Regnoil Kenya Limited v Karanja (Civil Appeal 534 of 2019)
[2023] KECA 112 (KLR) (3 February 2023) (Judgment)

Neutral citation: [2023] KECA 112 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 534 OF 2019

W KARANJA, MSA MAKHANDIA & J MOHAMMED, JJA

FEBRUARY 3, 2023

BETWEEN

REGNOIL KENYA LIMITED ..... APPELLANT

AND

WINIFRED NJERI KARANJA ..... RESPONDENT

(An appeal against the judgment of the High Court of Kenya at Nairobi (Makau, J.) dated 27th September, 2018 in HCCC No. 595 of 2014)

JUDGMENT

1. The genesis of the dispute leading to this appeal is an agreement for sale entered into between Regnoil Kenya Limited (the appellant) and Winfred Njeri Karanja (the respondent) dated November 2, 2011, (the agreement). The agreement was for the sale of Maisonette No 262 at Diamond Park in South B on LR No 209/17918, (the suit property) by the appellant who was the registered proprietor thereof to the respondent for an agreed purchase price of Kshs 11,700,000. The purchase price was agreed to be paid as follows:

    a. Kshs 1,200,000 as deposit on or before the execution of the sale agreement.

    b. The balance of Kshs 10,500,000 to be paid on or before the completion date.

2. From the record, the respondent made the following payments towards the purchase price: a deposit of Kshs 1,200,000 as the agreed deposit and 7,500,000 as part of the balance of the purchase price, all totalling Kshs 8,700,000 leaving a balance of Kshs 3,000,000 which was secured by an irrevocable professional undertaking of Kshs 5,000,000 from Messrs Robson Harris & Co. Advocates, the lawyers for KCB Bank (the Financier) vide a letter of undertaking dated October 7, 2012.

3. The respondent filed suit against the appellant for breach of contract, claiming special and general damages for failure to deliver the suit property as per the agreement of sale. The respondent averred

that due to failure to complete the suit property to the agreed standard, her financiers failed to release the balance of the purchase price. Further that, refusal by the appellants to remedy the defects in the suit property compelled her to file suit in the High Court.

4. The appellants filed a defence and counter-claim arguing that the maisonette was completed to the agreed standard. They sought rescindment of the sale agreement, a re-conveyance of the title and forfeiture of 10% of the purchase price as liquidated damages. In the alternative, they prayed for an order for the payment of Kshs 3,000,000 balance together with Kshs 80,000 mesne profits per month and general damages for breach of contract, all with interest from the completion date until payment in full.

5. The respondent prayed for judgment against the appellant for:-

   i. The cost of making good the defects to the suit property amounting to Kshs 2,150,694/52;

   ii. That the appellant do make good the defects in the suit property within 60 days and hand over its possession thereof to the respondent within 60 days;

   iii. That in the alternative the appellant do hand over the suit property as it is to respondent to make good the defects within 60 days at the appellant's costs to be apportioned with the balance of the purchase price;

   iv That in the further alternative, the appellant do immediately refund to the respondent the full deposit paid amounting to Kshs 8,7000,000.

   v That in addition to (i) (ii) and (iii) and (iv) above, the appellant do compensate the respondent mesne profits for the house at a monthly rent of Kshs 50,000 for loss of its use from December, 2012 until payment in full;

   vi. That the appellant do pay to the respondent general damages for breach of contract;

   vii. Interest on (iv) (v) and (vi) above at Kenya Commercial Bank rates from December, 2012 until payment in full;

   viii. Costs of the suit; and

   ix. Any other better relief that this Court may deem just.

6. The respondent testified in support of her case and called 3 other witnesses. It was her case that she sued the appellant after failing to complete the suit property; that the appellant did not complete the suit property as per the sample house; and that it had several defects; and that due to the defects the Financier's advocates could not honour their professional undertaking to pay the balance of the purchase price.

7. Ms Chepchirchir Sego (PW2), an advocate and a partner at Robson Harris & Co. Advocates (the Financier's Advocates) testified that their law firm acted for the Financier and gave an undertaking to the appellant's advocates on October 7, 2012 which undertaking was still in force; that they received the completion documents but the certificate of practical completion was not availed; that they did not pay the balance of the purchase price on behalf of the respondent as there was no proper completion; and that they issued a demand letter dated 22nd April, 2014 the appellant's counsel demanding inter alia the immediate and unconditional handover of the suit property in good, habitable condition to the respondent's satisfaction. Counsel conceded that they received a certificate of occupation but did not receive a certificate of completion as provided in Clause 3:2 of the Agreement for Sale.

8. Peter K. Gachanja (PW3), a registered practicing Architect produced an evaluation report regarding the suit property. He testified that he visited the suit property on April 10, 2014 when he noted that it was 95% complete; that a certificate of practical completion is issued by an architect while a certificate of occupation is issued by the local council; that a certificate of practical completion precedes that of occupation; and that a certificate of practical completion should be issued after full completion.

9. It was his further evidence that completion had not been realized by the time of his visit; that there were many defects which he noted and listed; and that he concluded that the suit property was 5% incomplete and needed to be brought to a habitable condition.

10. Joseph Kiburu Njoroge (PW4), a quantity Surveyor testified that he prepared a Bill of Quantities (BQ) Report dated April 17, 2014. He estimated the cost of repairs to be Kshs 2,150,694.52 as at 2014 and a proposed contingency amount of Kshs 300,000.

11. Mohamed Maalim Kulmia, a director of the appellant company, who was called by the appellant as DW1 stated that the respondent went to the appellant's office seeking to buy a house; that she was taken to Diamond Estate Phase II and agreed to buy the suit property after she had been shown the a sample house; that the appellant and the respondent agreed on the purchase price and she paid the deposit after a sale agreement was drawn on 2nd November, 2011; that the purchase price in respect of the suit property was Kshs 11,700,000 and the respondent paid Kshs 1,200,000, followed by other payments leaving a balance of Kshs 3 million. DW1 stated that the sale agreement they entered into is the standard one for the houses in Diamond Park; and that the suit property was to be similar to the show house; that the appellant obtained an undertaking from the Financier's advocates. That the appellant has been waiting for the respondent to pay and take possession of the suit property as the title deed thereof is in her name.

12. DW1 stated that the undertaking from the Financier's advocates was for Kshs 5,000,000; that Messrs Robson Harris & Co. Advocates through a letter dated September 26, 2012 requested for the Title Deed, occupation certificate and other documents in respect of the suit property which were supplied by the appellant's advocate; that the respondent's counsel stated that the suit property required some repairs to be undertaken; that the Financier's advocates indicated in their letter dated 15th May, 2013 to the appellant that the appellant had agreed to sell the suit property on behalf of the respondent to recover the balance of the purchase price from the sale proceeds and thereafter remit the balance of the sale proceeds to the purchaser; and that the appellant was not agreeable to this proposal.

13. DW1 stated that the house was in good condition terming the quantity surveyor's report as not truthful as the suit property is similar to the show house and is in good condition; that the respondent through the sale agreement had provided for payment of the balance of the purchase price within 90 days; that the respondent has not completed paying the balance of the purchase price and neither have the Financier's advocates paid the balance of the purchase price. That the suit property was transferred to the respondent on 8th March, 2013 as per the title L.R. 110828 notwithstanding the non-payment of the balance of Kshs 3,000,000.

14. From the record, the suit was heard by the late Onguto, J (May God rest his soul in peace.) who also visited the sample house and the suit property in February, 2018. Onguto, J passed on before hearing the submissions and preparing the judgment. Makau, J. took over the matter, heard the submissions from counsel for the parties and proceeded to write and deliver the judgment that is the subject of this appeal.

15. On these set of facts, in a judgment delivered by the High Court in Nairobi, (Makau, J) allowed the respondent's suit and dismissed the appellant's counterclaim against the respondent. The learned Judge made the following orders;

> " a. The cost of making good the house as today is Kshs 2,150,694/52.
>
> b. The Defendant do within the next 60 days make good the defects to the suit house as per the terms of the sale agreement and as noted in the BQ Report "P-exhibit 6" produced by PW4 to the tune of Kshs 2,150,694/52 or thereabout, issue certificate of completion and physically handover the premises to the plaintiff within 60 days from the date of the judgment and the plaintiff as per terms of the contract pay balance of the purchase price.
>
> c. In the alternative to (a) above the defendant do hand over the suit house or put the plaintiff into physical occupation of the suit house, as it is and the plaintiff, do proceed to make good the defects as noted in the BQ - "P-exhibit 6" of PW4 within 60 days at the defendants cost of Kshs 2,150,694/52 or thereabout to be apportioned with the balance of the purchase price agreed at Kshs 3,000,000/- and pay the balance arising thereto to the defendant within the said period.
>
> d. Prayer (d) of the plaintiff's plaint not proved and is rejected.
>
> e. Prayer (e) of the plaint not proved and is dismissed.
>
> f. Under prayer (f) of the plaint the plaintiff is awarded general damages for breach of contract assessed at Kshs 1,500,000/-
>
> g. The plaintiff is awarded cost of the suit with interest on (f) of the plaint at court rates.
>
> h. Prayers under defendant's counter-claim under prayers (sic) (i), (ii), (iii), (iv), (v) not proved and is dismissed.
>
> i. The plaintiff is awarded cost of the counter-claim."

16. Aggrieved by that decision, the appellant preferred this appeal on the grounds inter alia that the learned Judge misdirected himself:

i. In failing to appreciate that the subject matter of the suit between the parties having been an agreement for sale, general damages were not awardable;

ii. By dismissing the appellant's counter-claim and granting the respondent an alternative prayer that the appellant do hand over the suit property or put the respondent into physical occupation of the suit property as it is and the respondent do proceed to make good the defects;

iii. By ordering the appellant to pay the respondent Kshs 2,150,694/52 as costs for making good the house which in effect that the court re-wrote the contract between the parties;

iv By failing to appreciate that the respondent had not proved the basis of the claim of Kshs 2,150,694/52 and that the same being special damages, they ought to be specifically proved;

v By selectively finding that the respondent was not in breach of the contract yet she admitted that she had not paid the full purchase price;

vi. By finding that the professional undertaking was still in force and was to be released upon receipt of a Certificate of Occupation from the Nairobi City Council and that the same having been received by counsel for the Financiers, the respondent was in breach of the contract by failure to release the balance of the purchase price;

vii. By finding that the respondent had demonstrated that she was ready and able to have the amount released to the appellant upon issuance of the Certificate of Completion by the appellant's architect which ought to consider the similarity of the suit property and the sample house which holding amounted to the court re-writing the contract for the parties as the professional undertaking required a Certificate of Occupation and completion documents as confirmed by counsel for the Financier and also as upheld by the court in its judgment;

viii. By finding that the appellant has no basis for demanding the payment of the balance of Kshs 3,000,000 admitted to by the respondent as the appellant was yet to comply with the terms of the sale agreement which provided that the balance of the purchase price was to be paid 90 days from the date of the agreement;

ix. By failing to find that the respondent having not issued the 21 day rescission notice as provided for in the contract as admitted by PW2, the suit by the respondent was premature; and

x. By failing to find that Clause 6.4 of the Agreement for Sale was clear that variations in the specifications of the suit property cannot invalidate the agreement and further that the respondent cannot be compensated for any such relation to omission; mis-description or innocent mis-representation.

17. The appellant seeks the following orders:-

a. That the appeal be allowed with costs;

b. That the judgment of the High Court dated September 27, 2018 be set aside and an order do issue allowing the appellant's counter- claim;

c. That the costs of the appeal be awarded to the appellant; and

d. Any other order that this Court may deem fit to grant.

Submissions by Counsel

18. The appeal was disposed of by way of written submissions with oral highlights. Both the appellant and the respondent filed their respective written submissions. At the plenary hearing of the appeal, the appellant was represented by learned counsel, Ms. Kamende while the respondent was represented by learned counsel, Ms Wangui.

19. Counsel for the appellant submitted that the respondent admitted during cross-examination that she is yet to pay the balance of the purchase price of Kshs 3,000,000 and further that she had transferred the suit property to her name and charged it in favour of the Financier for Kshs 7,000,000. Counsel submitted that PW2 from the firm of Messrs Robson Harris & Co. Advocates that gave the undertaking confirmed during cross-examination that they received completion documents as per clause 5 of the Sale Agreement and thereafter gave an undertaking for the payment of the balance of the purchase price. Counsel further submitted that PW2 confirmed that the certificate of practical completion was not part of the undertaking and further that the same is issued before the certificate of occupation.

20. Counsel further submitted that although the respondent did not quantify what she pleaded as general damages for breach of contract, the High Court proceeded to award her Kshs 1,500,000 as general damages for breach of contract. Further, that general damages are not awardable for breach of contract and as such the trial court erred in law in proceeding to award the respondent the said sum and that in any event the appellant had already demonstrated that it was the respondent who was in breach of the agreement for sale. Counsel relied on the authority of *Kenya Tourist Development Corporation v Sundowner Lodge* [2018] eKLR for the proposition that general damages are not awardable for breach of contract.

21. On the issue that special damages must not only be pleaded but also proved, it was submitted that the value of the estimated costs of repair of the suit property of Kshs 2,150,694/52; that PW4 indicated this amount as the estimated repair costs and thereafter pleaded by the respondent as special damages. It was further submitted that the court upheld this amount by finding that the appellant did not controvert the (BQ) report by PW4. Counsel submitted that the court erred in reaching this holding since the appellant's counsel substantively questioned the same in court and further that the position of the appellant was that there were no defects in the house and as such a contrary report was not necessary. Further, that the respondent has pleaded this amount as a special damage the same ought to be proved and throwing to court the figure in the report was not sufficient proof as required. Reliance was placed on *Capital Fish Kenya Limited v The Kenya Power &Lighting Company Limited* [2018] eKLR and *Kenya Tourist Development Corporation v Sundowner Lodge* (*supra*).

22. Counsel further submitted that it was erroneous for the trial court to make an order for a set off of this unproved amount from the balance of the purchase price of Kshs 3,000,000 which was undisputed.

23. On the issue that the court cannot re-write the contract between parties, it was submitted that PW4 admitted not having received any drawings and plans from the respondent; that the BQ report was based on his analysis and assumptions of how the suit property should look like; that the respondent admitted being bound by clause 3.2 of the agreement for sale; that the trial court was oblivious of the requirement of the certificate of practical completion; and that a certificate of occupation was issued to the respondent's advocates.

24. It was submitted that in a letter dated April 5, 2013, Messrs Robson Harris & Co. Advocates requested for a copy of the occupation certificate to enable the respondent's officials inspect the suit property and have the matter finalized which certificate was issued; that the trial court erred in arriving at the conclusion that the suit property required Kshs 2,150,694/52 as the cost of making good the defects which would effectively change the model of the house from the show house and which amount was also agreed to be an estimate with some amount of Kshs 300,000 being a contingency amount. It was submitted that the trial court thus rewrote the contract between the parties as to the model of the house vis-a-vis the show house and that it equally re-wrote the contract as to what was to be availed by the appellant, to wit the certificate of occupation and not a certificate of completion. Reliance was placed on the case of *Abdul Jalil Yafai v Farid Jalil Mohammed* [2015] eKLR.

25. On the issue of the terms of the agreement for sale, it was submitted that it was common ground that the respondent was yet to pay the balance of the purchase price of Kshs 3,000,000; that she transferred the suit property to her name on 8th March, 2013 before filing the suit in the High Court; that she charged the suit property in favour of the Financier for Kshs 7,000,000 before filing suit and that she did not rescind the contract. Counsel submitted that the trial court found that the respondent had paid Kshs 8,700,000 and that the issuance of the title deed in her name cannot be a substitute for clear and unambiguous terms of the contract which demands for the issuance of a certificate of practical completion. Further that this was a clear contradiction of the evidence of PW2 who confirmed that the

undertaking in respect of the balance of the purchase price was pegged upon a certificate of occupation and not that of practical completion.

26. Counsel further submitted that the trial court erred in not finding in favour of the appellant's counterclaim that sought to compel the respondent to re-transfer the title back to it whereafter the purchase price will be refunded. Further, that PW2 who was acting for the respondent in the conveyance indicated that she did not issue the 21 day completion notice indicated under clause 9.2 of the Sale Agreement and instead of rescinding the contract, she went ahead and transferred the same to herself whereby she acquiesced that the suit property was in accordance with the standards she signed up to; that the trial court failed to find that it was premature for the respondent to approach the court without exhausting the rescission option and as such the court therefore failed to consider the ratio decidendi in the case of *Patricia Bini v Melini Investments Ltd & 3 others* [2015] eKLR.

27. In response, the respondent submitted on the issue whether the appellant was in breach of contract, that it is a fact that the sample house shown to the respondent formed an integral part of the sale agreement pertaining to the suit property and it was also a fact that the certificate of practical completion formed part of the completion documents; that the respondent had a legitimate right to expect that the suit property which she was purchasing from the appellant was similar to the sample house and that the respondent's financiers also have a right to expect that the certificate of practical completion would form part of the completion documents for the undertaking to be released; and that the respondent having been the first owner of the suit property and having purchased the same off plan based on the sample house that was ready for viewing. Counsel submitted that by the time of completion the respondent had paid Kshs 8,700,000 and the Financier's advocates had given an irrevocable undertaking for Kshs 5,000,000 which is still valid to date and which undertaking was way above the outstanding balance of Kshs 3,000,000 but at the time of completion the respondent was appalled to find that the suit property did not match the sample house and had several defects which would cost an estimated Kshs 2,150,694.52 to repair.

28. Counsel further submitted that the trial court (Onguto, J.) visited the site and noted several defects in the suit property: that the finishing was not as per the sample house; that the appellant had not issued a certificate of practical completion; and that the financier's advocates had testified that without this they could not honour the undertaking which has all along been ready. On the issue as to whether the appellant is entitled to the reliefs sought in the counter-claim it was submitted that the same had no merit and was rightly dismissed.

Determination

29. This a first appeal. Our duty is as is stipulated in Rule 31(1) of the *Court of Appeal Rules*, namely, to reappraise the evidence and to draw inferences of facts thereon. In *Selle v Associated Motor Boat Co. Ltd* [1968] EA 123, this mandate and which we fully adopt was delineated by the predecessor of this Court as follows:

> " An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence

or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v Ali Mohamed Sholan* (1955) 22 EACA 270)."

30. As we discharge our mandate of evaluating the evidence placed before the trial court, we keep in mind what the predecessor of this Court said in *Peters v Sunday Post Ltd* [1958] EA 424. In its own words:

> " Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or had plainly gone wrong, the appellate court will not hesitate so to decide ..."

31. In *Gicheru v Morton and Another* (2005) 2 KLR 333 this Court stated:

> " In order to justify reversing the trial judge on the question of the amount of damages it was generally necessary that the Court of Appeal should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of the Court, an entirely erroneous estimate of the damage to which the Appellant was entitled."
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> See also *Peter M. Kariuki v Attorney General* [2014] eKLR

32. The foregoing sets out the law and the guiding principles which we are bound to apply in the determination of this appeal. We have considered the record of appeal, the written submissions, the authorities cited and the law and discern the following issues for determination: -

    a. Whether there was breach of contract?

    b. Whether the trial court re-wrote the contract between the parties?

    c. Whether the trial court erred in awarding special damages?

    d. Whether the trial court erred in awarding general damages for breach of contract?

    On the question whether there was a breach of the contract, it is instructive to consider the express terms of the agreement for sale. Clause 1.1 of the Agreement for Sale defines the Completion Date as the date provided for under Clause 5 of the Agreement.

33. Clause 4:2 provided as follows:

> " The balance of Kshs Ten Million, Five Hundred Thousand only (Kshs 10,500,000) (the Balance) of the purchase price shall be paid by the Purchaser on or before the Completion date to the vendor."

34. Clause 5.1 provided as follows:

> " The completion Date shall be the seventh day from the date when the Vendor's architects shall issue a certificate of completion for purposes of the ongoing construction, or ninety (90) days from the date of this agreement, whichever comes first."

35. Whereas Clause 3.2 provided as follows:

> " It is hereby agreed and declared that the Vendor shall not be required to accede to any requests from the Purchaser for any changes or modifications to the aforesaid plans and

specifications. In all matters relating to carrying of the works and finishes, workmanship and in in authorizing any necessary variations the decision of the Vendor's Architect shall be final and upon the issuance of a Certificate of Practical Completion, the Vendor shall be deemed to have fulfilled its obligations as far as the works are concerned in full and the Purchaser shall have no claims of whatever kind for any alleged faults of defects."

36. The appellant's case as regards breach of the sale agreement is that the respondent breached the provisions of the agreement on completion as she has failed to pay the balance of the purchase price on time. The appellant's counsel in her submissions laid the basis for the appellant's claim that there was no breach of contract on its part as Clause 5.1 on completion and Clause 5.3 on the completion documents were fulfilled by the appellant as it forwarded to the respondent all the documents. That it is on the strength of the same that the respondent transferred the suit property to herself on March 8, 2013.

37. The respondent on her part submitted that she complied with the terms of the agreement for sale to the letter, including obtaining an undertaking of Kshs 5,000,000 from the Financier's advocates which was an amount over and above the balance of the purchase price of Kshs 3,000,000. The respondent asserted that she could not pay the balance of the purchase price as the suit property did not conform to the sample house that she had been shown and the same was uninhabitable as it had not been completed as provided for in the agreement for sale. The respondent emphasized that the Financier's advocates could not honour the undertaking on the payment of the balance of the purchase price as the appellant had failed to avail the certificate of practical completion as envisioned under clause 3.2 of the Sale Agreement.

38. It is notable that at the time of the hearing of the suit in the trial court, the respondent had transferred the suit property to her name on March 8, 2013 and had charged it for Kshs 7,000,000 in favour of the Financier. Further, the balance of the purchase price payable to the appellant was Kshs 3,000,000.

39. It is instructive that Clause 5:3 of the Agreement for Sale provided as follows:

> "On or before the completion date, and provided that the purchaser shall have made payments as stipulated in clause 4 above, the vendor's advocates shall deliver or procure delivery to the Purchaser's Advocates the following documents in respect of the property:
>
> a. An instrument of Transfer duly executed by the vendor in favour of the purchaser or the purchaser's nominee(s) or as directed by the purchaser;
>
> b. The Original Title in respect of the property;
>
> c. A certified copy of the Grant for the land specified in clause A;
>
> d. The Commissioner of Lands letter of consent to transfer;
>
> e. Certified copies of the Valid Rent Clearance certificate, together with the receipted land rent bills;
>
> f. Copies of the PIN certificates and national identity cards/ passports of the vendor's directors;
>
> g. Three (3) passport size coloured photographs of the directors of vendor."

40. The requirement that all the documents as provided for under Clause 5.3 would be provided by the appellant on the completion date was therefore expressly stated in the agreement for sale.

41. As already stated, Clause 4:2 of the Agreement for Sale provided that the balance of the purchase price being Kshs 10,500,000 would be paid by the Purchaser on or before the completion date.

42. It is notable that in the letter from the Financier's Advocates to counsel for the appellant dated September 26, 2012, the Financier's Advocates gave a professional undertaking to pay the balance of the purchase price to a maximum of Kshs 5 million within 14 days of receipt of the following documents:

    a. The original and counterpart lease in favour of the purchaser duly registered;

    b. The Charge (in replica) in favour of Kenya Commercial Bank Limited duly registered;

    c. The original Share Certificate for the Purchaser's share in the Management Company;

    d. The original Stamp Duty Declaration Assessment and Pay-In- Slip;

    e. A copy of the application for Registration Form; and

    f. A certified copy of the Occupation Certificate from the Nairobi City Council. [Emphasis supplied].

43. PW2 in her evidence confirmed to the trial court that the undertaking to pay the balance of the purchase price was pegged upon a Certificate of Occupation and not a Certificate of Practical Completion. It is on record that the completion documents including a Certificate of Occupation were forwarded to the Financier's Advocates and that the suit property was transferred to the respondent and a title issued in her favour.

44. It is notable from the letter from the then City Council of Nairobi dated April 4, 2013 to the appellant forwarding a partial occupation certificate in respect of the suit property (among other properties) stated in part as follows:

> " A site visit conducted on March 20, 2013, established that the house labelled as 264 (L.R. No 209/17916), 262 (209/17918), [the suit property] 256 (209/17960), 200 (17976), 249 (209/18000), 250 (209/17999), 196 (209/17980), 165 (209/17955), 190 (209/17967, 180 (209/17957), 176 (209/17944 and 183 (209/17944) consisting 12 number four bedroom maisonettes have been satisfactorily completed as per approved architectural Plan number EB 576 of July 13, 2006.
>
> Therefore, Partial Occupation Certificate is hereby granted for 12 number maisonettes satisfactorily completed as per approved plan No EB 576 of July 13, 2006 being part of phase II.
>
> This Partial Occupation Certificate is granted of ruse (sic) of the above maisonettes as per approved Plan No EB 576 of July 13, 2016." [Emphasis supplied].

45. To this extent, the finding by the High Court that the appellant was in breach of the contract was erroneous. We say so because as noted earlier neither the appellant nor the respondent repudiated or rescinded the contract when the respective obligations to the agreement for sale were not performed. On the contrary, it is not in dispute that a transfer of the suit property to the respondent was effected on March 8, 2013 and later charged for Kshs 7,000,000 before completion of payment of the balance of the purchase price.

46. In paragraph 21-016 of *Chitty on Contracts* - Volume I, it is stated that the right to terminate the contract when there is a fundamental breach may be lost where the innocent party affirms the contract,

is held to have waived it, or is estopped from exercising the right to terminate. Affirmance is defined in Black's Law Dictionary, Ninth Edition as

> "a ratification, reacceptance or confirmation",

and in relation to contracts, it is explained therein that

> "a party who has the power of avoidance may lose it by action that manifests a willingness to go on with the contract. Such action is known as affirmance and has the effect of ratifying the contract".

47. However, a party will not be held to have elected to affirm the contract unless it has knowledge of the facts giving rise to the breach, and of its legal right to choose between the alternatives open to it. In addition, where a party having this knowledge elects to affirm the continued existence of the contract, it does not necessarily relinquish its claim for damages for any loss sustained as a result of the breach.

48. Waiver on the other hand is defined in *Black's Law Dictionary*, Ninth Edition as

> "the voluntary relinquishing or abandonment- express or implied - of a legal right or advantage", while estoppel is defined as
>
> "a bar that prevents one from asserting a claim or right that contradicts what one has said or done before, or what has been legally established as true".

The doctrine of equitable estoppel is a defense that is raised when such conduct or representation has been relied on by another party, with the result that the other party has suffered a detriment or injury. See in this regard the decisions by this Court in *John Mburu v Consolidated Bank of Kenya* (2018) eKLR and *Kenya National Assurance Company v Kimani another* (1987) eKLR.

49. There is an intertwined connection between the application of the concepts of affirmation, estoppel and waiver in the law that applies to performance and discharge of contracts. Affirmation and estoppel both arise from clear and unequivocal representations or conduct by a party that they will not exercise their right to treat a contract as repudiated, which if proven, then leads the other party to rely on waiver as a defence to any purported termination of a contract. Affirmation will lead to the application of the defence of waiver by election, while waiver by estoppel is also raised as an application of the principle of equitable estoppel. The only difference between the two waivers is that unlike in a waiver by election, no knowledge of the facts giving rise to the exercise of the right to waiver and of its effects is required in a waiver by estoppel. See in this regard *Chitty on Contracts* - Volume I, paragraphs 24-003 to 24- 008.

50. Arising from the above principles of law, we find that the legal effect of the breach of the conditions in the sale agreement in the instant appeal was that the appellant and respondent, who were both aware of the conditions, having signed the sale agreement and having legal representation at the time, were entitled to treat the agreement as discharged. However, they both elected to continue with the performance of their obligations by their conduct and representations. It is notable that neither party issued a rescission notice to the other. The parties were therefore deemed to have affirmed the contract, waived their rights to rescind the contract, and were therefore estopped from terminating the contract or repudiating performance of their obligations under the sale agreement on account of the breaches.

51. From the record, vide a letter dated May 15, 2013 from the Financier's Advocates to counsel for the respondent, it was intimated that:

> " We are advised by the Purchaser that she has discussed the issue of the outstanding balance of the purchase price with your client's director, Mr. Mohamed Maalim, during which they

agreed that our client shall sell the house on behalf of the purchaser and recover the balance of the purchase price from the sale proceeds and thereafter remit the balance of the sale proceeds to the purchaser."

52. We find that the trial court therefore erred in finding that the appellant had breached the contract as the subject sale agreement continued to subsist and was valid. We find that the respondent breached the agreement for sale by failing to pay the balance of the purchase price as provided for in the agreement for sale.

53. On the question whether the trial court re-wrote the contract between the parties, the facts confirm that the parties acknowledged having entered into the agreement for the sale of the suit property. Neither party complained of fraud or coercion and they are accordingly bound by its terms. This was what this Court had in mind in *National Bank of Kenya v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR:

> "The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved."

54. We thus proceed on the basis that the agreement was lawfully entered into by the parties and therefore legally binding on both of them. This leaves us with the interpretation of that agreement. We reiterate that the general rule of interpretation is to ascertain and give effect to the intention of the parties as it is that intention that was crystallized in writing in the sale agreement.

55. This Court in *Sun Sand Dunes Limited v Raiya Construction Limited* [2018] eKLR stated as follows:-

> "The object of construction of terms of a contract is to ascertain its meaning or in other words, the common intention of the parties thereto. Such construction must be objective, that is, the question is not what one or the other parties meant or understood by the words used. Rather, what a reasonable person in the position of the parties would have understood the words to mean."

56. Clause 9.1 provided that:

> "If the of Purchaser shall, fail to comply with any of the conditions hereof the condition subject to which this sale is made including the condition relation to payment of the purchase price the Vendor, may give to the purchaser at least Twenty one (21)days, notice in writing and specifying the Vendor's readiness to complete the sale in all respects and specifying the default and requiring the purchaser to remedy the same before the expiration of such notice and if the purchaser shall fail to comply with such notice the vendor shall at his sole option be entitled..."

57. From the above, it can be deduced that the intent of the parties was that failure to pay the purchase price would lead to the termination of the agreement. The termination of the agreement for sale was tied to the default of payment of the full purchase price. With respect, the trial court erred by concluding that the appellant was in breach of the contract for failure to complete the suit property as per the sample house. The trial court also sought to re-write the contract between the parties in finding that a Certificate of Completion was a completion document contrary to Clause 5:3 of the Agreement for Sale. The intent of the parties is paramount in the interpretation of provisions of an agreement as

courts must be faithful and give them effect. It was held in *Savings and Loan Kenya Limited v Mayfair Holdings Limited* [2012] eKLR:

> "...Therefore, the intention of the parties should be construed with reference to the object and the terms of the agreement.
>
> If the words used in the agreement are clear they should be construed in their ordinary meaning so as to establish the intention of the parties."

58. We find that the trial court erred in not giving effect to the parties' intentions and more so in holding that the appellant was in breach of the contract for failing to complete the same specific to the sample house. Having found that the High Court erred in that aspect we also hold the view that completion was not possible as long as there was an unpaid balance of the purchase price.

59. The next issue is on the question of the propriety of the award of special and general damages to the respondent being Kshs 2,150,694/52 as special damages and Kshs 1,500,000 as general damages. Counsel for the appellant submitted that it was erroneous for the trial court to have awarded the respondent such damages in the circumstances of this case.

60. On the principles governing the award of damages, the trial court was alive to them and it cannot be faulted for reasoning thus at paragraph 40:

> "The plaintiff under prayers (a) (b) and (c) seek that the court do under (a) find that the cost of making good the defects to the house as at today is Kshs 2,150,694/52 or thereabout. The plaintiff relies on the BQ Report by PW4 Joseph K. Njoroge Q S. The BQ on page 2 on construction shortcomings gives the cost of remedial work at Kshs 2,150,694/52 after noting all the defects at the suit property and giving 2 months as the time to be taken to complete the work. The defendant did not controvert the BQ Report by PW4, by filing on opposing BQ Report or calling on evidence to the contrary. In view of the evidence of PW1 and the site visit by the trial Judge in presence of parties, I find the defects alluded to by PW4 were evidently proved. I find no reason why I cannot find the plaintiff has proved the cost of making good the defects to the house as at today is around Kshs 2,150,694/52 or thereabout. Having found so in respect of prayer (a) I find the prayer (b) and (c) can be treated as alternatives to (a) and need not go further in my finding in respect of the aforesaid prayers."

61. On the question whether the trial court erred in awarding special damages, we find that the evidence tendered failed to prove the specific sums pleaded. PW4 who prepared the BQ report which was relied on by the trial court stated as follows during cross-examination:

> "I estimated the repairs at Kshs 2,150,694.52 as at 2014. The document which we use is a guide. It comes from Ministry of Works. The guide captures all items. My report is an estimate. There is an estimate "ADD" as a contingency of Kshs 300,000". [Emphasis supplied].

62. This evidence fell way short of the requirement not only of specific pleading but, also, indeed the more, strict proof. See *Banque Indosuez v DJ Lowe & Co. Ltd* [2006] 2KLR 208 *Hahn v Singh* [1985] KLR

716. Because of want of proof as required in a claim for special damages, the trial court was entitled to dismiss the claim. The trial court therefore erred in its reliance on the BQ which was speculative and an estimate and did not satisfactorily prove the amount of Kshs 2,150,694/52 as costs of completion

of the suit property to a habitable state. The speculative nature of the BQ report lends credence to this finding as a sum of Kshs 300,000 was indicted in the report as a contingency amount.

63. This Court in *Macharia Waiguru v Muranga Municipal Council & another* [2014] eKLR stated:

> " In the case of Siree Limited v Lake Turkana El Molo Lodges (2002) 2 EA 521 stated:
>
> > This court has said time and again that when damages can be calculated to a cent, then they cease to be general damages and must be claimed as special damages".
> >
> > It is now trite law that special damages must not only be pleaded but must also be specifically proved and those damages awarded as special damages but which were not pleaded in the plaint must be disallowed.".

Again this Court stated in the case of *Finmax Community Based Group & 3 Others v Kericho Technical Institute* [2021] eKLR:

> " It is now firmly established that special damages must both be pleaded and proved, before they can be awarded by the court.

64. In *Hahn v Singh*, Civil Appeal No 42 of 1983 [1985] KLR 716, at 717, and 721 the Court (Kneller, Nyarangi, JJA, and Chesoni Ag JA emphasised that:

> " Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves".

65. A claim for special damages must be specifically pleaded and proved with a degree of certainty and particularity.

As stated by Chesoni, J in the case of *Ouma v Nairobi City Council* (1976) KLR 304;-

> " Thus for a plaintiff to succeed on a claim for special damages he must plead it with sufficient particularity and must also prove it by evidence. As to the particularity necessary for pleading and the evidence in proof of special damage the court's view is as laid down in the
>
> English leading case on pleading and proof of damages, Ratcliffe v Evans (1892) 2 QB 524 where Bowen L J said at pages 532, 533;-
>
> > The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

66. The rationale for requiring a party to plead and prove special damages was given in the persuasive case of *Jackson Mwabili v Peterson Mateli* [2020] eKLR:

> "...the law is settled that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. This is because a claim for special damages represents what the party has actually lost in the form of the amount used to put him where he is before the loss. He therefore would want the court to put him back to the position he would have been had the loss not occurred, hence the need for strict proof of the claim, for no man should gain for losing nothing." (Emphasis supplied.)

67. Essentially, as counsel for the appellant submitted and from the record, the respondent was not able to prove the amounts stated in the BQ and there was no specific proof on what exactly the costs of the itemized items were. It was not enough for the respondent to make a general proposition based on the BQ on what would complete the suit property and make it habitable. Specific proof was required in the circumstances, and we find that the BQ was not sufficient. We find that the learned Judge therefore erred in awarding the said amount as it was not particularized and proved.

68. On the question whether the trial court erred in awarding general damages for breach of contract, the trial court awarded the respondent Kshs 1,500,000 as general damages for breach of contract. The trial court held as follows:

> "43. On prayer under (f) of the plaint, the plaintiff prays for general damages for breach of contract I have already found the defendant was in breach of the contract for failing to complete the suit property as per terms of the agreement. There has been delay in handing over the premises for plaintiff's physical occupation though the transfer has been effected. I also find though the house is not habitable as per the evidence of PW1, PW2, PW3 and PW4 the plaintiff has been able to charge the property but that does not mean the party who is in breach of the contract can be allowed to go free on the issue of general damages. I find the plaintiff has proved that she is entitled to general damages for defendant's failure to complete the building, and hand over the certificate of completion since 2013 to date a period of close to 8 years. The plaintiff is in view of thus entitled to general damages. I find general damages of Kshs 1,500,000/-."

69. This Court in the case of *Total (Kenya) Limited Formally Caltex Oil (Kenya) Limi ted v Janevams Limited* [2015] eKLR stated as follows:

> "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 v Muthoga & Another. [2002] 1 EA 81 at page 88 cited with approval the decision of the Court of Appeal for Eastern Africa in the Case of Dharamshi v Karan (supra) where that court held as follows:
>
> "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 v 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."

70. This Court in *Postal Corporation of Kenya v Gerald Kamondo Njuki t/a Geka General Supplies* [2021] eKLR stated as follows:

> " the respondent having quantified what it considered to have been the loss it suffered, and gone on to particularize the same, there would be absolutely no basis upon which the learned Judge would go ahead to award the totally different, unrelated, unclaimed and unquantified sum of Kshs 30 million merely because he believed that the respondent "had suffered serious damages" (sic).
>
> What was suffered or was believed to have been suffered, the damage that is, to be compensated by way of damages, could only be known by the respondent and it claimed it in specific terms which, in the event, it was unable to prove."
>
> Likewise, the respondent claimed the sum of Kshs 205,095,000 as the loss that he claimed to have suffered out of the appellant's breach. It was a duplication of his claim to seek an award for general damages. In any case, having failed to prove his claim for Kshs 205,095,000 there was no basis for the learned Judge awarding him the sum of Kshs 20 million. We come to the conclusion that the learned Judge misapprehended the law in making the award."

71. By parity of reasoning, it is not in dispute that in the instance case, the respondent's claim was based on breach of contract. In the circumstances, the trial court erred in granting general damages.

72. For the foregoing reasons, we allow this appeal and set aside the judgment and decree of the trial court. In the circumstances of this case, we do not find it appropriate to make any order as to costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023

W. KARANJA

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR