



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**

**MILIMANI LAW COURTS**

**ELC NO. 698 OF 2015**

**PAA BROTHERS COMPANY LIMITED.....PLAINTIFF**

**=VERSUS=**

**QIYE COMPANY LIMITED.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff filed this suit against the defendant claiming the following reliefs:-

***1. A declaration that the lease dated 26<sup>th</sup> January 2015 is null and void for breach of the Law of Contract Act Cap 23 Laws of Kenya.***

***2. An order for refund of the purchase price paid to the Defendant on account of transfer of the property.***

***3. In the alternative and without prejudice, a declaration that the Defendant is in fundamental breach of its contractual obligations under the lease between the parties.***

***4. An order for reimbursement to the plaintiff of the expenses incurred in repairing the electrical defects.***

***5. A mandatory injunction directing the Defendant at its own costs to carry out professional workmanship on all the repairs and or reinstating the Plaintiff's apartments into a tenable state and be fit for their purpose.***

***6. In the alternative and without prejudice an order allowing the Plaintiff to undertake reinstatement of the apartments and the defendant to unconditionally reimburse the costs incurred thereof.***

***7. An order for damages for breach of contract as particularized in paragraph 13 above for:-***

***a. Loss of rental income***

***b. Loss of diminution and /or depreciation of value of the apartments***

***c. Reinstatement cost of each apartment***

***d. Reinstatement cost incurred by the plaintiff***

***8. Cost of the suit and interest thereof from the date of filing the suit until judgement at the prevailing commercial interest rates.***

***9. Any other relief that the Honourable Court may deem just and fit to grant.***

2. The Defendant constructed 42 apartments on ***LR No. 3734/22*** commonly known as ***Muthangari Suites***. On 4<sup>th</sup> June 2014, the Plaintiff entered into a sale agreement with the Defendant for purchase of 13 apartments namely ***A5, A6, B5, B6, C5, C6, D5, E5, E6, F5, F6, G5*** and ***G6***. Transfer of the apartments into the plaintiff's name was done on 26<sup>th</sup> January 2015.

3. Upon taking possession of the apartments, the Plaintiff became aware of latent and patent structural defects. These defects were brought to the attention of the Defendant who despite acknowledging the same has refused and or neglected to take remedial measures.

4. The Plaintiff had purchased the apartments for rental income and sale so as to make profits. Because of the defects, the tenants in the apartments have made numerous complaints particularly on ***leaking roofs, peeling floors, plumbing works, electrical faults, and water heating systems***. As a result of this, some tenants have moved out and some apartments have remained un-occupied and it has become difficult to sell any of the apartments because of the defects.

5. The plaintiff was forced to carry out electrical repairs at its own cost for which it seeks reimbursement in the sum of ***Kshs.1,194,826/=***. The Plaintiff engaged an Engineer who assessed what it would cost the plaintiff to repair the defects. The engineer compiled a report which categorized the defects as being ***architectural, electrical, and mechanical***. The engineer gave a total figure of ***Ksh.48,952,469.35/=*** as the total cost of effecting the repairs of the defects noted.

6. The Defendant in its defence denied the Plaintiff's claim contending that the Plaintiff has experience in real estate and was accorded reasonable opportunity to inspect the suit property and that if there were any defects as alleged, they would have been discovered on inspection. The defendant further contends that if the plaintiff had any claim, it should have directed it against the management company of the apartments and not itself as a developer. The defendant further states that its obligations under the contract terminated after transfer of the apartments and that in any case, there was an arbitration clause in the agreement which was not invoked and therefore the Plaintiff should not have filed this suit as the arbitration clause ousted the jurisdiction of this court.

7. The defendant called its engineer who testified that there were no structural defects noted. This finding was based on the engineer's observation of the report filed by the plaintiff's engineer. This engineer produced a letter he wrote on 13.5.2016. He conceded that what was contained in the report by the engineer which the plaintiff engaged was outside his area speciality.

8. I have gone through the evidence adduced by the plaintiff as well as the evidence adduced by the defendant. I have also gone through the submissions filed by the parties. There are two issues which the plaintiff called upon the court to decide on. The first is whether there are defects in the apartments and if so whether the defendant is liable for the same. The second issue is on what quantum is payable if liability of the defendant is proved. There are additional issues for determination. These include whether the plaintiff should have filled this suit when there was a clause which provided for arbitration. The other issue is whether the plaintiff should have directed its claim to the management company instead of the defendant as developer of the apartments.

9. I will start with the latter two issues. There is no doubt that there was an arbitration clause in the agreement between the plaintiff and the defendant. Once this suit was filed, it was upon the defendant to make an application seeking to have the matter referred to arbitration before it filed a defence. As this was not done, the defendant is precluded from raising such an issue after it filed a defence in the claim.

10. The defendant had incorporated a management company called Muthangari Suites Management Company. The plaintiff was given shares in this company but the company has remained moribund. The agreement was entered between the defendant and the plaintiff. There is therefore no basis upon which the plaintiff would have sued the Management Company.

11. Though the plaintiff had pleaded in its claim that it wanted the agreement between it and the defendant declared as null and void, it is clear that it did not pursue this line of claim as no evidence was led on the same in evidence in chief and no submissions were made on the same. The plaintiff clearly abandoned this claim flowing from breach of the contract.

12. The Plaintiff entered into sale agreements with the defendant in respect of the 13 apartments. The agreements were entered into on 4<sup>th</sup> June 2014. The Plaintiff introduced a sample sale agreement in respect of apartment A6 through the plaintiff's supplementary list of documents. According to clause 1.1 of the agreement the defendant undertook to construct 42 flats in a good workman like manner and in accordance with the plans and specifications approved by the City Council of Nairobi and the Commissioner of Lands.

13. The completion period for the sale was set in clause 3.1 and the date of completion was stipulated as 31<sup>st</sup> August 2014. Clause 5.4 of the agreement absolved the defendant from any liability as to damages, loss, costs or expenses incurred by the plaintiff by reason of defects or other faults which were to occur on the apartments within a period of six months after the completion date. There is however a **proviso** in that clause which provided that the plaintiff was entitled to call upon the Defendant to rectify at its cost any defects or faults of a structural nature appearing within six months after the completion date.

14. In the instant case, the defendant assured the plaintiff through its letter of 18<sup>th</sup> July 2014 that it was going to give a six month additional warranty for any defects or faults and an additional one year warranty for any leakages from the roof of the apartments. This additional warranty was given even before the completion date. When the apartments were completed and possession was given to the plaintiff, the Plaintiff let out the apartments to tenants. It is after the tenants occupied the apartments that *latent defects* were noted.

15. The tenants started complaining of ***water not heating as required, poor plumbing leading to smell emanating from toilets, bulbs blowing due to faulty wiring, overheating of electric wires with smell of burning coming out, windows not closing, leaking roofs, peeling of floors and paint on the walls peeling off due to leakages as a result of poor plumbing works.*** These defects were brought to the attention of the Defendant which did not act on the same.

16. The Plaintiff lost some tenants who could not stand the defects. When the Plaintiff tried to sell the apartments, potential buyers declined to go on on viewing the apartments. As a result of this, the plaintiff lost opportunity of making profit from rental income or sale of the apartments. When this suit was filed in court, the plaintiff and the defendant agreed that they were to look for their own engineers who were to undertake a joint inspection of the apartments and write a joint report. The defendant did not cooperate forcing the plaintiff to prepare a report on its own. This report was filed in court on 7<sup>th</sup> December 2015.

17. During the hearing, the plaintiff called the engineer who prepared the report. The engineer is Arjan Sharinka who has over 35 years' experience as a structural engineer. He testified that when he was tasked to make an inspection of the apartments and prepare a report, he engaged necessary person's such as structural engineers, quantity surveyors electrical engineers as well as mechanical engineers. He noted damaged floors, leaking roofs and worn out sockets. He noticed that the floor was peeling off, there was no enough water proofing of the roofs resulting in leakages. The stair cases were not done properly. The hand rails were poorly done.

18. The engineer found out that the electricity cables which were used were small thus causing overheating. The sockets were blowing because the wires could not carry the power. On mechanical works there was a very small cylinder for hot water making tenants not to get enough hot water. The drainage from the kitchen was connected to rain water. The engineer found that it would cost

**Kshs.48,952,469.35** to rectify the defects and once the defects are fixed , the apartments will be good for letting or sale.

19. The plaintiff has produced copies of tenancy agreements in respect of apartment **Nos A6, G5 ,B6, B5,and E6**. All these agreements except for **E5** were entered into between January and June 2015. Most of these agreements for tenancy were entered into during the extended period of warranty. The first warranty of six months ended in February 2015. The extended warranty of six months was to end in August 2015. The warranty in respect of leaking roofs was extended for one year which means it was to last until January 2016.

20. There are letters of complaints from the tenants. The complains were made within the extended warranty. These complaints are contained on page 510-556. Some tenants had to vacate the premises and seek refunds. Others threatened to withhold rent payment until repairs were made. The plaintiff had meetings with the defendant where concerns were raised. There are minutes of those meetings as contained on pages 338-343 of the plaintiff's bundle of documents. The meetings were held on 11.5.2015 during the extended period of warranty.

21. The engineer who went to the apartments made a compressive report of the defects and what it would cost to rectify the defects. Photographs of the defects noted were taken and are contained in the report. The engineer categorized the defects into architectural defects whose cost is **Kshs.32,957652.24**. Electrical defects would cost **kshs.4,598,538.63** and mechanical defects which would cost kshs.11,396.278.48. The total cost of rectifying the defects is therefore shs.48952,469.35

22. The defendant through Engineer **Godwin Wasike Wanyonyi** who is a Civil Engineer stated that what was contained in the report filed by the engineer who was engaged by the plaintiff is not within his area of specialty. He stated that his work is civil engineering and that a civil engineer does not supervise issues to do with workmanship. He stated that structural work deals with columns, bases and beams and that there were no structural defects noted.

23. The defendant's witness produced a letter dated 13.5.2016 in which he gave his opinion that he had studied the report compiled by Somers Engineering Ltd which highlights architectural, electrical and mechanical issues but that there are no structural weakness mentioned. During cross-examination it turned out that he was the supervising engineer when the apartments were being constructed. He conceded that he cannot give an independent opinion.

24. The warranty clause in the agreement provided for remedial works by the defendant. These remedial works were limited to structural defects. This then raises the issue of what structural defects are. According to engineer Wasike who testified on behalf of the defendant, structural issues include columns ,bases and beams. According to him finishing's which fall on workmanship are not part of structural works.

25. According to the **European Journal of Technology and Design 2014 Vol (3) No.1** most common types of defects according to California Civil Code 896, are structural defects resulting in *cracks or collapse; defective or faulty electrical wiring or lighting, defective or faulty, plumbing, inadequate drainage systems, faulty ventilation, cooling or heating systems, insufficient insulation or sound proofing, and also inadequate fire protection suppression systems*. In the same journal, structural defects are defined as any defect in a structural building that is attributable to defective or faulty workmanship or defective material and sometimes any combination of these.

26. The structural defects as defined in the European journal are all seen in the report prepared by Somers Engineering Limited. These defects occurred within the initial warranty period and the extended period. The defects were brought to the attention of the defendant who did nothing to remedy the same. I therefore find that the defendant is liable for the defects both patent and latent.

27. Peeling of paint is a result of poor surface preparation. Majority of peeling paint problems occurs on surfaces exposed to rain, sun and the variation degree of temperature. There is evidence of leaking roofs

in the apartments. There is evidence of poor plumbing leading to leakage of water which affects the paint on the walls.

28. The plaintiff in its submission stated that it had dropped prayer 6 of the plaint. It also stated that it was no longer going to ask the amounts of damages particularized in paragraph 13 of the plaint. It instead stated that it will go as per the amounts indicated in the report by Somers Engineering Limited. In the case of **Darlington BC Vs Wiltshier Nothern Ltd ( CA) 1 W.L.R 1995 the Court as Page 73** stated that;-

***“ We start, therefore with certain elementary propositions in law as to damage for breach of contract which are binding on this court. Thus, in the first place, the general principle for the assessment of damage for the breach of contract is compensatory- to compensate the plaintiff for the damage, loss or injury he has suffered through the breach”***

29. In the case of **East Ham B C Vs Bernard Sunley ( 1965) 3 ALL ER** at Page 630, the Court held as follows:-

***“Dealing with this subject , the learned editors of Hudson Building and Engineering Contracts (8<sup>th</sup> Edition ) say at page 319, that there are in fact three possible bases of assessing damages , namely ,***

***a. Cost of the reinstatement***

***b. the difference in cost to the builder of the actual work done and work specified or***

***c. The diminution in value of the work due to the breach of contract”***

30. In the case of **Quick Vs S Taff Ely Borough Colonial (1985) 3 WLR** it was stated as follows:-

***“ I find helpful the observation of Atkin L .J. ....that repair connotes the idea of making good damages so as to leave the subject so far as possible as though it had not been damaged”.***

31. In the instant case, I will use the cost of reinstatement as a measure of damages for breach of contract. The engineer who prepared the report filed in court gave details of what it will cost to reinstate the condition of the 13 apartments. I find the computation reasonable given the nature of defects noted. I will therefore award ***Kshs.48,952,469.35*** as general damages for breach of contract.

32. The Plaintiff having been awarded the cost of reinstatement, there is no need for award of any other damages as to do so would amount to double compensation. The plaintiff had prayed for ***Kshs.1,194,826*** being cost of repairing electrical defects . There was no proof of these costs. The figure is what a contractor gave as cost of material and labour. There was no evidence that the materials were bought or the electrical defects were fixed. There is therefore no basis for grant of that sum. There is also no evidence that six apartments remained unoccupied due to the defects. The engineer who prepared the report testified that as at the time of preparing the report all the apartments were occupied. There is therefore no basis for award of loss of rental income from six apartments.

33. In the final analysis, I therefore enter judgement for the Plaintiff against the Defendant in the sum of ***Kshs.48,952,469.35/=*** as *general damages*. This amount shall attract interest at court rates from the date of this judgement. The defendant shall pay costs of this suit.

Dated, Signed and delivered at **Nairobi** on this **6<sup>th</sup>** day of **February, 2018**.

**E.O.OBAGA**

**JUDGE**

In the presence of ;-

Mr Maingi for Plaintiff

Court Assistant: Kajuju

**E.O.OBAGA**

**JUDGE**