they resulted from poor workmanship. It is its case that, as a structural engineer, it duly discharged its obligations under the contract with due skill, care, and diligence. The 2nd Defendant maintains that the Plaintiff inspected the building at handover and raised no complaint at the time. It therefore denies any breach of contract or the existence of any cause of action against it.
11. The 3rd Defendant filed its Statement of Defence dated 9th August 2018, in which it similarly denied the averments in the Plaintiff. It contends that at the time of handover, the building was in sound and satisfactory condition, free from cracks or defects. The 3rd Defendant asserts that as a contractor, its mandate did not extend to matters of structural design or soil analysis, which fell outside the scope of its contractual obligations. It maintains that there is no credible evidence to demonstrate poor workmanship on its part.
12. The 3rd Defendant further avers that it was subsequently engaged by the Plaintiff, through the Plaintiff's architect, to undertake certain remedial works, which it executed to completion. Upon completion, the Plaintiff inspected the works and issued a written acknowledgement confirming satisfaction. It thus contends that the remedial works were separate and distinct from the original contract and were undertaken pursuant to fresh instructions from the Plaintiff.

The Evidence

13. The hearing of the suit commenced on 27th June 2019, Pw1 testified before L. Onguto J. He stated he is an architect with 30 years of experience. He joined the project after he was invited by the Plaintiff. He produced a report on the project. He testified that the building developed cracks in the walls in 2012 after the long rains, and the semi-cracks were noted, which were rectified by the structural engineer. He testified that during the construction, the initial drawing showed the walls were to go all the way to the foundation, but during construction, it was noted that the soil was very unstable, and the structural engineer revised the drawings and introduced columns only to the slab.
14. The structural Engineer put up a suspended slab instead of a ground slab. Unfortunately, she did not remove the soil on the site so that the slab was duly suspended.
15. In submissions the 1st Defendant submit that the plaintiff has not proven on the balance of probabilities that the 1st Defendant was professionally negligent or in breach of contract: the contract was in place, but no credible evidence showed the Defendant failed to carry out the required duties (such as soil-analysis or supervising the structural engineer) or departed from the accepted standard of care, and the expert evidence admitted that drawings were correct and that the building complied with them. Because no breach or negligence is established, the Plaintiff is not entitled to general damages for breach of contract, and likewise cannot claim special damages (such as loss of use) because those were neither properly pleaded nor substantiated by evidence.
16. The 2nd Defendant submits that the Plaintiff has failed to establish that the 1st Defendant breached his professional duty, specifically that the 1st Defendant did not bring the 2nd Defendant to the site for



pre-construction soil analysis and that under Sections 107 and 108 of the *Evidence Act*, the Plaintiff bore the burden of proof and has not discharged it. The Plaintiff's expert witnesses admitted the construction followed both architectural and structural drawings without deviation, that consultants held regular meetings with no objections and the handover was accepted without issue, and that defects only emerged well after the defects-liability period and the building was never condemned.

17. Meanwhile, the 2nd Defendant produced unchallenged soil test results (dated July 2010, pre-construction) showing the foundation design was adapted accordingly, up to three meters deep as confirmed by consultancy evidence. In light of this, the 2nd Defendant argues he exercised the requisite professional skill and diligence, the project was completed in line with approved designs, the Plaintiff accepted the work and paid all dues, including for defects, and thus the claims of breach of contract and negligence are unproven. Furthermore, since no breach or negligence has been shown, the Plaintiff is not entitled to relief; and the alleged special damages lack support in evidence, and the purported condemnation is not substantiated by any competent authority.
18. The 3rd Defendant submits that the Plaintiff has failed to enumerate any particulars of breach as against it. The Plaintiff has accused the defendants of a blanket breach of the contract, notwithstanding that each defendant had a specific mandate/role in the project. The plaintiff has failed to state any clause of the agreement breached by the 3rd Defendant. It relied on *Sahkar Limited & anor v African Hotels and Adventure East Africa Limited (2020) eKLR*.
19. The Plaintiff has also failed to enumerate the elements of the alleged poor workmanship. The 3rd Defendant was not involved in the structural designs. A final certificate for the work done was issued on 15th December 2014, a confirmation that the 3rd Defendant had carried out its work to satisfaction. There is no evidence adduced to show that the building has been condemned, and thus the claim of Kshs. 78,000,000/= should fail. It maintains that the Plaintiff has failed to discharge the duty of proving that the 3rd Defendant breached the consultancy agreement and the alleged loss and the reliefs sought.

Analysis and Determination

20. Having considered the pleadings, evidence, and submissions, the following issues arise for determination:
 - i. Whether the Defendants, or any of them, were in breach of contract or professionally negligent;
 - ii. Whether the Plaintiff suffered loss attributable to such breach; and
 - iii. Whether the Plaintiff is entitled to the reliefs sought.

Whether there was a breach of contract or professional negligence

21. It is not in dispute that a consultancy and construction relationship existed among the parties. The Plaintiff's evidence, however, hinges on the assertion that structural cracks appeared after completion, indicating poor workmanship or defective design. The burden of proof under Sections 107–109 of the *Evidence Act* rests upon the Plaintiff, who must prove both the existence of a duty and breach thereof.
22. PW1, an architect with 30 years' experience, testified that cracks emerged in 2012 after the long rains. He stated that the structural engineer revised the drawings mid-construction due to unstable soil conditions and introduced columns resting on slabs. He did not, however, establish that this revision was unprofessional or contrary to approved standards.
23. The Plaintiff's expert report, while acknowledging defects, did not conclusively attribute them to negligent design or workmanship. Indeed, there was evidence that the structural drawings were



approved and the works inspected at every stage. The Plaintiff accepted handover and subsequently issued a final certificate, an act that, as held in *Sahkar Limited & Another v African Hotels and Adventure East Africa Ltd* [2020] eKLR, raises a presumption that works were completed satisfactorily unless vitiated by fraud or latent defect.

24. The Plaintiff did not call the independent engineer who allegedly condemned the building, nor did it produce any certification from a statutory body (such as NCA or the County Government) declaring the building unsafe. The alleged cost of reconstruction (Kshs. 78 million) was not supported by a quantity surveyor's report or any independent valuation.
25. Professional negligence requires proof of duty, breach, and causation. The Plaintiff has not shown that the Defendants acted below the standard expected of their respective professions.
26. The Court thus finds that the Plaintiff failed to establish, on a balance of probabilities, that the 1st, 2nd or 3rd Defendants breached the contract or were professionally negligent. The cracks that appeared after heavy rains, while unfortunate, are not by themselves proof of negligence or breach, especially in the absence of evidence demonstrating departure from professional standards.
27. The Plaintiff's case therefore fails to establish, on a balance of probabilities, that any of the Defendants breached their respective contractual or professional duties.

Whether the Plaintiff suffered loss attributable to such breach

28. Having found that no breach or negligence was proved, the question of loss does not arise. The Plaintiff's claim for the alleged reconstruction cost of Kshs. 78 million was not supported by credible expert or documentary evidence. Without proof of liability, the alleged loss remains speculative. As was stated in *Cecilia W. Mwangi & Another v Ruth W. Mwangi* [1997] eKLR, damages are compensatory, not punitive, and must flow from a proven wrong.

Whether the Plaintiff is entitled to the reliefs sought

29. Having failed to establish liability, the Plaintiff cannot succeed in its claim for damages or the contract sum. In *Kenya Power & Lighting Co. Ltd v Nathan Karanja Gachoka & Another* [2016] eKLR, the Court of Appeal emphasized that damages cannot issue where liability is not proven.
30. I find that the claim for special damages in the sum of Kshs. 78 million must fail for want of strict proof. It is trite law that special damages must not only be specifically pleaded but also strictly proved. (See *Capital Fish Kenya Ltd v Kenya Power & Lighting Co. Ltd* [2016] eKLR).
31. The claim for a mandatory injunction compelling demolition equally fails, there being no credible evidence of condemnation, statutory notice, or imminent danger justifying such an order.
32. Having found that no breach or negligence has been proved, the Court finds no basis for the grant of any damages or the reliefs sought.
33. In light of the foregoing, the Plaintiff has failed to prove its case on a balance of probabilities against all the Defendants. The suit is accordingly dismissed with costs to the Defendants.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 30TH DAY OF OCTOBER 2025.

P.M. MULWA

JUDGE

In the presence of:



Ms. Kamunya h/b for Mr. Mbaluka for Plaintiff

Mr. Munawa h/b for Mr. Kihara for 1st Defendant and appearing 2nd Defendant

Ms. Kache h/b for Mr. Oonge for 3rd Defendant

Court Assistant: Carlos

