



Wainaina & Karimi Advocates v Mwai & another (Civil Suit 235 of 2014 & 300 of 2012 (Consolidated)) [2026] KEHC 3044 (KLR) (Commercial and Tax) (5 March 2026) (Judgment)

Neutral citation: [2026] KEHC 3044 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 235 OF 2014 & 300 OF 2012 (CONSOLIDATED)**

F GIKONYO, J

MARCH 5, 2026

BETWEEN

WAINAINA & KARIMI ADVOCATES PLAINTIFF

AND

JANE WAMUYU MWAI 1ST DEFENDANT

AFRITRACK INVESTMENTS (E.A) LTD 2ND DEFENDANT

JUDGMENT

1. This judgment relates to two suits, namely, HCCC 235 of 2014; Wainaina & Karimi Advocates v Afritrack Investments (E. A.) Ltd and HCCC 300 of 2012 Afritrack Investments (E. A.) Ltd v Jane Wamuyu Mwai, which were consolidated for hearing and determination by order of F. Amin J. of 13th February 2015. Subsequently, the court designated HCCC 235 of 2014 as the lead file.
2. The 2nd defendant instituted HCCC 300 of 2012 through a plaint dated 4 May 2012. In response, the 1st defendant filed its defence and counterclaim dated 20 June 2011, subsequently amended on 28 April 2016. The 2nd defendant then filed a reply to defence dated 28 June 2012
3. The plaintiff instituted HCCC 235 of 2014 through a plaint 4 June 2014. In response, the 2nd defendant filed a defence and counterclaim dated 22 August 2014. In reply, the plaintiff filed a reply to defence and defence to counterclaim 3 September 2014.

Background

4. The common background to the two suits is that the 1st and 2nd defendants entered into an agreement for sale dated 11th March 2011 for the sale of all that property known as Land Reference No. 14902/18 (the subject property) and the developments thereon for Kshs. 54 Million.



5. The 1st defendant was the vendor, represented by Kairu Mbuthia & Kiingati Advocates. The 2nd defendant was the purchaser, represented by the plaintiff.
6. The salient terms of the agreement were that the purchaser would pay a deposit of 10% to the vendor's advocates to hold as stakeholder. The purchaser would take possession of the property upon payment of the deposit. The completion would be 90 days from the date of the agreement. The vendor's advocates would deliver the completion documents before the completion date.
7. In exchange, the purchaser's advocate would deliver a professional undertaking for the payment of the balance of the purchase price upon successful registration of the transfer to the purchaser and/ or its nominee's name, but in any case, within 14 days from the date the registration is complete. Interest would be charged at 18% per annum from the lapse of the 14-day timeframe.
8. The 2nd defendant paid Kshs. 37,000,000/- to the 1st defendant, leaving a balance of Kshs. 17,000,000/-. The amount comprised the deposit of Kshs. 5,400,000/-, 10% of the purchase price, which was paid to the 1st defendant's advocates and part of the balance, Kshs. 31,600,000/-, which was paid to the 1st defendant directly as per her request.
9. Through a letter dated 8.8.2011, the vendor's advocates forwarded some of the completion documents and demanded payment of Kshs. 17,000,000/- within 14 days of registration.
10. In exchange of the completion documents delivered, the plaintiff issued a professional undertaking dated 21st July 2011 for payment of the balance of Kshs. 17 Million upon successful registration of the transfer to the purchaser.
11. The registration of the transfer was completed on 19 October 2011, but the defendant failed to pay the balance of Kshs. 17,000,000/-.

2nd defendant's case

12. The 2nd defendant instituted HCCC No. 300 of 2012 vide a plaint dated 4th May 2012 claiming misrepresentation, non-disclosure, concealment of material facts and negligence. Its case is that it could not occupy the property due to the 1st defendant's failure to deliver the certificate of occupation from the City Council of Nairobi (Council).
13. According to the 2nd defendant, prior to execution of the agreement, it had disclosed to the 1st defendant the purpose for which it intended to use the subject property. The 2nd defendant claimed that the 1st defendant had represented to it that the developments thereon were residential and fit for occupation.
14. The 2nd defendant indicated that it later emerged that the property had been developed without statutory inspections as required by the Council's Building By-laws and had been implemented contrary to the approvals granted. Consequently, the Council declared the building unsafe for occupation. It was condemned and total demolition was recommended.
15. The 2nd defendant therefore seeks special damages of Kshs. 22,410,000/- comprising part of the purchase price paid, expenses on structural engineers, valuation costs and demolition costs.

1st defendant's case

16. The 1st defendant denied breaching the agreement and the alleged failure to deliver the agreed completion documents. She asserted that she complied with the requirements for the supply of the completion documents required under the agreement and any others that were requested by the 2nd defendant.



17. The 1st defendant also denied that the 2nd defendant had disclosed the purpose for which it intended to use the property or that it made any representations that the developments were fit for occupation.
18. The 1st defendant highlighted that when the 2nd defendant made an offer to purchase the subject property for Kshs. 60,000,000/-, she was in the process of constructing a house on the subject property. She stated that following negotiations, considering the various defects identified, the 2nd defendant agreed to purchase the subject property for Kshs. 54,00,000/-, instead of the initial Kshs. 60,000,000/-.
19. The 1st defendant asserted that during execution and performance the agreement, the property was not ready for occupation, therefore there was no obligation to deliver an occupation certificate. She also stated that during execution and performance, the property had defects known to the 2nd defendant. She denied that the property had been developed without statutory inspections as required by the Council's Bylaws or implemented contrary to the approvals granted.
20. The 1st defendant highlighted that it was a term of the agreement for sale that the 2nd defendant, having been given a prior opportunity of examining the property in the same condition it was in, would not require the 1st defendant to repair, alter or improve it.
21. The 1st defendant contended that the 2nd defendant is not entitled to the amount claimed as it failed to pay the balance of the purchase price. She claimed that the 2nd defendant acted fraudulently by receiving the completion documents and transferring the property knowing that it had no intention of paying the balance of the purchase price.
22. The 1st defendant also contended that the 2nd defendant's continued possession, occupation and registration as the owner of the subject property, without payment of the balance of the purchase price, constitutes unjust enrichment.
23. The 1st defendant prayed for entry of judgment against the 2nd defendant on her counterclaim for Kshs. 17,000,000/-, interest thereon at 18% per annum from 3 November 2011 until payment in full and costs of the suit.

Plaintiff's case

24. The plaintiff law firm denied having neglected the purchaser's instructions. It denied that it carried out the transaction unprofessionally or acted negligently or recklessly. It contended that the purchaser never raised the issue of unprofessionalism on its part and that the reason it advanced for non-payment was due to the structural defects and the fact that it was condemned by the Council. It asserted that it carried out its duty according to the sale agreement.
25. The plaintiff indicated that the 1st defendant did not deliver some of the requisite completion documents, being: -
 1. Approved building plans for the house under construction and all other approvals by the relevant authorities.
 2. Duly executed indemnity to safeguard the purchaser's interest.
26. The plaintiff stated that on diverse dates in 2011 and 2012, it informed the vendor's advocates that the house was structurally unsound and unsafe for occupation and was condemned by the Council by a letter dated 10th February 2012. The Council's technical experts found that the house erected on the subject property had been constructed without statutory inspections or approval and that no occupation certificate had been granted by the Council.



27. The plaintiff stated that the transfer of the subject property in favour of the 2nd defendant was registered on 19 October 2011. That, however, by a letter dated 8 June 2012, the 2nd defendant informed it that it did not forward the balance of the purchase price because the house erected in the subject property had been condemned on account of structural defects.
28. The plaintiff stated that following numerous demands for it to remit the balance of the purchase price, the vendor's advocate instituted a complaint against it before the Advocate's Disciplinary Committee in Misc. Cause 51 of 2012. It filed judicial review proceedings in Nairobi JR 159 of 2013, Paul Wainaina & Ano. V The Law Society of Kenya & Others.
29. The plaintiff therefore claimed that it has suffered loss and damages on account of the 2nd defendant's failure to remit to it the balance of the purchase price. The particulars of loss includes the institution and prosecution of the judicial review proceedings and defending the disciplinary proceedings.
30. However, the plaintiff indicated that on 14 May 2014, the judicial review proceedings were dismissed and the court held that this suit was the proper forum for seeking a stay. That thereafter, the disciplinary proceedings were stayed pending the hearing and determination of this suit.
31. The other particulars of loss and damage include: -
 - a. The loss of reputation as a firm of advocates who are viewed as persons who do not honour undertakings.
 - b. Incurring costs of Kshs. 250,000/- by way of deposit to its advocates for filing the present proceedings.
 - c. Failing to safeguard the interests of the plaintiff by not obtaining any injunctive relief in HCCC 300 of 2012 to forestall the payment of the balance of the purchase price.
32. The plaintiff therefore seeks entry of judgment against the defendant for: -
 - a. a permanent injunction restraining the 2nd defendant from selling, leasing charging or transferring the subject property pending payment of the balance of Kshs. 17,000,000/- together with interest at 18% from 3 November 2011 until payment in full.
 - b. a mandatory injunction compelling the 2nd defendant to pay the balance of the purchase price together with interest at 18% from 3 November 2011 until payment in full to enable it to honour and discharge its professional undertaking.
 - c. Damages for defamation, costs and expenses incurred.
 - d. Costs of the suit on a full indemnity basis together with interest at court rates.

Evidence

33. The trial commenced on 21 March 2023 before Hon. Mabeya J. The plaintiff called Paul Wainaina Kimani as PW1. He adopted his witness statement dated 10 June 2016 as his evidence. The witness statement is a replica of the plaint. He produced the common bundle as Exhibit A.
34. Mr. Kimani (PW1) testified that the further witness statement of DW2 dated 2 March 2023 refers to payments totaling Kshs. 12,970,062 made between 15 March 2011 and 11 November 2011. He clarified that the payments made on 15 March 2011 and 14 April 2011 related to the purchase of an office, and that another payment was made towards a separate purchase transaction. He stated that the monies were remitted directly into the 1st defendant's bank account by MMC Advocates.



35. Mr. Kimani further testified that a sum of Kshs. 4,100,000 was paid to SDV Transami as duty for the importation of a Toyota Land Cruiser. He also referred to page 10 of the 2nd bundle, which indicated that certain funds were paid for the purchase of Kibwezi/931 property.
36. Mr. Kimani reiterated that the claims relating to those payments were time-barred, unrelated to the subject matter of the present suit, and that no demand notice in respect thereof had been issued to him.
37. Mr. Kimani was cross-examined by Mr. Kiingati for the 1st defendant and Mr. Wandabwa for the 2nd defendant. He confirmed that he had been a director and a minority shareholder with a 2% stake of the 2nd defendant.
38. Mr. Kimani testified that he resigned as a director in November 2011, following a disagreement with his co-director and client. He further testified that he continued to act for the 2nd defendant in the transaction even after his resignation.
39. Mr. Kimani admitted that he did not obtain the approved plans from the vendor.
40. He confirmed that he negotiated the transaction on behalf of the 2nd Defendant on the instructions of his co-director. He testified that he was conversant with the agreement for sale and the completion documents listed therein, which included approved building plans. He admitted that he did not obtain the approved plans from the vendor.
41. He stated that by the time he was handling registration of the transfer, the building had already been completed and was not under construction. His co-director was residing in the premises. He acknowledged that, in addition to the approved plans, he was required to obtain other approvals. He confirmed that he was not furnished with a completion certificate and was unaware that approvals from the county government were required for each stage of casting in a storeyed building.
42. He testified that he only became aware of the requirement for such periodic approvals after writing the letter appearing at page 255 of the bundle, at which point he learned that periodic certificates were necessary approval documents. He confirmed that these documents were not among those received from the vendor. He further stated that he first saw the approved plans during these proceedings and noted that the one-page document did not include mechanical or structural drawings, making it impossible to identify the architect.
43. Referring to Clause 6 and Part 9 of the agreement on indemnity, he stated that he now understood that the county government ought to have carried out periodic inspections and approved the stages of construction, and that failure to do so could attract enforcement action. He confirmed that he did not receive any indemnity from the vendor. He stated that the building was ultimately condemned and demolished by the county government, and that had he received an indemnity, he would not have faced the present proceedings or disciplinary action.
44. He testified that payments amounting to approximately Kshs. 12 million had been made prior to the professional undertaking, though he clarified that these payments were unrelated to the transaction in issue. He reiterated that he became aware of the importance of completion documents after his letter dated 13th February 2012.
45. During re-examination by Mr. Gichuhi, Mr. Kimani stated that the defendant confirmed that the balance of the purchase price had not been remitted to him. He confirmed that upon payment of the 10% deposit on 18th March 2011, when the agreement was executed, the 2nd Defendant took possession of the property and moved in. He stated that the 2nd Defendant remained in possession



for approximately eight months until the transfer was effected in October 2011, and that the 2nd Defendant made various payments directly to the vendor.

46. He further testified that the 2nd Defendant never instructed him to vary or rescind the agreement. He stated that the original purchase price was Kshs. 60 million, but following negotiations initiated by letter dated 25th February 2011, and on the instructions of the 2nd Defendant, the price was renegotiated to Kshs. 53 million (and ultimately agreed at Kshs. 54 million) to account for the cost of rectifying defects in the house. He confirmed that the 2nd Defendant was aware of certain defects, which formed the basis for the reduction in price.
47. He stated that by the time the transfer was effected on 19th October 2011, he had not been informed that the house had been condemned. He testified that it was only in 2012 that Mr. Kiingati brought to his attention a letter indicating issues with the house, by which time the transfer had been completed and title issued. He confirmed that prior to the transfer, the 2nd Defendant had not provided him with any documentation regarding alleged structural unsoundness.
48. He further stated that the property was being purchased in the condition in which it stood at the time of viewing and execution of the agreement. He added that there was no requirement for a specific written indemnity.
49. The 1st Defendant called Ms. Jane Wamuyu Mwai as DW1. She adopted her witness statement dated 3rd October 2012 as her evidence-in-chief.
50. Upon cross-examination by Mr. Gichuhi for the Plaintiff, she stated that she was unaware whether the 2nd Defendant had complained of structural unsoundness of the house between March and October 2011, adding that her son would have been aware of such matters. She confirmed that the transfer was effected on 19th October 2011 and that she was the signatory to the transfer instrument.
51. She further testified that she saw the report on the structural investigation of the residential development for the first time during the trial. She stated that although she supervised the construction of the property, the sale transaction was handled by her son. She indicated that she did not know the identity of the architect or engineer involved in the project, as they had been engaged by her son.
52. She confirmed that the 2nd Defendant was granted possession of the property in 2011. She also stated that she did not witness any inspection of the construction works nor the casting of the first floor.
53. The 1st defendant called Christopher Mwai Wamuyu as DW2. He adopted his witness statement dated 3rd October 2012 as his evidence-in-chief.
54. He testified that he could only recall complaints relating to leakages which damaged the ceiling. He acknowledged receipt of the letter dated 26th May 2011 from Karimi & Company Advocates, which raised concerns about water leakage on the upper floor that had damaged the ceiling, walls, and floor, and indicated that although some repairs had been undertaken, they were unsatisfactory. He stated that he was not aware of any other complaint prior to the transfer of the property.
55. He further stated that at the time the transfer was effected in October 2011, no structural investigation report had been presented to him or to the 1st Defendant. He testified that the structural investigation report dated October 2011 was shared with him by email after the property had already been transferred. He stated that he was not invited to appoint a structural engineer to assess the house and noted that the scope of the investigations required excavation works, yet the tests were conducted in his absence.
56. He referred to a report by the City Council of Nairobi signed by the City Engineer, stating that it related to an inspection conducted in January 2012, after Leeds Engineers had already undertaken their



tests. He contended that the house referenced in that report was not the one he had sold and that he was unaware which property had been inspected. He alleged that the house was actively damaged by the 2nd Defendant through the actions of Leeds Engineers.

57. He also pointed to a court order dated 10th June 2020 directing the deposit of Kshs. 17 million in court, which he stated had not been complied with. He confirmed that the 2nd Defendant had never sought to rescind the contract.

Submissions

58. The plaintiff filed primary and supplementary submissions dated 26 June 2025 and 17 November 2025 respectively. It argued that the 2nd defendant has not proved its counterclaim on a balance of probabilities as it did not adduce evidence or call any witness in support. It also argued that the defendant did not adduce any evidence to counter the claim for breach of contract. In support, it relied on *Top Tank Company Limited v Amos Ondiek Wandaye* [2018] eKLR and *Rono v Lomsons Enterprises* [2024] KEHC 6249 (KLR).
59. The plaintiff highlighted that the defendant did not pursue rescission of the contract as per clause 7.2 (ii) of the contract and opted to take full benefit of the contract.
60. The plaintiff relied on *Parminder Singh Sagoo & another v Neville Anthony Dourado & another* [1983] eKLR on the issue of time being of essence and estoppel in contracts for sale of land. It also relied on *John Mburu v Consolidated Bank of Kenya* [2018] KECA 796 (KLR) to assert that a party who allows a contract to continue is estopped from refusing to perform the contract in future.
61. The plaintiff submitted that the 2nd defendant is estopped from raising any alleged structural defects after it was registered as the owner of the subject property.
62. The plaintiff asserted that the 2nd defendant took possession of the subject property in March 2011 upon payment of the deposit. That the property was transferred to the purchaser on 19th October 2011 almost 8 months after the 2nd defendant took possession. Prior to that, no structural report had been brought to its attention or that of the 1st defendant about any alleged defects.
63. The plaintiff highlighted that in the report dated October 2011, the 2nd defendant's expert, Leeds Engineering & Construction Management Ltd did not condemn the building but advised on remedial measures. The expert concluded that there were no structural defects noticeable on walls or any of the structural elements within the building; that the roof timber members are inadequately treated; the reinforcement in the beams and columns agrees to that in the structural drawings and that however the covers to the steel vary and are on the safe side.
64. The plaintiff relied on *Mwangi v Kiiru* [1984] KECA 43 (KLR) to argue that the defaulting party must pay the balance of the purchase price once the property has been transferred.
65. The plaintiff submitted that clause 9.6 of the contract expressly provided for interest at the rate of 18% per annum. It relied on *Lydia Wanjiku Wanyee suing as the administrator of the estate of the Late George Wanyee v George Nyanja* [2015] KECA 124 (KLR) where it was held that interest for delayed payment would be payable when fixed in the contract.
66. The plaintiff urged the court to award it general damages of Kshs. 6,000,000/- for loss of reputation on account of the defamation. This is due to the damage to his professional reputation caused by the 2nd defendant's failure to pay the balance and consequential failure to honour its professional undertaking. He explained that the reputational exposure occurred when the complaint was lodged at the Advocates Disciplinary Committee. That his colleagues now perceive him as a person who does not honour



professional undertakings and by extension a person who cannot be trusted to hold money in trust. This made him not to be in good standing with the Law Society of Kenya and he could not get clearance for any public appointment.

67. The plaintiff cited *C Mehta & Co. Limited v Standard Bank Limited* [2014] KEHC 8707 (KLR) where the court awarded damages of Kshs. 3,000,000/- for loss of the reputation.
68. The 2nd defendant submitted that the plaintiff's suit is fatally defective, premature and offends well established doctrines of law. It asserted that the plaintiff's suit ought to be dismissed with costs.
69. The 2nd defendant submitted that due to breach of the plaintiff's fiduciary duty to it, it has suffered loss and is entitled to Kshs. 6,075,000/-.
70. The 2nd defendant submitted that the decision to discount the purchase price was not based on any known and admitted defect by it, but rather the anticipation of the works needed to be done by it to complete the remaining work. Therefore, it argued that the final agreed purchase price was inclusive of the value attributed to the building that was under construction on the subject property.
71. The 2nd defendant submitted that the 1st defendant is in breach of the agreement and that the breach is construed through a scheme of misrepresentation to dupe it to pay an inflated purchase price for the subject property. It asserted that it has suffered loss amounting to Kshs. 22,410,000/-.
72. The 2nd defendant relied on *Muriithi v Wakaba t/a Tim-Trade Converters Limited* (Civil Appeal E075 of 2022) [2024] KEHC 5748 (KLR) (9 May 2024) (Judgment) on drawing of an adverse inference where a party fails to adduce evidence in its custody; *Kenneth Nyaga Mwise v Austin Kiguta & 2 others* [2015] eKLR on how documents filed by litigants becomes part of the record; *Macfoy v United Africa Co. Ltd* [1961] 3 All ER 1169 to support the proposition that if an act is void then it is in law a nullity; *George Kimani Njuki v National Lands Commission & 2 others* [2022] eKLR on requirements for production of public documents.
73. The 2nd defendant further relied on *Kim Jong Kyu v Housing Finance Company Ltd & 2 others* [2015] KECA 274 (KLR) on the fiduciary nature of an advocate client relationship; *Laser Communications Limited & 5 others v Safaricom Limited* (Civil Case 196 of 2011) [2021 KEHC 257 (KLR) (Commercial and Tax) (12 November 2021) (Judgment) on estoppel; *Lucy Wanjiku Kinyanjui v Wilson Nguyo* [2022] KEBPRT 69 (KLR) on court's non-interference with parties agreements; *Kenya Airways Limited v Satwant Singh Flora* [2013] eKLR on the principle of *ex turpi causa non oritur actio*, that no court ought to enforce an illegal contract; *Exobi (Finance House) Limited v Zahid A A Nanji & 2 others* [2020] KEHC 3673 (KLR) on the fiduciary duty of a director to a company; *Harit Sheth t/a Harit Sheth Advocate v K. H. Osmond t/a K. H. Osmond Advocate* [2011] KECA 286 (KLR) on professional undertakings.
74. The 1st defendant submitted that it did not breach the agreement by failing to provide the approved building plans, consents, clearances necessary for completion. That the fact that the property was transferred to the 2nd defendant shows that it provided them.
75. The 1st defendant argued that the 2nd defendant has the option to rescind the contract but did not. That the 2nd defendant is estopped from claiming breach by the 1st defendant.
76. The 1st defendant argued that the 2nd defendant should not be indemnified as it did not provide any evidence to prove the claim for breach of warranties.
77. The 1st defendant relied on *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others* [2017] eKLR on importance of pleadings and evidence; *National Bank*



of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd [2002]2 EA 503 on the principle that courts should not rewrite parties' contracts; Fidelity Commercial Bank v Kenya Grange Vehicle Industries Limited [2017] eKLR on the parole evidence rule; D & C Builders v Sidney Rees [1966] 2 DB 617 on the doctrine of estoppel; Top Tank Company Limited v Amos Ondiek Wandaye [2018] eKLR on the threshold of proof in civil claims and David Bageine v Martin Bundi [1997] eKLR on the requirement that special damages be specifically pleaded and proved.

Analysis and Determination

78. It is not the business of courts to rewrite contracts between parties. They are bound by the terms of their contracts, unless coercion, fraud or undue influence are pleaded and proved. National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd [supra] and Langat v Co-operative Bank of Kenya Ltd [2017] KECA 152 (KLR)
79. The 2nd defendant claims refund of the value of the building from the 1st defendant which was of part of the purchase price. It has pleaded two causes of action against the 1st defendant: -
 - i. Misrepresentation, non-disclosure, concealment of material facts regarding the approved building plans; and
 - ii. Breach of contract; failure to provide the approved building plans.
80. The 1st defendant's claims against the 2nd defendant are founded on: -
81. Breach of contract; failure to pay the balance of the purchase price
82. Fraud; transferring the property to itself with no intention to pay the balance.
83. The 2nd defendant's claim against the plaintiff is for negligence.
84. The plaintiff's claims against the 2nd defendant are for: -
 1. Breach of contract
 2. Defamation
85. I have perused the agreement for sale dated 11.3.2011.
86. Clause 6.2 (ix) and (x) of the Agreement for Sale lists among the completion documents, approved building plans for the house under construction and all other approvals by the relevant authorities and all other consents, clearances and necessary and/ or relevant documents for the completion of the transaction.
87. Clause 6.3 of the agreement provides that in exchange of the completion documents, the purchaser's advocates shall deliver to the vendor's advocates a suitable professional unequivocal undertaking for payment of the balance of the purchase price upon successful registration of the transfer to the purchaser of its nominee's name but, in any case within 14 days from the date the registration is complete.
88. Clause 7 of the agreement stipulates that if either party is unable to complete the transaction, the other party has the right to serve a 21-day compliance notice and upon noncompliance with such notice, is entitled to either extend the completion time or rescind the agreement by sending a notice to the other party.
89. Clause 10.1 of the Agreement provides that: "The Purchaser, having been given an opportunity of examining the property prior to the date of this Sale Agreement purchases the property in the same



condition it is now in and shall not require the vendor to repair, alter or improve the property in any way.

90. Clause 11.6 states that: - “The Vendor undertakes to indemnify the purchaser the full purchase price plus all other expenses he may have incurred in respect of this transaction as a result of any breach of the representations and warranties given by the vendor.
91. It is not in dispute that the 2nd defendant paid Kshs. 37,000,000/- comprising of the 10% deposit and a portion of the balance of the purchase price.
92. The plaintiff issued a professional undertaking dated 21.7.2011 to the 1st defendant’s advocates, in the following terms: -

“In compliance with clause 6.3 of the Sale Agreement, we hereby give you our unequivocal professional undertaking for payment of the balance of the purchase price of Kenya Shillings Seventeen Million upon successful registration of the Transfer to the Purchaser and/ or its nominee’s name but in any case within fourteen (14) days from the date the registration is complete.”
93. The 1st defendant’s advocates then released some of the completion documents to the plaintiff on 8.8.2011.
94. The record contains a copy of the certificate of title to the subject property showing that the transfer to the 2nd defendant was registered on 19.10.2011.
95. In a letter dated 7.2.2012, the vendor’s advocates wrote to the plaintiff indicating that they had been advised that the registration of the property in favour of the 2nd defendant was complete and the certificate of title was issued in February 2012.
96. On 26.10.2011, the plaintiff forwarded the 1st defendant the structural investigation report showing that the house erected on the subject property required extensive renovations to be done on the structural, architectural and electro-mechanical elements to make it safe for occupation. The plaintiff indicated that the renovations would involve a considerable amount and that the house was not safe for occupation.
97. On 7.11.2011, the plaintiff wrote to the 1st defendant referring to a meeting held on 3.11.2011 between her, Madam Sabena and the plaintiff where it was discussed that the 2nd defendant would have to spend over Kshs. 15 Million to rectify the subject defects. The plaintiff indicated that the 2nd defendant had proposed to pay Kshs. 9,000,000/- out of the balance of Kshs. 17,000,000/- and that Kshs. 8,000,000/- be knocked off to cover a portion of the renovations.
98. On 13.2.2012, the plaintiff confirmed to the 1st defendant’s advocates that the subject property had been registered in favour of the 2nd defendant. It also notified them that the house on the subject property had been condemned on the grounds that the structure was unsafe and the development had been implemented without statutory inspections required under the Council’s by-laws.
99. The plaintiff further indicated that the 2nd defendant was willing to settle the matter amicably by allocating from the Kshs. 37,000,000 paid, Kshs. 25,000,000/- as consideration for the land and proposed that the 1st defendant would refund Kshs. 12,000,000 to compensate it for the loss arising from the demolition of the house.
100. Thereafter, the parties’ advocates exchanged apposite demands for the settlement of Kshs. 17,000,000/- and Kshs. 12,000,000/-.



101. There is no dispute that the house erected on the subject property was demolished. The record contains the city engineer's structural report following a site visit undertaken on 13.1.2012. The engineer's finding was that the structure can be considered unsafe. The structure had minimal columns and thus not structurally sound as the walls which were acting as load bearing looked very weak and poorly constructed. Some of the structural elements were partly demolished during the renovation.
102. A report by the 2nd defendant's structural engineer, Leeds Engineering & Construction Management Limited, following a site visit on October 2011 indicates in part that: -
1. The structure is comprised of load bearing stone walls with R. C. columns at various locations. These columns do not form a structure frame and they can only be treated as stiffening columns.
 2. No structural defects are noticeable on walls or any of the structural elements within the building. The roof timber members are however inadequately treated.
 3. The compressive stress core tests are too low and this indicates failure in achieving the desired strength of concrete.
 4. The chemical analysis carried out also shows a mix lacking sufficient cement content to aggregate ration due to poor batching while mixing the concrete. This shows there was total negligence during the concrete mixing and casting as the specified mixes were not achieved.
 5. The reinforcement in the beams and columns agrees to that in the structural drawings. However, covers to the steel vary and are on the safe side.
103. The structural engineer concluded that from the anomalies, the concrete elements would require remedial measures to be taken to ensure safety in the occupation of the building.

Misrepresentation, non-disclosure, concealment of material facts regarding the approved building plans; and breach of contract by the 1st defendant

104. The 2nd defendant claimed that the 1st defendant misrepresented the nature of the works that were needed to be done on the property. It also claimed that the 1st defendant misrepresented that the developments on the property has been given all the necessary approvals and clearances by all the relevant authorities and in particular by the Council. It also claimed that she misrepresented that she was in a position to secure from the Council an occupation certificate.
105. The 2nd defendant claimed that the 1st defendant misrepresented that the property had been developed with statutory inspections as required under the City Council of Nairobi Building Bylaws; concealed that the developments had been implemented contrary to the approvals granted by the council and failed to disclose that the property was irredeemably defective.
106. The 1st defendant asserted that it provided the 2nd defendant with necessary approvals, consents and clearances that were necessary for completion of the transaction. She submitted that this was discernable from the completion of the registration of the transfer in favour of the 2nd defendant.
107. The 1st defendant argued that the claim for the documents during the trial is an afterthought, pointing out that it did not call for any missing documents after the other documents were forwarded, it only sought to renegotiate the purchase price. She highlighted that she provided the architectural and engineering designs relied on by Leeds Engineer.



108. Part of the evidence on the record show that, the 1st defendant disclosed that there were defects on the house during the negotiations held before the execution of the agreement. The record shows that the purchase price was renegotiated downwards from the initial offer of Kshs. 60,000,000/- to Kshs. 54,000,000/- to take into consideration the defects. But, from the totality of evidence, the extent and effect of the defects was not properly evaluated and represented.
109. Evidence also show that there were no necessary approvals and inspection of the property under construction as required in the by-laws. This fact, although it will also be discussed elsewhere, compounds the guarantee by the vendor that the building was done in accordance with the by-law and its soundness. There was complete misrepresentation of the soundness and compliance of the building by the vendor. Merely disclosing that there were some defects was not sufficient especially noting that the building was done without the necessary approvals and inspection by the County government. Similarly, the substandard works totally compromising the soundness of the building were undertaken by the 1st defendant and her contractors with full knowledge thereof, thereby, intentional and deliberate negligence. There was not full and accurate disclosure of how the construction had been carried out.
110. This violations and negligence compromised the soundness of the building resulting into its being condemned and demolished. The renovations did not restore the soundness of the building.
111. I do find misrepresentation with respect to the soundness of the building as well as the nature of the works that needed to be done.
112. There was no dispute that the house was incomplete and required renovations, therefore I do not find any misrepresentation with regard to issuance of the certificate of completion.

Completion documents

113. The evidence shows that the 1st defendant's advocates did not forward all the completion documents as required under Clause 6.2 (ix) of the Agreement. No evidence that such completion documents as the approved building, statutory approvals by the County Government were forwarded to the advocate for the purchaser.
114. Evidence show that the building was not done with the approvals required and none had been obtained.
115. Therefore, I find that the 1st defendant misrepresented that she could provide the approved building plans which she could not as she had not obtained them. This, coupled with the fact that she knew the construction was not compliant to the statutory requirements as well as architectural and building standards, is stealth fraudulent misrepresentation for which remedy would lie.
116. Lord Denning explained this liability and remedy: 'the defendant is bound to make reparation for all the damage flowing from the fraudulent inducement'. *Doyle v Olby (Ironmongers) Ltd* [1969] 2 QB 158
117. The law on fraudulent misrepresentation is such that the defendant is responsible for all losses including any consequential loss, provided a causal link can be shown between the fraudulent misrepresentation and the claimant's loss.
118. As a result of the misrepresentation, the 2nd defendant incurred renovation costs, loss of the building which constituted part of the purchase price and cost of demolition of the condemned building which he has quantified and proved.



119. The law on fraudulent misrepresentation has developed. A claimant who is a victim suffering loss as the result of a fraudulent misrepresentation, has two choices:
- i) may affirm the contract but sue for damages or
 - ii) but might also disaffirm the contract and refuse further performance and seek damages within the terms of the contract.

The 2nd defendant is entitled to relief on the loss he has claimed.

120. I also find that the 1st defendant breached Clause 6.2 (ix) of the Agreement by failing to provide the approved building plans. The architectural and engineering designs provided by the 1st defendant to the structural engineers do not suffice the requirements under the agreement.
121. I also find that registration of the 2nd defendant in the title is not proof that completion documents, especially, the building plans as well as the other statutory approvals required under the agreement and the by-laws were provided. Evidence show that they were not forwarded to the purchasers advocate as had been agreed by the parties.

Breach of contract and fraud by the 2nd defendant

122. A breach of contract occurs where a party does not fulfil its contractual obligations without lawful justification.
123. According to the 1st defendant, the 2nd defendant breached the contract by failing to pay the balance of the purchase price of Kshs. 17,000,000/- following the successful registration of the transfer in its favour.
124. On the other hand, the 2nd defendant argued that a development that has been rendered null and void ab initio is incapable of retaining and/ or acquiring any value capable of attracting any consideration.
125. As earlier noted, the 1st defendant did not provide the approved building plans and other relevant approvals required under the agreement. This was a fundamental term of the agreement. She breached the agreement in failing to provide the completion documents especially, the approved building plans and necessary approvals thereto. Thus, the 2nd defendant did not breach the agreement in not paying the balance.
126. The 1st defendant's claim that the 2nd defendant acted fraudulently by transferring the property to itself without the intention of paying the balance of the purchase price is unfounded and most cynical given the circumstances of this case.
127. Accordingly, the 1st defendant's claims for breach of contract and fraud against the 2nd defendant fail.
128. For the same reasons, the plaintiff's claim for breach against the 2nd defendant for payment of the balance of the purchase price also fails.

Negligence, disciplinary proceedings, defamation

129. Moving on, the 2nd defendant claimed that the plaintiff acted negligently. The plaintiff had a fiduciary duty to the 2nd defendant as his client. However, in my considered view, the 2nd defendant has not shown the causation between the purported negligence and the loss it incurred. The loss incurred by the 2nd defendant is directly attributable to the 1st defendant who did not comply with the Council's By-laws, and procure and provide the approved building plans.



130. Closely tied to this, the vendor's advocates instituted disciplinary proceedings against the plaintiff before the Advocate's Disciplinary Committee. In my considered view, valid questions could be asked on whether the proceedings were brought in good faith considering the unclean actions of the 1st defendant.
131. The proceedings before the Tribunal were pending the hearing and determination of this suit.
132. Therefore, the plaintiff's claims for damages for defamation, costs and expenses incurred in relation to the disciplinary proceedings are premature. They therefore fail.

Disposition

133. In conclusion, the plaintiff's suit against the 2nd defendant is dismissed. Claims by the 1st defendant are dismissed.
134. Judgment is entered in favour of the 2nd defendant against the 1st defendant for Kshs. 22,410,000/- with costs to be borne by the 1st defendant.
135. The counter-claim by the 1st defendant is dismissed with costs to the 2nd defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THROUGH MICROSOFT TEAMS ONLINE APPLICATION THIS 5TH DAY MARCH, 2026

F. GIKONYO M

JUDGE

In the presence of: -

Allen SC for Plaintiff

Kingati for 1st defendant

Ms Mukoso for Hussein for 2nd defendant

CA- Ivan/Aggrey

