**Kitololo & 2 others v Housing Finance Company HFC Limited (Commercial Case E560 of 2023) [2025] KEHC 17354 (KLR) (Commercial and Tax) (24 November 2025) (Judgment)**

Neutral citation: [2025] KEHC 17354 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**COMMERCIAL AND TAX**

**COMMERCIAL CASE E560 OF 2023**

**MA OTIENO, J**

**NOVEMBER 24, 2025**

**BETWEEN**

**JULIANA MUTHONI KITOLOLO .................................................... 1ST PLAINTIFF**

**PETER WANGAI MURIITHI ........................................................... 2ND PLAINTIFF**

**SILVERSTONE PROPERTIES LIMITED ......................................... 3RD PLAINTIFF**

**AND**

**HOUSING FINANCE COMPANY HFC LIMITED ........................... DEFENDANT**

## JUDGMENT

### Introduction and Background

1. The 1st Plaintiff, Juliana Muthoni Kitololo, was a customer of the Defendant Bank (HFC Limited) and obtained loan facilities in the sum of Kshs. 6,600,000/- secured by property Title No. Ngong/Ngong/14666, and another property, being Ngong/Ngong/2725.
2. On 11th February 2019, the 1st and 2nd Plaintiffs entered into a Joint Venture Agreement (JVA) under which the 2nd Plaintiff, Peter Wangai Muriithi, agreed to offset the outstanding loan in exchange for Title No. Ngong/Ngong/14666 for development. The 3rd Plaintiff, Silverstone Properties Ltd, was the special purpose vehicle intended by the Plaintiffs to execute the project.
3. Following the JVA, the 1st Plaintiff on 28th January 2019 wrote to the Defendant, expressing her intention to redeem both securities at their respective market values aggregating to KES 26,000,000/=, starting with Title No. Ngong/Ngong/14666 by paying KES 11 million in three installments of KES 5 million, KES 3 million, and KES 3 million. The other parcel, Title Ngong/Ngong/2725, was to be later redeemed on terms that were to be agreed with the defendant bank.

4. After negotiations, the Defendant issued a letter dated 25 February 2019, accepting a redemption sum of KES 11,000,000 for Title No. Ngong/Ngong/14666 on condition that the amount was to be received within 90 days from the date of the letter, that is, by 26th May 2019.

5. In relation to Title Ngong/Ngong/2725, the Defendant, by the same letter of 25 February 2019, accepted the 1st Plaintiff's request for redemption on condition that the balance (KES 15,000,000/=) was to be paid in four (4) equal instalments within a period of 120 days from the date of the letter, that is by 30th September 2019.

6. It was further the Defendant's undertaking that the title documents and a duly executed discharge for the properties were to be released sequentially upon receipt of the amounts referred to in paragraphs 4 and 5 of this judgment.

7. The Plaintiffs claim they fully paid the redemption sum for Title No. Ngong/Ngong/14666 by 23 November 2019, but the Defendant withheld the title deed until 28 June 2021, frustrating the joint venture project, hence this suit. Consequently, the Plaintiffs, therefore, a Plaint dated 15th September 2023 and Amended on 4th July 2024 (the "Amended Plaint") seek the following prayers:

   i. The sum of KES 151,232,917.00 being the losses occasioned to the Plaintiffs' project as a result of the Defendant's breach of its undertaking dated 25 February 2019;

   ii. General damages for the damage caused to the Plaintiffs' project's reputation due to the Defendant's contemptuous and malicious conduct;

   iii. Costs of the suit and applicable interest at commercial rates on the amount in (i) above from the date of filing suit until payment in full; and

   iv. Any other or further relief as the Honourable Court may deem fit to grant.

8. The Defendant, by Amended Statement of Defence dated 23 August 2024, contested liability, arguing that the Plaintiffs defaulted on payment timelines, that only the 1st Plaintiff was privy to the contract, and that the claim is speculative and unproven.

**Hearing**

9. The case for the Plaintiffs was heard on 22 October 2024, when the 1st Plaintiff, Ms. Juliana Kitololo, testified on behalf of the other Plaintiffs. Also called as a witness for the Plaintiffs was Mr. Patrick Tana Mutisya, a Quantity Surveyor, who testified as an expert witness.

10. The case for the defence was heard on 19 November 2024, when the sole witness for the defence, Ms. Mary Gathugu, the Defendant's Credit Administration Officer, testified.

**Evidence by the Plaintiffs**

11. Ms. Juliana Muthoni Kitololo (the 1st Plaintiff) testified as PW1 and adopted her witness statement dated 15 September 2023 as her evidence in chief. She also produced in evidence (PEXH 1) the documents in the Plaintiff's List and Bundle of Documents of the same date.

12. Ms. Kitololo stated that she was a customer of the Defendant Bank and had obtained loan facilities secured by Title No. Ngong/Ngong/14666. She stated that following negotiations with the Defendant, the Bank issued a letter dated 25 February 2019 in which it undertook to release the title documents sequentially upon payment of redemption sums of KES 11,000,000 and KES 15,000,000, respectively.

13. The witness confirmed that together with her joint venture partner, the 2nd Plaintiff, they executed a Joint Venture Agreement dated 11 February 2019, under which the 2nd Plaintiff was to offset the outstanding loan in exchange for the title to the property for development. She testified that the agreed redemption sum of KES 11,000,000 was fully paid by 23 November 2019, but despite several demands, the Defendant failed to release the title until 28 June 2021.

14. She maintained that the Defendant's delay frustrated the joint venture project, leading to substantial losses. Under cross-examination, she conceded that the payment was not made within the stipulated deadline of 26 May 2019, but insisted that the Defendant accepted the late payment without objection and was therefore bound to release the title.

15. The Plaintiffs' second witness (PW2), Patrick Tana Mutisya (Quantity Surveyor), a quantity surveyor, gave evidence as an expert witness and adopted as his evidence in chief, his witness statement dated 4th July 2024. He also produced in evidence (PEXH 2) the documents in the list of documents dated the same date.

16. The QS testified that he prepared a report quantifying the losses suffered by the Plaintiffs as a result of the Defendant's delay in releasing the title. According to his calculations, the losses amounted to KES 151,232,917, broken down into:

    i. Losses due to 84 weeks' delay – KES 20,160,000

    ii. Loss of profit – KES 109,500,000

    iii. Performance bond (19 months) – KES 16,031,250

    iv. Insurance covers (19 months) – KES 5,541,667

17. The Witness (PW2) stated that the joint venture project was viable and that the Defendant's failure to release the title caused its collapse.

18. Under cross-examination, the witness admitted that his expertise related to construction costing rather than property valuation, and that he had not produced evidence of regulatory approvals, pre-sale contracts, or actual expenditure on insurance and performance bonds.

**Evidence of the Defendant**

19. The Defendant called one witness, Ms. Mary Gathugu, its Credit Administration Officer, who testified as DW1 on behalf of the Defendant. She confirmed that the Bank issued the letter dated 25 February 2019, but emphasized that its terms required payment of KES 11,000,000 by 26 May 2019. She stated that the Plaintiffs failed to meet this deadline, and under clause (vi) of the letter, the negotiated terms ceased to apply, entitling the Bank to demand full repayment of the outstanding debt.

20. DW1 further testified that subsequent negotiations between the parties culminated in a consent order recorded in ELC Case No. 819 of 2017, which governed the release of the title. She maintained that the consent order superseded the letter of 25 February 2019, and that the Bank was therefore not in breach.

21. Under cross-examination, DW1 admitted that the Bank accepted the redemption sum of KES 11,000,000 paid in November 2019, but insisted that acceptance did not revive the earlier undertaking. She also acknowledged that the Bank did not charge interest for the delay, as provided in clause (vi) of the said letter, but explained that the Bank relied on the consent order as the operative instrument.

**Submissions**

22. At the conclusion of the hearing, directions were taken on the filing of submissions. The Plaintiff filed submissions dated 18th February 2025, whilst the Defendant filed theirs dated 18th March 2025.

**Plaintiffs' Submissions**

23. Counsel for the Plaintiffs submitted that the Defendant's letter dated 25 February 2019 constituted a binding undertaking by which the Defendant expressly undertook to release the title documents sequentially, starting with Title No. Ngong/Ngong/14666, then Ngong/Ngong/2725, upon receipt of redemption sums of KES 11,000,000 and KES 15,000,000, respectively.

24. Counsel submitted that the Plaintiffs paid the KES 11,000,000 Title No. Ngong/Ngong/14666 by 23 November 2019, yet the Defendant withheld the title until 28 June 2021, thereby breaching its undertaking in relation to the release of the title. This, according to Counsel, was in breach of the aforesaid undertaking by the Defendant.

25. Counsel for the Plaintiffs submitted that, despite that payments in respect of Title No. Ngong/Ngong/14666 were not within the timelines specified in the Defendant's letter of 25 February 2019; the Defendant, having accepted payments without objection, had awas byacquiesced by his conduct to the late payment, and was therefore estopped from denying liability. Counsel relied Authorities relied upon among others, the case of Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR, where it was held that estoppel prevents a party from resiling from a representation relied upon to another's detriment.

26. On damages, Counsel for the Plaintiffs summitted that once breach is established, damages are awardable and that the Plaintiffs are entitled to compensation for the losses incurred, to restore them to the position they would have been in but for the breach. The Plaintiffs relying on the evidence by PW2 therefore claimed KES 151,232,917 in special damages, broken down as: Delay losses – KES 20,160,000; Loss of profit – KES 109,500,000; Performance bond – KES 16,031,250; and Insurance covers – KES 5,541,667.

27. It was argued on behalf Plaintiffs that the Defendant having failed to call an expert witness, the evidence by PW2 on the quantum of damages payable remained unchallenged, and are therefore awardable as claimed. Counsel relied on the Court of Appeal decision in the case of Basil Criticos v National Bank of Kenya Limited (as the successor in business to Kenya National Capital Corporation Limited "KENYAC") & Another (Appeal 80 of 2017) [2022] KECA 870 (KLR) (28 April 2022) (Judgment) in support of this preposition.

28. It was emphasised that Defendant's conduct was malicious and contemptuous, warranting general damages for reputational harm. Counsel therefore urged this Court to allow the Plaintiffs claim in terms of prayers in the Amended Plaint dated 4th July 2024.

**Defendant's Submissions**

29. The Defendant in its submissions opposed the claim in its entirety and urged the Court to dismiss the suit with costs. The Defendant's submissions were structured around five principal arguments.

30. First, it was submitted that the letter dated 25 February 2019 was addressed solely to the 1st Plaintiff, Juliana Muthoni Kitololo. The 2nd and 3rd Plaintiffs were not parties to that arrangement and therefore lacked locus standi to sue. Counsel relied on among others, the Court of Appeal decision in Agricultural Finance Corporation v Lengetia [1982–88] KAR 772, where it was held that a contract

cannot be enforced by or against a person who is not privy to it, even if made for his benefit. Reliance was also placed on City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & Another [2016] KECA 649 (KLR), which reaffirmed the doctrine of privity.

31. Second, it was submitted that the redemption sum of KES 11,000,000 was due by 26 May 2019 but was only paid in November 2019. Counsel asserted that Clause (vi) of the letter expressly provided that in the event of default, the negotiated terms would lapse and the Bank would be entitled to demand full repayment of the outstanding debt. Counsel asserted that the Plaintiffs cannot rely on their own default to allege breach. In support, reliance was placed on Nabro Properties Ltd v Sky Structures Ltd & 2 Others [2002] KECA 296 (KLR), which affirmed the maxim that no man shall take advantage of his own wrong.

32. The Defendant further submitted that subsequent negotiations culminated in a consent order recorded in ELC Case No. 819 of 2017, which governed the release of the title. Counsel argued that the consent order superseded the letter of 25 February 2019, and that the Plaintiffs cannot rely on the earlier letter once fresh terms were agreed. Reliance was placed on Flora N. Wasike v Destimo Wamboko [1988] eKLR and Hirani v Kassam [1952] 19 EACA 131, both of which held that a consent order has contractual effect and is binding unless set aside on grounds such as fraud, mistake, or misrepresentation.

33. Fourth, Counsel for the Defendant submitted that contrary to the Plaintiff's submissions/allegations, estoppel was not pleaded in the Plaint and cannot be invoked at the stage of submissions. Counsel emphasised that estoppel cannot found a cause of action (a sword), but is merely a shield. Reliance was placed on the case of Diamond Trust Bank Kenya Ltd v Said Hamad Shamisi & 2 Others [2015] KECA 717 (KLR), where the Court of Appeal held that estoppel must be specifically pleaded and on Bank of Africa Ltd v Time Trucks Ltd & 2 Others [2024] KEHC 12494 (KLR), which reiterated that estoppel cannot be used to create a cause of action.

34. Finally on damages, the Defendant submitted that the Plaintiffs' claim for KES 151,232,917 in special damages was not proven in line with the principle in Hahn v Singh [1985] KLR 716, requiring that special damages must be specifically pleaded and strictly proved. Counsel maintained that no documentary evidence was produced to support claims for insurance premiums, performance bonds, or delay costs. He argued that the claim for loss of profit was speculative, as no regulatory approvals, pre-sale contracts, or feasibility studies were tendered.

35. Counsel further maintained that the expert evidence of the quantity surveyor was of limited probative value since the witness was not a valuer and his projections were based on assumptions. Reliance was placed on among others, the case of David Njuguna Ngotho v Family Bank Ltd & Another [2018] eKLR, Stephen Kinini Wang'ondu v The Ark Ltd [2016] eKLR, where it was emphasised that expert opinion is not binding and must be weighed against other evidence.

36. In conclusion, the Defendant urged the Court to dismiss the Plaintiffs' claim in its entirety with costs.

## Analysis and Determination

37. Having considered the pleadings, the evidence, and the detailed submissions of counsel, I am satisfied that the following issues arise for determination:

    i. Whether the 2nd and 3rd Plaintiffs have the requisite locus standi.

    ii. Whether there was breach on the part of the Defendant.

    iii. What damages, if any, are awardable to the Plaintiffs?

### Whether the 2nd and 3rd Plaintiffs have the requisite locus standi

38. The first issue for determination was whether the 2nd and 3rd Plaintiffs had locus standi to sue on the basis of the Defendant's letter dated 25 February 2019.

39. The Defendant submitted that the letter was addressed solely to the 1st Plaintiff, Juliana Muthoni Kitololo, and that the 2nd and 3rd Plaintiffs were not privy to it. Counsel relied on the settled principle of privity of contract, as articulated in Agricultural Finance Corporation v Lengetia [1982–88] KAR 772, where the Court of Appeal held that "as a general rule, a contract affects only the parties to it, and cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit." The Court in that case rejected an attempt by a third party to enforce contractual rights, emphasizing that privity is a cornerstone of contractual certainty.

40. The Defendant also cited City Council of Nairobi v Wilfred Kamau Githua t/a Githua Associates & Another [2016] KECA 649 (KLR), where the Court of Appeal reaffirmed that only parties to a contract may sue upon it, unless there is a recognised exception such as agency, trust, or statutory intervention.

41. The Plaintiffs argued that the Defendant was aware of the joint venture arrangement between the 1st and 2nd Plaintiffs, and that by engaging with them in meetings and correspondence, the Defendant acquiesced to their participation. They urged the Court to find that the Defendant's conduct effectively extended contractual rights to the 2nd and 3rd Plaintiffs.

42. While the Court appreciates that exceptions to the doctrine of privity exist (such as contracts made for the benefit of third parties, agency relationships, or statutory provisions), it has not been sufficiently demonstrated in the present case that the letter of 25 February 2019 was intended to confer any enforceable rights upon the 2nd and 3rd Plaintiffs.

43. Further, the Court notes that the Joint Venture Agreement of 11 February 2019 was between the 1st and 2nd Plaintiffs. The Defendant was not a party to it, nor was the 3rd Plaintiff, Silverstone Properties Ltd, who equally was not privy to either the letter of 25 February 2019 or the JVA. The mere fact that the Defendant was aware of the JVA does not, without more, create contractual obligations enforceable on non-parties.

44. Accordingly, the Court finds that the 2nd and 3rd Plaintiffs therefore lacked locus standi. Their claims are dismissed.

### Whether there was breach of Undertaking

45. The Plaintiffs argued that payment of KES 11,000,000 entitled them to release of the title under the 25 February 2019 letter. The Defendant countered that the payment was made late, extinguishing the negotiated terms under clause (vi) of the letter. It was further the Defendant's argument that a subsequent consent order in ELC Case No. 819 of 2017 between the Defendant and the 1st Plaintiff herein superseded the letter.

46. From the evidence on record, the Court agrees with the Defendant that payment was late. However, the Court notes that the Defendant accepted it without objection and did not enforce clause (vi) of the said letter of undertaking, which provided for the charging of interest at the rate of 13% per annum for late payment. In National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another [2001] eKLR, the Court of Appeal held that parties are bound by their contracts, but waiver by conduct is recognised. Acceptance of late payment without objection amounts to waiver.

47. It therefore follows that under the letter of 25 February 2019 (which was actually authored by the Defendant), the option available to the Defendant was to charge interest at 13% p.a. (which the Defendant failed to do, and which they are by their conduct now estopped from doing), but not to resile from the agreement in relation to the re-negotiated debt. The argument by the Defendant that the 1st Plaintiff had lost the benefit accrued under the letter is therefore unmeritorious. In any event, evidence on record reveals that the cause of delay on the part of the 1st Plaintiff was explained to the Defendant through various correspondences and meetings, including in the meeting of 30 May 2019, the minutes of which were produced at pages 148-149 of the Plaintiff's Bundle of Documents dated 15th November 2023.

48. Further, the Defendant's position is not helped by the fact that they failed to respond in any way to various letters from the 1st Plaintiff requesting the release of Title No. Ngong/Ngong/14666 after settlement of full redemption of KES 11,000,000/- on 23rd November 2019. In particular, there is no evidence on record that the Defendant promptly responded to the letter dated 23 June 2020 (page 167 of the Plaintiff's Bundle) by the Plaintiff's Advocates.

49. The Plaintiffs relied on Section 120 of the *Evidence Act* and authorities such as Serah Njeri Mwobi v John Kimani Njoroge [2013] eKLR and Gatirau Peter Munya v Dickson Mwenda Kithinji [2014] eKLR. The Defendant argued estoppel was not pleaded, citing Diamond Trust Bank v Said Hamad Shamisi [2015] KECA 717 (KLR).

50. The Court finds that while estoppel must ordinarily be pleaded, equity will not permit a party to accept payment and remain silent, only to later deny its obligation. Estoppel operates defensively here to bar the Defendant from escaping liability.

51. As regards the consent order, while the Court accepts the position, as guided by the Court of Appeal decision in Flora N. Wasike v Destimo Wamboko [1988] eKLR and Hirani v Kassam [1952] 19 EACA 131, that consent orders have contractual effect, evidence on record reveals that in this matter, the Consent Order dated 3rd June 2021 in ELC Case No. 819 of 2017, which the Defendant contends vitiated the letter of 25 February 2019, in substance only related to Title No. Ngong/Ngong/2725. This can be gleaned from the letters that formed the basis of the consent, that is, the letter dated 1 March 2021 from the Plaintiff's Advocate and the Defendant's Advocate's letter of 15th March 2021 (See pages 1 and 2 of the Defendant's Bundle of Documents). There is nothing on the face of the two letters indicating that Title No. Ngong/Ngong/14666 was the subject of negotiations.

52. In any event, evidence on record reveals that by 3rd June 2021, when the said consent was signed, a breach of the terms of the letter of 25 February 2019 regarding the release of Title No. Ngong/Ngong/14666 had already happened as demonstrated by the demand letter dated 23 June 2020 (Pages 168-169 of the Plaintiff's Bundle of Documents) from the Plaintiffs' Advocate to the Defendant. The fact that the mere fact that Title No. Ngong/Ngong/14666 was referenced in the said Consent did not change the date from which the title ought to have been released, bearing in mind clause (iv) of the letter dated 25 February 2019 which provided that the title documents were to be released sequentially, upon receipt by the Defendant of their respective redemption sums.

53. Consequently, the Court finds that the consent did not extinguish the obligations under the letter in respect of Title No. Ngong/Ngong/14666.

54. Accordingly, it is therefore further the finding of this Court that the Defendant breached its undertaking by failing to release the title upon receipt of the redemption sum on 23 November 2019.

**What damages, if any, are awardable to the Plaintiffs?**

55. In view of the Court's finding on locus standi and breach, what remains for determination is whether the 1st Plaintiff proved her claim for KES 151,232,917 in special damages, and whether the claim for general damages is merited.

56. The law on damages is settled. Special damages must be specifically pleaded and strictly proved. Mere assertion or estimates without documentary proof (receipts, contracts, vouchers) are insufficient. This in the position of the law as stated by the Court of Appeal in Capital Fish Kenya Limited v The Kenya Power & Lighting Company Limited [2016] KECA 56 (KLR) that:

> " Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR, Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur). In the latter case this Court was emphatic that
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> "... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...".

57. The Plaintiffs in this case claimed KES 151,232,917 in special damages under four heads: Delay losses (KES 20,160,000); Loss of profit (KES 109,500,000); Performance bond (KES 16,031,250); and Insurance covers (KES 5,541,667).

58. They primarily relied on the expert report of PW2, a quantity surveyor, who quantified the losses. Counsel submitted that damages should restore the Plaintiffs to the position they would have been in but for the breach, citing Robinson v Harman (1848) 1 Ex 850. They argued that the Defendant's delay frustrated the joint venture project, causing substantial financial loss and reputational harm. It was further the Plaintiffs' submissions that the claim had not been controverted in line with the Court of Appeal decision in the case of Basil Criticos v National Bank of Kenya Limited (as the successor in business to Kenya National Capital Corporation Limited "KENYAC") & Another (Appeal 80 of 2017) [2022] KECA 870 (KLR) (28 April 2022) (Judgment) that expert evidence can only be challenged by another expert.

59. Whereas the Court concurs with the Plaintiff's argument that an expert witness can only be challenged by another witness, the Court is equally cognizant of the fact that expert evidence is not necessarily binding on the Court and must be weighed against other evidence to enable the Court to make a finding whether or not it believes in such evidence. As was held in Shah and Another v Shah and Others [2003] 1 EA 290:

> " The opinion of the expert witness is not binding on the court, but is considered together with other relevant facts in reaching a final decision in the case and the court is not bound to accept the evidence of an expert if it finds good reasons for not doing so."

60. In this case, I agree with the Defendant's contention that PW2, whose testimony forms the basis of the Plaintiffs' claim for KES 151,232,917, was a quantity surveyor, not a valuer, and that his projections lacked probative weight. The professional competence of a quantity surveyor lies in construction costing and project management. His report (PEXH 2), however, purported to quantify financial

losses amounting to KES 151,232,917, including delay losses, loss of profit, performance bond, and insurance premiums.

61. The court is of the considered view that valuation of property, assessment of commercial loss, and quantification of profits fall within the domain of registered valuers, accountants, or actuaries, not quantity surveyors. PW2's expertise does not extend to financial forecasting or market analysis. This mismatch undermined the probative value of his testimony.

62. Further, PW2's evidence (Page 10 of the Plaintiff's Supplementary List and Bundle of Documents) indicates that the construction contract was to be for a period of 65 weeks commencing 8 April 2019 and was to end on 6 July 2020. It is not contested that the Plaintiffs themselves were responsible for the delay during this period. The Defendant's letter of 25 February 2019 was clear that payment in respect of Title No. Ngong/Ngong/14666 was to be made by the 1st Plaintiff on or before 26 May 2019, a condition which was not complied with until 23 November 2019. It therefore follows that it is the Plaintiffs and not the Defendant who occasioned the delay and prevented the construction contract from commencing and ending by the set timelines of 65 weeks from 8 April 2019. The 1st Plaintiff was the author of her own cause, and she cannot therefore claim any damages

63. The Court notes the attempt by PW2 to base the claim for "damages for delay in completion of the works" on the period between when the 1st Plaintiff finally made the final payment of the subject property (23 November 2019) and when the Defendant bank eventually released the title to the property (28 June 2021). However, the Court also notes the witnesses' testimony that the project was aborted, and therefore did not proceed. PW 1, on cross-examination, confirmed that the contractor had left the site, though she could not remember when. The Plaintiffs have failed to demonstrate that there was a delay in construction works between 23 November 2019, when the 1st Plaintiff made the final payment, and 28 June 2021, when the title was released. This claim, therefore, fails.

64. Further, the claim for loss of profits as claimed was speculative and was based on projections of apartment sales. In Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] KECA 312 (KLR), the Court of Appeal rejected speculative profit claims stating that: -

> "We think that the learned Judge was correct to approach the sums claimed as quantified special damages properly pleaded. The problem, however, lay in the fact that the evidence tendered, such as there was, either failed to touch on the specific sums pleaded or was contradictory, inconclusive or speculative. This fell way short of the requirement not only of specific pleading but, also, indeed the more, strict proof. See Banque Indosuez Vs. Dj Lowe & Co. Ltd [2006] 2KLR 208. Hahn Vs. Singh [1985] KLR 716. That proof having lacked, the learned Judge was perfectly entitled to dismiss the huge claim and to grant only the satisfactorily proven amount of Kshs. 153,000 paid as appraisal fees."

65. Finally, on the Performance bond and insurance, no receipts or payment vouchers were produced, indicating that the Plaintiffs actually incurred the cost. In fact, PW2 on cross-examination confirmed that these costs would ordinarily be incurred by the contractor, who, in any event, is not a party to these proceedings. On this account alone, the Plaintiffs' claim for Performance bond – KES 16,031,250; and Insurance covers – KES 5,541,667 collapses.

66. Although the claim for special damages has failed, the Court is satisfied that the 1st Plaintiff suffered real harm from the Defendant's conduct of failing to release Title No. Ngong/Ngong/14666 upon receipt of the full redemption value on 23 November 2019. This delay, to some extent, frustrated the joint venture project, caused reputational harm to the 1st Plaintiff, and deprived her of the ability to deal with her property freely.

67. The inconvenience and loss of credibility in the eyes of her business partners were foreseeable consequences of the Defendant's breach. No credible explanation has been provided by the Defendant for the failure to release the title upon receipt of the last instalment in respect thereof on 23 November 2019. From the evidence adduced (Page 158 of the Plaintiff's Bundle of Documents), it is clear that following payment of the last instalment in respect of the title, the 1st Plaintiff wrote to the Defendant on 14 May 2020, seeking to have the title released. There is no evidence on record that the Defendant responded to that letter.

68. Additionally, the Plaintiffs, through their Advocates, wrote to the Defendant on 26 June 2020 seeking to have the title released, but again, no response was accorded to the letter by the Defendant. It was not until 15 March 2021, approximately 18 months later, that the Defendant, in response to the Plaintiffs' further letter of 1 March 2021, attempted to address the Plaintiffs' concerns. However, a perusal of the said letter by the Defendant's Advocates did not provide any single reason for the failure to release the title for the property in dispute – Title No. Ngong/Ngong/14666. The said letter only referred to the sum of KES 13,500,000.00, which was to be paid by the 1st Plaintiff as a condition for the release of the title to a different property - Title No. Ngong/Ngong/2725.

69. From the foregoing, it is clear that there was a prolonged and unexplained delay (over 18 months) in releasing the title. This obviously caused reputational harm to the 1st Plaintiff in her dealings with business partners, for which the 1st Plaintiff is entitled to some damages for this breach, since there cannot be a wrong without a remedy. In Macharia Mwangi Maina & 87 others v. Davidson Mwangi Kagiri [2014] eKLR, the court held: -

> " This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive justice rather than technical and procedural justice".

70. While the general rule is that general damages are not normally awardable for breach of contract, exceptions to this rule do exist in law. Kenyan courts have recognised that general damages may be awarded for inconvenience, distress, and reputational harm where special damages are not proved. The Court of Appeal in the case of Total (Kenya) Limited Formally Caltex Oil (Kenya) Limited v Janevams Limited [2015] KECA 822 (KLR), pronounced itself thus in part;

> " The next issue raised by the appellant is the propriety of the award of general damages for breach of contract. As a general rule, there can be no damages for breach of contract. This was the holding of this Court in Provincial Insurance Co East Africa Ltd v Nandwa LLR No. 867 (CAK). In Habib Zurich Finance (K) limited vs. Muthoga & Another. [2002] 1 EA 81 at page 88 cited with approval in the decision of the Court of Appeal for Eastern Africa in the Case of Dharamshi v Karan (supra) where that court held as follows:
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> "This case has been accepted by this court as an authority for the proposition that general damages cannot be awarded for breach of contract and that proposition makes sense because damages arising from a breach of a contract are usually quantifiable and are not at large. Where damages can be quantified they cease to be general..." (see also Securicor Courier (K) Ltd vs Benson David Onyango [2008] eKLR).
>
> However, where there has been some loss arising from such breach, then damages may be awarded so as to put the claimant in a good position as if there had been no such loss. This was the holding of the Court in Visoi Saw Mills Ltd v The Attorney-General [1997]

eKLR (Civil Appeal No. 78 Of 1996):"But whether the claim is in contract or tort the only damages to which the appellant is entitled is a pecuniary loss: it is to put the appellant into as good position as if there had been no such breach or interference. Normally this would entitle the appellant to recover damages for the expenses caused by and gains foregone because of the breach or interference."

71. Bearing in mind the circumstances of the case and taking into account the existing jurisprudence on the award of general damages for breach of contract, I award to the 1st Plaintiff as against the Defendant, a sum of KES. 3,000,000/- (Three Million Only). In arriving at this figure, the Court has taken into account the prolonged delay of over 18 months in releasing the title, the reputational harm suffered by the 1st Plaintiff in her dealings with business partners, and the need to vindicate the Plaintiff's rights.

72. The award takes into account awards in similar cases, such as the case of Muita and Company Limited & another v Kenya Commercial Bank [2025] KEHC 11461 (KLR), where the Court (WA Okwany J) awarded KES 3,000,000.00 in general damages for unlawful threats of auction and reputational harm.

73. Accordingly, the Court finds the suit herein partially merited. I therefore make the following orders: -

    i. The claims by the 2nd and 3rd Plaintiffs are hereby dismissed for lack of privity.

    ii. The Defendant breached its undertaking to the 1st Plaintiff under the letter of 25 February 2019.

    iii. The 1st Plaintiff is awarded KES 3,000,000 in general damages for inconvenience and reputational harm.

    iv. The claim for special damages of KES 151,232,917 is dismissed for want of proof.

74. On Costs, I direct that the same shall be borne equally: the Defendant shall pay half the costs to the 1st Plaintiff, whilst the 2nd and 3rd Plaintiffs shall bear their own costs.

75. It is so ordered.

**SIGNED, DATED, AND DELIVERED AT NAIROBI ON 24TH NOVEMBER 2025**

**ADO MOSES**

**JUDGE**

In the presence of: -

C/A – Moses

Ougo....................for the Plaintiff

Mutua.................... for the Defendant