

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: MUSINGA (P), MUMBI NGUGI, & OCHIENG, JJ.A.)

CIVIL APPEAL NO. E617 OF 2024

BETWEEN

FAIRVIEW ESTATE LIMITED.....APPELLANT

AND

**WANHO INTERNATIONAL
HOLDING LIMITED.....RESPONDENT**

*(Being an appeal from the judgment and decree of the Environment and Land Court of Kenya at Nairobi (**Wabwoto, J.**) dated 30th July 2024*

in

ELC Case No. 1222 of 2015)

JUDGMENT OF THE COURT

1. This is an appeal against the decision of the Environment and Land Court at Nairobi (**Wabwoto, J.**) delivered on 30th July 2024 in **ELC Case No. 1222 of 2015**.
2. The background to this appeal as borne out of the plaint dated 30th November 2015 and filed on 1st December 2015 is that on or around 1st March 2010, the parties entered into a land sale agreement in which the **Fairview Estate Limited** (hereinafter referred to as **“the appellant”**) sold 100 acres of land identified

as **LR No. 28093** (the

suit land), which was excised from LR No. 4897/2 and 79/3 to the **Wanho International Holdings Limited** (hereinafter referred to as **“the respondent”**) at Kshs.6,600,000 per acre, bringing the total purchase price to Kshs.660 million. On 30th September 2010, parties executed an addendum to the agreement which sought to address access issues that arose after it was discovered that the parcel lacked suitable access roads, a fact not known to the respondent at the time of execution.

3. In its suit, the appellant accused the respondent of breaching both the agreement and the addendum by failing to prepare and submit a master plan within 90 days, construct a 1.3 km access road, erect a boundary wall, form a joint management company with the appellant for the larger estate, and commence development within 12 months. Additionally, the appellant alleged that the respondent induced the sale through misrepresentations and acted fraudulently, including grossly understating the consideration in the transfer instrument (indicating Kshs.400 million instead of the agreed Kshs.660 million), which the appellant argued amounted to fraud on the government, and a basis for invalidating the respondent’s title.
4. The appellant sought a wide array of remedies, including rescission of the agreement dated 1st March 2010 and its

addendum of 10th

September 2010; a declaration that the respondent had repudiated the contract through breach; a declaration that the respondent had obtained transfer of the suit land by material misrepresentation; a declaration that the appellant is discharged from granting the respondent vacant possession of the suit land; an order directing the Chief Lands Registrar to cancel the transfer registered in favour of the respondent as I.R No 123426/2 in respect of the suit land and restore its title to the appellant; an order directing the defendant, its agents, assigns, employees and/or servants to vacate the suit land forthwith; a temporary injunction to restrain any dealings with the property pending determination of the suit; mesne profits from 2011; an order of forfeiture of the deposit, a refund of the balance of the purchase price; general damages for breach of contract and misrepresentation; special damages as pleaded; directions for accounts; and costs of the suit.

5. The respondent filed its defence dated 26th March 2018, denying all allegations of breach and misrepresentation. It asserted that it had fully complied with the terms of the agreement and addendum, including paying the full purchase price and registering the transfer within the agreed 60 days' period. It contended that any delays in implementing development works

were directly attributable to the

appellant's failure to fulfill its obligations under the addendum, namely: to re-survey the land, provide two new access roads through adjacent land belonging to the appellant and procure a new deed plan within 120 days. It contended that these failures left the suit land inaccessible and thus incapable of being developed. In addition, that the appellant had lodged a caveat on the suit land in 2013 further complicating the respondent's ability to obtain necessary approvals for development.

6. The appellant did not furnish this Court with the trial court proceedings. We note that vide a letter dated 13th August 2024, the appellant's advocates, M/s Wanjama & Associates, requested an uncertified copy of the proceedings from the trial court. It is unclear whether the proceedings were ever supplied or whether the appellant subsequently applied for certified typed copies. Consequently, the only witness account available to this Court is the one summarised in the impugned judgment which we shall proceed to highlight in brief.
7. **Eric Asembo**, a Licensed Surveyor, testified as PW1. The gist of this testimony was that he was engaged to assess access road to the suit land. He testified that various subdivisions were undertaken to create access roads linking the land to Kiambu Road, and that the approved

plans reflected this. He stated that his work started after the property had already been transferred to the respondent.

8. **Jane Nyambura Githinge**, a director of the appellant, testified as PW2. Her testimony was that the respondent breached key terms of the agreement by failing to provide a master plan and commence development. She acknowledged that the full purchase price was paid, but maintained that the appellant fulfilled its obligations, including providing access roads and a deed plan. She denied any misrepresentation and insisted that the appellant placed a caveat only after failed efforts to prompt the respondent to perform.
9. **Paul Kamau**, a Financial Analyst, testified as PW3. His testimony was that he assessed the economic loss resulting from the stalled development. He prepared a report which focused on lost business opportunities and was meant to support the appellant's claim for special damages. He confirmed that while the purchase price had been paid, the project was never completed.
10. Lastly, **Philip Kiprotich**, a valuer, testified as PW4. He gave evidence based on a valuation report as to the property's worth and the development expectations. He confirmed that he relied on assumptions drawn from the agreement and did not consult the respondent in the course of preparation of the report.

11. **Xu Chengquan**, the respondent's Business Operations Manager, testified as **DW1**. The gist of his testimony was that the respondent intended to develop a high-end mixed-use project and had shared the master plan with the appellant by email. He stated that the addendum addressed access issues, but the appellant failed to provide the required deed plan. He admitted that the boundary wall and the management company premises were not completed, and that construction was halted after a caveat was lodged. He confirmed that the respondent did not respond to a completion notice and maintained that lack of access prevented progress on the development.
12. After the full hearing, the trial court delivered its judgment on 30th July 2024. It identified three key issues for determination, namely, whether there was breach of the agreement and the addendum and by which party; whether there was any fraud and or misrepresentation in respect of the sale and transfer of the suit land; and whether the appellant was entitled to the reliefs sought.
13. On the first issue, the trial court found that the appellant bore greater responsibility for the breakdown of the agreement. It had failed to fulfil key obligations necessary to provide proper access to the property and to support the respondent's enjoyment and use of the

land as envisioned in the agreement. The court also observed that the appellant had placed a caveat against the title, which significantly hindered the respondent's ability to meet its obligations. The trial court was therefore satisfied that the respondent had discharged the duties that fell within its control and had adequately explained any unmet obligations as being contingent on the appellant's prior compliance. As such, the appellant could not rely on those unfulfilled obligations caused largely by its own default as grounds for rescinding the agreement.

14. On the second issue regarding alleged fraud and misrepresentation, the trial court relied on the decisions of **Vijay Morjaria v Nansingh Madhusudan Darbar & Another** [2000] eKLR and **Kinyanjui Kamau v George Kamau** [2015] eKLR, which reaffirmed that allegations of fraud must be specifically pleaded and strictly proved by distinct evidence; and that fraud cannot be inferred from general facts. The same standard was said to apply in respect of misrepresentation under Order 2 rule 4 of the Civil Procedure Rules. The trial court reiterated that the standard of proof in such cases is higher than a balance of probabilities but does not reach the criminal threshold of beyond reasonable doubt.

15. The court noted that the appellant had not pleaded fraud and had only alluded to misrepresentation, which was unsupported by evidence. It found that the sale and transfer to the respondent were properly executed and that the respondent's title, which was acquired upon payment of the full purchase price under a valid sale agreement was protected under **sections 24, 25, and 26** of the **Land Registration Act**.
16. Referring to the decision of **Gladys Wanjiru Ngacha v Teresa Chepsaat & 4 Others** [2013] eKLR, the trial court emphasized that the burden to prove fraud or misrepresentation lies with the party alleging it. In the absence of cogent evidence to prove fraud and misrepresentation, the trial court held that there was no basis to impeach the respondent's title or to rescind the agreement.
17. On the final issue as to whether the appellant was entitled to the remedies sought, the trial court held that since the appellant did not establish its case against the respondent to the required legal standard, it was not entitled to any of the orders sought in the plaint. Its suit was found to be unmerited and was accordingly dismissed with costs to the respondent.
18. Being aggrieved and dissatisfied with the decision of the trial court, the appellant filed this appeal. The memorandum of appeal raises

seventeen (17) grounds which may be summarized as follows: the learned judge erred in law and in fact by failing to find that the respondent breached the contract by not providing a master plan, constructing an access road, building a boundary wall, forming a management company, commencing development of the land, and initiating the agreed joint venture; by failing to properly evaluate and appreciate the evidence on record, including evidence of the respondent's non-performance and the appellant's compliance with agreed terms of the sale; by misinterpreting the legal consequences of the respondent's failure to perform and instead wrongly attributed fault to the appellant in the absence of any notice of breach or demand; by failing to award the appellant proven special damages amounting to Kshs.664,979,771.31 arising directly from the respondent's breach; and by failing to find that the respondent misrepresented material facts and acted fraudulently in the formation, execution, and performance of the contract, including understating the consideration in the transfer of the property.

19. At the hearing of this appeal, the appellant was represented by learned counsel **Mr. Havi** and **Mr. Wanjama**, while the respondent was represented by **Senior Counsel Mr. Ohaga** and learned counsel **Mr. Okireng**.

20. In its written submissions which were highlighted by Mr. Havi, the appellant contended that the trial court erred in construing the agreement dated 1st March 2010 and varied on 10th September 2010 as a mere sale of land. The appellant maintained that the agreement was in fact a composite contract encompassing both the sale of the suit land and the joint development of a larger 320-acre parcel. It asserted that the sale was expressly conditional upon the respondent fulfilling seven specific obligations, including the preparation of a master plan, construction of an access road, boundary demarcation, and the formation of a management company to oversee the joint development.
21. The appellant faulted the learned judge for disregarding the conditional nature of the agreement despite clear contractual terms indicating that the transaction involved both the sale of the suit land and its joint development together with the farm, subject to seven (7) specific conditions to be fulfilled by the respondent. It submitted that the respondent had repudiated the agreement through a letter dated 14th October 2015, found at page 225 of the record, in which it asserted that the transfer was 'unconditional'. The appellant contended that this position, which was accepted by the trial court, was erroneous and contrary to the express language of the

agreement. In support of those submissions, the appellant relied on **The Law of Real Property (8th edn, Charles Harpum, Stuart Bridge & Martin Dixon, Sweet & Maxwell)**, which underscores that a contract for sale of land does not come into force until the conditions precedent are satisfied, and that neither party can unilaterally waive such a condition as the contract's existence is dependent upon them.

22. The appellant maintained that it was not the party in breach of the agreement. It reiterated that the respondent had failed to perform any of the seven contractual obligations despite having been served with a valid notice to complete. In contrast, the respondent neither issued a corresponding notice, nor made any effort to fulfill its obligations even though the addendum to the agreement had expressly provided the necessary access to facilitate joint development. The appellant made reference to Clauses 15 and 16 of the agreement which emphasized that time was of the essence, and that performance was obligatory. It contended that the trial court erred in improperly shifting the burden of proof and in relying on the respondent's uncorroborated assertions. To reinforce its position, the appellant cited several English decisions, including **Property and Bloodstock Ltd v Emerton** [1967] 3 All ER, **BSC v Cleveland Bridge Co** [1984]

1 All ER 504, **Tootal Clothing Ltd v Guinea Properties**

Management Ltd [1992] 2 EGLR 80 and **North Eastern Properties v Coleman** [2010] EWCA Civ 277, to highlight the enforceability of performance obligations in dual-purpose contracts and the legal consequence of non-performance on the entire agreement. It was submitted that the trial court ought to have found the respondent in breach of the joint development obligations, thereby entitling the appellant to rescind the sale and pursue damages.

23. Relying on **sections 3(2) and 3(3)** of the **Law of Contract Act**, **section 80** of the **Land Registration Act**, and **section 39** of the **Land Act**, the appellant contended that the trial court erred in failing to uphold its right to rescission. It cited **Alastair Hudson, Equity and Trusts (7th edn, Routledge)** in support of the proposition that rescission is an equitable remedy available in cases of repudiatory breach and is intended to restore the parties to their original positions by setting aside the contract. The appellant further relied on the decision of this Court in **Samuel Ngige Kiarie v Njowamu Construction Co. Ltd & Another** [2019] eKLR, where rescission was upheld following breach by a purchaser. Additional reliance was placed on **Jiwaji v Jiwaji** [1968] EA 547, **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd** [2002] 2 EA 508 and **Centurion Engineers &**

Builders Ltd v Kenya Bureau of Standards (Civil

Appeal E398 of 2021) [2023] KECA 1289 (KLR) to underscore the principle that courts must respect and enforce freely negotiated contracts rather than rewrite them. In this regard, the appellant argued that by construing the agreement between the parties as a sale of land only, the trial court effectively re-wrote the contract contrary to established legal principles.

24. On the issue of remedies, the appellant submitted that if rescission was not available, whether due to the completed transfer of the suit land to the respondent or for any other reason, then an award of special and general damages was both appropriate and justified. The appellant referred to a valuation report dated 13th July 2018, found at pages 229 to 303 of the record of appeal, which assessed its losses at a total of Kshs 664,929,771.31. These losses included costs incurred in constructing roads and boundary walls, expenses arising from staff terminations, and a substantial reduction in the value of the 320-acre farm. The appellant contended that the value of the land dropped from Kshs 7.3 billion to Kshs 4.7 billion as a direct result of the respondent's failure to fulfill its obligations under the agreement. It argued that it had produced detailed documentary evidence and oral testimony to support both the actual expenses incurred and the

projected costs, yet the trial court failed to consider or refer to this evidence in its judgment.

25. In support of its claim for damages, the appellant relied on **Chitty on Contracts: Specific Contracts (Volume II, Sweet and Maxwell)** and **Goff and Jones, The Law of Unjust Enrichment (Eighth Edition, Sweet and Maxwell)**, which both affirm that restitution is available where a party has been unjustly enriched at the expense of another. The appellant further cited the decision in **Cobbe v Yeoman's Row Management Ltd** [2008] 1 WLR 1752, where the House of Lords held that a party who benefits from another's expenditure in the context of an informal or failed agreement may be required to make restitution.
26. Finally, during the hearing of the appeal, counsel for the appellant addressed the respondent's contention that the appeal was incompetent on the basis that the notice of appeal had been filed out of time. Relying on rule 84 of the Rules of this Court, counsel submitted that any challenge to the notice of appeal must be brought by way of a formal application within thirty days of the alleged irregular filing. It was contended that since the respondent had not filed any such application, then that the objection had no merit and

could not be raised at the hearing stage or at such a late stage of the appeal.

27. The respondent opposed the appeal through its written submissions which were highlighted by **Mr. Ohaga**, Senior Counsel. It maintained that the impugned judgment was well-reasoned and founded on a correct interpretation of both facts and law. The respondent began by addressing the applicable standard of review in appellate proceedings, citing **Selle & Another v Associated Motor Boat Co Ltd & Others** [1968] EA 123 to affirm that although an appellate court has the duty to re-evaluate the evidence and reach its own conclusions, it must also give appropriate deference to the findings of the trial court which had the advantage of observing the demeanour of witnesses firsthand. This principle was reinforced by reference to **Kenya Ports Authority v Kuston (Kenya) Ltd** [2009] 2 EA 212 and **Peters v Sunday Post Ltd** [1958] EA 424, where the courts emphasized that appellate interference with findings of fact should be exercised cautiously, particularly when such findings are based on credibility of witnesses.
28. The respondent also raised a preliminary issue on the competence of the appeal, arguing that the notice of appeal upon which the appeal is anchored was filed out of time in contravention of rule

77(2) of the

Rules of this Court, which requires filing within fourteen days of the impugned decision. The appellant cited the decision of this Court in **John Mutai Mwangi & 26 Others v Mwenja Ngure & 4 Others** [2016] eKLR to stress the importance of strict compliance with timelines, and **Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others** [2013] eKLR to underscore the constitutional value of procedural integrity. The Supreme Court's holding in **Bookpoint Limited v Guardian Bank Limited & Guilders International Bank Limited** [2021] KESC 73 (KLR) was also cited for the proposition that absence of a valid notice of appeal is fatal and renders the entire appeal a nullity.

29. On the substantive issues raised in the appeal, and particularly the allegation of breach of contract, the respondent asserted that both parties bore obligations under the agreement for sale and the accompanying addendum. However, it was the appellant who failed to provide the necessary access to the suit land, thereby frustrating the respondent's ability to perform its contractual duties. The respondent argued that the trial judge correctly concluded that the appellant's conduct had impeded its performance. In support of the principle that a party cannot benefit from its own breach, the respondent cited **Alghussein Establishment v Eton College** [1988]

1 WLR 587, where the *House of Lords* held that contractual terms must not be construed so as to allow a party to profit from its own default. The respondent further noted that this principle had been applied by this Court in **Trishcon Construction Company Limited v Mohamed Salim Shamshudin & Another** [2019] eKLR.

30. The respondent further disputed the appellant's characterization of certain contractual obligations as 'conditions precedent'. It contended that these obligations were more accurately classified as 'conditions subsequent', the fulfilment whereof was not solely dependent on the respondent's actions. The respondent maintained that the appellant's failure to provide access to the property effectively made performance impossible. Accordingly, it submitted that the trial court was correct in finding that no breach had occurred on its part.

31. With regard to the issue of fraud and misrepresentation, the respondent contended that the trial court correctly applied the law in finding no evidentiary basis to support such claims. The respondent contended that the appellant appeared to have effectively abandoned these allegations on appeal as they appeared only briefly and without emphasis in the written submissions.

32. Regarding the appellant's claim for special damages, the respondent

argued that these had not been properly proven. It further contended

that the appellant's attempt to have this Court assess and award damages was misguided as it invited the appellate court to exercise original jurisdiction contrary to its mandate.

33. With respect to the submission made by the appellant on the doctrine of unjust enrichment, the respondent contended that the said concept had not been pleaded and lacked both legal and factual foundation. It contended that the appellant having received full payment of Kshs.660 million more than a decade ago could not now seek rescission of the contract or further compensation. Instead, the respondent maintained that it was the appellant who sought to unjustly enrich itself through an unmerited reversal of the transaction.

34. In conclusion, the respondent submitted that the appeal was misconceived and urged us to dismiss it with costs.

35. We have considered the issues raised in this appeal. This being a first appeal, our mandate is to re-evaluate, re-assess and re-analyze the extracts on the record and then determine whether the conclusions reached by the learned judge should stand, and give reasons either way. See **Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates** [2013] eKLR, **Kiruga**

vs. Kiruga & Another [1988] KLR 348 and **Peters vs. Sunday Post Ltd** [1958] EA 424.

36. Having re-evaluated the record of appeal as well as submissions by the parties, the following issues commend themselves for our determination: **whether the trial court erred in its characterization of the agreement between the parties; whether the trial court erred in failing to find that the respondent breached the agreement thereby justifying rescission; whether the trial court properly addressed the allegations of fraud and misrepresentation; and whether it erred in declining to grant the reliefs sought by the appellant.**

37. Before we delve into the substantive issues raised in the appeal, we deem it necessary to dispense with the preliminary regarding competence of this appeal. The respondent raised a preliminary issue asserting that the appeal was incompetent on the basis that the notice of appeal was filed outside the fourteen-days' period stipulated under rule 77(2) of the Rules of this Court. It submitted that strict adherence to procedural timelines is a constitutional imperative and that failure to file a valid notice of appeal renders the entire appeal a nullity. In response, the appellant contended that the objection to the notice of appeal was improperly raised.

Relying on rule 86, the

appellant contended that any challenge to the competence of a notice of appeal must be brought through a formal application filed within thirty (30) days of the alleged defect. Since the respondent had not filed such an application, then the objection was procedurally barred and could not be raised informally at the hearing stage.

38. Indeed, as per the decision of the Supreme Court in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others** (supra), a notice of appeal is a jurisdictional prerequisite and signifies the intention to appeal. Without a proper notice of appeal on record, this Court is divested of jurisdiction to hear an appeal. Rule 77 (2) of the Rules of this Court contemplates the filing of a notice of appeal within fourteen days from the date of the decision sought to be appealed from. The appellant did not deny having filed its notice of appeal out of the prescribed timeline. In essence, therefore, this appeal is premised on a defective notice of appeal. In the normal scheme of things, the appeal ought to be declared as incompetent and thus struck out.

39. However, rule 77 (2) must be read together with rule 86, and more specifically the proviso thereto, which provides that a party seeking to strike out a notice of appeal must do so by way of a

formal application filed within thirty days of the alleged defect. In the present

case, the respondent did not file such an application and instead raised the issue informally during the hearing. Kiage, J.A. in **Esther Anyango Ochieng v Transmara Sugar Company** [2020] eKLR stated thus:

“... I have no doubt in my mind that the application to strike out the notice of appeal on the grounds that it was served out of time and that it was not followed by the filing of the record of appeal is incompetent. It is incompetent because, while it seeks to enforce timelines as against the respondent, it is itself violative of the proviso to Rule 84 which mandatorily requires that it be filed within 30 days. It was not so filed and leave to file it out of time not having been sought and given, the notice of motion should be for striking out. I can do no better than quote what this Court stated in SALAMA BEACH (Supra);

“This Court has in the past had occasion to decide the fate of applications made under Rule 84, but which had been filed out of time. In Joyce Bochere Nyamweya v Jemima Nyaboke Nyamweya & another [2016] eKLR, this Court held that parties are bound by the mandatory nature of the proviso to Rule 84 of this Court’s Rules. An application seeking to strike out a notice of appeal or an appeal must be made within thirty (30) days of service of the notice of appeal or the appeal sought to be struck out.

That failure to do so renders such an application fatally defective and liable to be struck out. As was held in the Joyce Bochere case (supra), stipulations on time frames within which acts should be done in law are of essence and must be strictly observed. In the event that a party finds itself caught up by the lapse of time as was in this case, the proper thing to do is to file an application for extension of time under Rule 4 of this Court’s Rules.

Similarly, in William Mwangi Nguruki v Barclays Bank of Kenya Ltd [2014]

eKLR, the Court held that an application to strike out a notice of appeal that is brought after 30 days from the date of service of the notice of appeal is incompetent unless leave is sought and obtained to file the application out of time. See also Michael Mwalo v Board of Trustees of National Social Security Fund [2014] eKLR.”

40. Similarly, this Court while dealing with an application to strike a notice of appeal in **Pickwell Properties Limited v Kenya Commercial Bank** [2016] KECA 786 (KLR) held thus:

“In the instant application, the applicant does not contest the fact that it was served way back in March 2013 with the Notice of Appeal which it now seeks to have struck out. The time within which the application should have been brought elapsed a long time ago in March 2013. The application to strike out was brought way out of time after the expiry of the period stipulated by the proviso to rule 84. The application is therefore not competent as it does not lie in light of the proviso to rule 84. Its purported basis is absent.”

41. It follows, therefore, that whereas the respondent may have had a valid argument regarding the lateness of the notice of appeal, its failure to invoke the proper procedural mechanism for challenging that defect renders the objection untenable.
42. Turning to the substantive issues in this appeal, the central one is the appellant’s claim that the respondent breached what it describes as a composite agreement involving both the sale of land and a joint development project. The appellant argues that this breach entitled it either to rescind the agreement or to be

awarded damages. It

maintains that the trial court erred in construing the contract as one limited to the sale of land rather than recognizing it as an integrated arrangement that included sale of the suit land, along with the joint development of a broader 320-acre estate. The appellant relies heavily on seven specific conditions set out in the agreement which it considers to be the foundation of the intended joint venture. These include the respondent's obligations to prepare a master plan, construct a 1.3 kilometers access road, build a boundary wall and establish a management company to oversee the development. On its part, the respondent maintains that the trial court rightly found the appellant in breach of its own obligations under both the agreement and the addendum. It argues that the appellant was responsible for providing access to the property and that its failure to do so frustrated the respondent's ability to undertake development as envisioned in the agreement.

43. It is not disputed that the parties entered into an agreement dated 1st March 2010, which was varied by the addendum dated 10th September 2010. On the face of it, the agreement concerned the sale of Land Reference No. 28093 situated in Kiambu, a 100-acre portion subdivided from a larger 320-acre estate comprising LR Nos. 79/3 and 4879/3. The appellant (**as the vendor**) intended

to develop the

estate into a mixed-use project with residential, commercial, hospitality, and other amenities, and the respondent agreed to purchase the suit land as part of this broader development plan. We have carefully examined both the agreement and the addendum, and in our view, the obligations of the parties are clearly interdependent, reflecting a relationship grounded in mutual commitments. A key example is the clause stipulating that the vendor's obligation to release critical completion documents, including the original title, the executed transfer, the directors' personal identification numbers and identity cards and the letter of consent to transfer, is expressly dependent on the purchaser first depositing the full purchase price into a joint interest-earning account held in both parties' names. This arrangement, in our view, establishes a condition precedent, meaning that the appellant's duty to perform arises only upon the respondent's fulfilment of its payment obligation.

44. Similarly, the purchaser's right and corresponding obligation to begin development on the property was contingent upon the vendor first securing all necessary governmental and regulatory approvals, particularly those related to the road infrastructure serving the estate. The agreement clearly assigned the responsibility of applying for and obtaining these approvals to the

appellant. At the same time,

the respondent's obligation to commence construction within twelve months was explicitly made subject to the issuance of all relevant consents.

45. In our view, this sequence of obligations makes it clear that the respondent could not reasonably be expected to perform its part of the contract unless and until the vendor had fulfilled its own responsibilities.
46. In addition, the clause relating to the construction of a boundary wall illustrated a layered and reciprocal arrangement. The respondent was required to construct a wall enclosing both the 100 acres it had purchased and the remaining portion of the appellant's land. The cost of this construction was to be treated either as an advance contribution toward a proposed joint venture or, if the joint venture did not materialize, to be reimbursed by the appellant. The appellant's obligation to reimburse would therefore only arise upon the abandonment of the joint venture, making its performance dependent on the respondent's actions or decisions regarding the continuation of the venture.
47. Having considered and analysed the above clauses of the agreement and the addendum, it is clear to us that the parties' obligations were not meant to operate in isolation, but were fundamentally

interconnected. Each party's performance was contingent upon the other fulfilling specific responsibilities. In our view, this structure reflects a contract built on mutual dependence where the rights and duties of one party are closely tied to the actions of the other. Therefore, it follows that neither party could properly assert performance or allege breach without first considering its own compliance. The agreement and the addendum therefore represented a collaborative arrangement grounded on reciprocal expectations rather than separate or unilateral undertakings.

48. Having so held, we are not persuaded by the argument made by the appellant's characterization of the respondent's obligations as conditions precedent. As per **Black's Law Dictionary, 11th Edition page 366**, a condition precedent refers an act or event, other than a lapse of time, that must exist or occur before a duty to perform something promised arises. While the appellant relied on **The Law of Real Property (Harpum, Bridge & Dixon)**, which correctly states that no enforceable contract arises until a condition precedent is fulfilled, that principle does not, in our view, apply where a contract has already been formed and partly performed. In the circumstances herein, there was full payment of the purchase price by the respondent, registration of the title in the respondent's name, and

subsequent correspondence between the parties which demonstrated that the contract had been treated as fully operative. The specific obligations cited by the appellant, which included the preparation of a master plan, construction of an access road, boundary demarcation, and the formation of a management company to oversee the joint development were dependent on the continued mutual cooperation between the parties.

49. In light of the foregoing, we are satisfied that the agreement between the parties as read together with the addendum constituted a contract built upon mutual and interdependent obligations rather than one founded on separate or unilateral undertakings. The appellant's characterization of the respondent's obligations as strict conditions precedent was neither borne out by the terms of the contract nor supported by the conduct of the parties. The respondent paid the full purchase price and effected transfer as per the terms of the agreement, thereby discharging its primary duty under the agreement. However, the joint development aspect required coordinated action, including provision of access and deed plans by the appellant. Once the contract was partly performed through payment, registration, and ongoing engagement, the legal

relationship became binding and enforceable on both sides, subject to reciprocal performance.

50. The above findings bring us to the question of whether the trial court correctly addressed the issue of the respondent's alleged breach, and whether such breach, if established, would justify rescission. To determine whether a party has breached a contract, courts look at whether there has been a failure to perform a material obligation that goes to the root of the agreement. In **Carter v Boehm (1766) 3 Burr 1905**, *Lord Mansfield* held that the obligation of good faith and fair dealing underpins contractual performance and breach is measured against this standard.
51. Regarding enforcement of contracts, this Court was categorical in **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another** [2001] eKLR that a court cannot rewrite a contract for parties, and that enforcement must be based on the expressed intentions and obligations of the parties.
52. It is undisputed that access to the suit land posed a significant challenge on the respondent's ability to undertake any development, leading to the execution of an addendum dated 10th September 2010. This addendum was prompted by the realization that the subdivision plan previously undertaken by the appellant resulting in the issuance

of a deed plan for the suit land, failed to provide proper and adequate access to the property. To address this shortcoming and in furtherance of the agreement dated 1st March 2010, the appellant committed through the addendum to create additional access to the suit land via the adjoining parcel known as LR No. 25257/2. The appellant also undertook to complete the resurvey and facilitate the processing and issuance of a new deed plan within 120 days from the date of the addendum. The addendum stipulated that if the appellant failed to complete this process within the stipulated timeframe, it would be liable to pay interest to the respondent on the sum of Kshs.100 million at a rate of 10 percent per annum. In turn, the respondent was required to pay the balance of the purchase price and complete the transfer of the suit land into its name within sixty days.

53. The respondent asserted that the appellant failed to provide access to the suit land and did not deliver the agreed deed plan in accordance with the contractual terms. As per the terms of the agreement, these obligations fell squarely upon the appellant, and it was therefore incumbent upon it to adduce cogent evidence demonstrating compliance with the contractual provisions requiring it to facilitate access to the property and to procure and deliver a revised deed plan as stipulated in the addendum. In

contrast, the respondent

successfully established that it had fulfilled its principal obligations under the agreement by remitting the full purchase price of Kshs.660,000,000, a fact expressly acknowledged by the appellant, and by effecting the transfer of the suit land within the agreed timeline.

54. The trial court while addressing the issue of breach of the agreement observed thus:

“71. It was argued during trial that the plaintiff did not discharge its obligations to prepare another deed plan in time for the road currently shown in deed plan No. 291762 for the new access road. Evidence presented before this court also showed that a master plan was prepared and provided to the plaintiff. Evidence was also adduced to the effect that the plaintiff lodged a caveat which affected the defendant in discharging the other obligations as stipulated in the agreement.

72. Having analyzed the evidence that was adduced herein the plaintiff beared (sic) more responsibility by failing to carry out its obligations which was necessary to give proper access to the property and do such acts as may be required by the purchaser for the proper enjoyment and use of, the property. The plaintiff also placed a caveat to the suit property which affected the defendant’s ability to fulfill its obligations that were stipulated in the agreement.

73. The court is satisfied that the defendant was able to fulfill the obligations which were primarily hinged on its role or responsibility and to those that were to be performed after compliance by the plaintiff, the defendant has equally been able to explain how it was able to perform and any failures on the same. The defendant was able to adduce evidence showing that what was not performed was solely dependent on the

obligations of the plaintiff. The plaintiff cannot therefore hinge on the said breaches to its advantage in seeking the recession of the agreement.”

55. We do not find any grounds upon which we can interfere with the findings of the trial court on this issue. We fully agree with the trial court’s finding that the appellant bore greater responsibility for the breakdown of the agreement by failing to fulfil its obligations, particularly the ones that were necessary to facilitate the respondent’s proper access to the property and to ensure its proper use and enjoyment. The situation was further compounded by the appellant’s decision to register a caveat against the title of suit land, which, in our view, significantly impeded the respondent’s ability to perform its duties under the agreement. As such, the trial court was correct in finding that the respondent met its obligations where performance was within its control and provided reasonable explanations for any outstanding obligations that were contingent upon the appellant’s prior compliance.

56. Having found that the appellant materially breached the agreement by failing to provide access and the requisite deed plans as stipulated, it cannot validly rely on the respondent’s non-performance to justify rescission. A party who defaults cannot seek to terminate the contract or benefit from its own breach. This

Court in **Trishcon Construction**

Company Limited v Mohamed Salim Shamshudin & another

(supra) held thus:

“34. In arriving at our decision, we have borne in mind dicta in Alghussein Establishment vs. Eton College (1991) 1 All ER pp 267, where it was held

“The principle that in the absence of clear express provisions in a contract to the contrary, it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party... to avoid his obligations under the contract ”

57. Therefore, while we acknowledge the appellant’s reliance on section 39(1) of the Land Act which grants a vendor the statutory right to rescind a land sale contract in the event of a purchaser’s breach, the broader principles of contract law make it clear that a party in default cannot be heard to complain of the non-performance of the other party and cannot seek to terminate the contract on that basis. To do so would be to allow a party to benefit from its own breach, which equity and good conscience cannot support. The appellant, having received the full purchase price from the respondent, which was a colossal sum of Kshs.660 million, and having failed to perform its foundational obligations under the agreement, particularly those related to providing access, it could not, in our view, validly assert breach by the respondent as a ground for rescission or damages.

58. Turning to the issue of fraud and misrepresentation, it is trite that fraud must be specifically pleaded and proved. See **Vijay Morjaria v Nansingh Madhusingh Darbar & Another** [2000] eKLR, **R.G Patel v Lalji Makanji** [1957] EA 314, **Central Bank of Kenya limited vs. Trust Bank Limited & 4 others** [1996] eKLR.
59. We have perused the plaint dated 30th November 2015 and fully associate ourselves with the trial court's finding that the appellant did not plead any fraud but only aspects of misrepresentation. With respect to the claims of misrepresentation, we have examined the particulars set out in paragraph 15 of the plaint and are satisfied that the trial court was correct in finding that no credible or verifiable evidence of false representations was made by the respondent. There was also no indication that the respondent knowingly concealed any material facts to induce the appellant into entering the agreement. In our view, the performance issues raised by the appellant are more appropriately considered within the framework of breach of contract rather than being framed as misrepresentation or fraudulent inducement. Accordingly, the agreement could not be rescinded on grounds of misrepresentation.
60. Finally, with regards to the appellant's claim for special, general,

and exemplary damages along with the other reliefs sought, we
are not

persuaded that these can be granted. Since the appellant has not demonstrated that the respondent breached the agreement in a manner that would justify rescission, there is no legal basis for awarding any form of damages. In other words, without any proof of a wrongful act on the part of the respondent, the claims for compensation cannot stand.

61. In the end, this appeal is devoid of any merit. It is accordingly dismissed with costs.

62. This judgment is delivered under **rule 34(4)** of this Court's Rules, following the untimely death of Ochieng, J.A. before its delivery.

Dated and delivered at Nairobi this 24th day of October 2025.

D. K. MUSINGA, (PRESIDENT)

.....
JUDGE OF

APPEAL MUMBI

NGUGI

.....
JUDGE OF APPEAL

*I certify that this is
a true copy of the
original.*

Signed

DEPUTY REGISTRAR.