



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO.595 OF 2014

WINFRED N. KARANJA PLAINTIFF

VERSUS

REGNOIL KENYA LIMITED DEFENDANT

JUDGMENT

1. The Plaintiff **WINIFRED NJERI KARANJA** through a plaint dated 15th December 2014 through the firm of M/s **KIMANDU GICHOHI & Co. ADVOCATES** filed on 17th December 2014 sued the defendant **M/s REGNOIL KENYA LIMITED** seeking the following orders against the defendant namely:-

- a) That this Honourable Court do find that the cost of making good the defects to the house as at today shall be Kshs. 2,150,694.52 or thereabout.
- b) That the defendant do make good the defects in the house within 60 days and hand over its possession to the plaintiff within the said 60 days.
- c) That in the alternative the defendant do hand over the House as it is to the plaintiff who shall then make good the defects within 60 days at the defendant's costs to be apportioned with the balance of the purchase price.
- d) That in the further alternative the defendant do immediately refund to the plaintiff the whole of the deposit paid to it amounting to Kshs. 8,700,000/-.
- e) That in addition to either (a) (b) (c) and (d) above, the defendant do compensate the plaintiff *mense* profits for the house at a monthly rent of Kshs. 50,000/- for loss of its use from December 2012 until payment in full.
- f) That the defendant do pay to the plaintiff general damages for breach of contract.
- g) Interest on (d) (e) and (f) above at Kenya Commercial Bank rates from December 2012 until payment in full.
- h) Costs of this suit.
- i) Any further better relief that this Honourable Court may deem just.

2. The defendant **M/s REGNOIL KENYA LIMITED** filed their defence and counter-claim against the plaintiff dated 17th March 2015 through the firm of M/s **KAMENDE D.C. & Company Advocates** and filed on the same day. The defendant denied the plaintiff's claim, sought the suit to be dismissed and made a counter-claim against the plaintiff's as follows:-

- i) A declaration that pursuant to the breach of the agreement by the Plaintiff, the sale agreement herein be rescinded and the Defendant be allowed to rescind this agreement, forfeit the equivalent of the 10% of the purchase price as liquidated damages and resell the Maisonette as it deems fit;
- ii) An order to issue against the Plaintiff, its agents, tenants and servants compelling them to re-convey the title back to the Defendant;
- iii) In the alternative a declaration that the Plaintiff is in breach of the sale agreement and an order do issue compelling her

to pay the balance of the purchase price of Kshs.3,000,000.00 with interest with effect from the Completion date upto the date of full payment.

iv) General damages for breach of contract/agreement;

v) Mesne profits in the form of rent at the rate of Kshs. 80,000.00 per month from with effect from the Completion date upto the date of full payment.

vi) Costs of this suit.

vii) Interest of (i), (iii) (iv) (v) above at court rates with effect from Completion date of payment in full.

viii) Any other relief that this Honourable Court may deem fit and just to grant.

3. The plaintiff filed Reply to defence and counter-claim dated 9th April 2015 and filed on the same day. Praying the prayers in the plaint be allowed and the defendant's counter-claim be dismissed.

4. The suit was heard by the late Hon. Justice J.L.O. Onguto, (*God rest his soul in peace*), who also visited the scene and made notes; but he passed on before hearing the submissions and preparing the judgment. Unfortunately upon my transfer to Commercial Division in May 2018, I inherited the matter which my late brother was handling. I heard the submissions from both counsel and as I prepare to write the judgment I am alive to the fact that I never saw nor heard any of the parties nor party's witnesses nor visited the scene hence I cannot comment on the demeanor of the witnesses but I am under duty to analyse and evaluate the evidence and come to my own independent decision in this matter.

5. The plaintiff gave evidence and called four (4) witnesses. The plaintiff's case briefly is as follows:-

That the defendant by a letter dated 10th May 2011 offered to sell a 4 bedroom maisonette at Diamond Park South B on **L.R. No.209/17918** commonly referred to as House No. 262. The plaintiff accepted the offer leading to the plaintiff and the defendant entering into a Sale Agreement dated 2nd November 2011.

6. According to the Sale Agreement clause 4.1 the plaintiff was to pay an initial deposit of Kshs. 1,200,000/-; (*which she paid*) and the balance of Kshs. 10,500,000/- was payable on or before completion but the plaintiff partly paid the amount leaving a balance of Kshs. 3,000,000/- as of the time of filing the suit and which balance was and is still secured by an irrevocable professional undertaking of Kshs. 5,000,000/- from the plaintiff's financiers' lawyers Messrs Robson Harris & Co. Advocates vide a letter of undertaking dated 7th October 2012.

7. The plaintiff evidence is that House **No. 262 in L.R. No. 209/17918** was not completed to the agreed standard and in accordance with the sample House which was shown to her, following which her bank and lawyers could not release the balance of Kshs. 3,000,000/-; which provoked the filing of the suit seeking the reliefs underlined thereto.

8. The plaintiff Winifred Njeri Karanja testified that she sued the defendant after they had entered into an agreement on 2/11/2011 purchasing maisonette No. 262 at Diamond Park Estate Nairobi after failing to complete the house as per sample house that she had been shown at the time of the agreement. She stated out of the purchase price of Kshs. 11,700,000 she paid Kshs. 8,780,000 and produced the agreement dated 2/11/2011 as "**P-exhibit 1**". She averred that the defendant did not complete the house as per sample house, pointing out several defects which included leaking roof; inferior doors and windows to that of show house; **PVC** ceiling as opposed to gypsum in show house; no electrical fittings; plastic bath tabs as opposed to ceramic; uneven stair case making the house inhabitable.

9. The plaintiff testified that she had paid Kshs. 8,700,000/- and difference was undertaken to be paid by the bank but due to defects the bank could not honour the undertaking. She stated she had performed all her responsibilities and notified the defendant in writing on 22/4/2014 (letter marked **P-exhibit 2**) but the defendant did not rectify the defects. She averred the sample house and the house sold to her No.262 are completely different stating she has never occupied the house. She stated that she is seeking the repair charge so that she can repair the house as the defendant does not want to rectify the defects. She sought Kshs. 2.5 million as per report by the quantity surveyor for Kshs. 2,250,694/52 and claimed loss of Kshs. 1,250,000/- from December 2012 till filing of the suit. Mesne profit at a rate of Kshs. 50,000/0 per month.

10. The plaintiff in support of her case lined up three (3) witnesses. **PW2 Chepchirchir Sego**, an Advocate and currently a partner at Robson Harris & Co, Advocates, testified, their firm acted for KCB Ltd and gave an undertaking to defendant on 7th October 2012 for Kshs. 5,000,000/- (*as per Defendant's bundle of documents*) which is still in force. That they received documents but no certificate of practical completion hence they did not pay the money as there was no proper completion. That they issued a demand on 22/4/2014. He produced the letter of undertaking as "**P-exhibit 3**" and demand letter as "**P-exhibit 4**". **PW1** admitted their firm received certificate of occupation but did not receive certificate of practical completion in terms of clause 3.2 of the Agreement dated 2nd November 2011.

11. **PW3** Peter Kaluli Gachinge, a registered practicing Architect; Registration **No. A 1098 (BORAL)** but with **AAK No. 3382**; produced an evaluation Report on suit property which he had visited on 10/4/2014, whereby he noted that only 95% of the work had been done. He stated that certificate of practical completion is issued by Architect whereas certificate of occupation is issued by the local council. He clarified that certificate of practical completion precedes that of the occupation. That partial certificate of occupation should be issued after full completion. That certificate was issued on 4/4/2013 but he visited the premises later and found completion had not been realized. He concluded there was no finishes as a lot was pending such as electrical wiring and fitting, were yet fixed; he noted incomplete bathtubs; leaking ceiling; incomplete electrical wiring; windows not intact and not of dimension; falling cement; stained floor tiles, leaking roof; non fixed toilets, incomplete timber works; uneven stairs; kitchen requiring repainting; manholes had not been covered by airtight covers; covers

in plastic; in parking weed growing in space between cambros; external boundary wall not capped to avoid water damage; gates not to the drop level to prohibit access by animals; gate not closing properly; rood trap door missing; external walls not well done; some doors not fixed completely; ceiling points very weak and could come out; taps loose whereas sample house had been well finished. The house was 5% incomplete and needed to be brought to habitable condition. PW3 produced his report as "**P exhibit 5**" in which he made his recommendation and to which he attached photos in respect of his observations.

12. PW4 Joseph K. Njoroge, a quantity surveyor; Qs 258 current practicing certificate No. 3375, testified that he prepared a BQ Report dated 17th April 2014, which he produced as "**Exhibit P 6**". He estimated the repairs of the house at Kshs. 2,150,694/52 as at 2014 applying the document which are a guide from the registry of works, adding his report was an estimate and that there is an estimate "**ADD**" as a contingency of Kshs. 300,000/- which may or may not be used; that he compared the findings in sample house and show house. **PW4** produced his professional certificate and firm documents as exhibit 7.

Defendant's case

13. The defendant's case is that it admits that by a letter dated 10th March 2011 it offered to sell a 4 bedroom massionette as stated by the plaintiff and after acceptance of the offer by the plaintiff an agreement dated 2/11/2011 was entered into later. That the defendant complied with the terms of the sale agreement "**P exhibit 1**". The Defendant upon compliance with terms of the agreement gave the plaintiff certificate of occupation but the plaintiff breached the agreement by failing to comply with the laid down terms in the agreement and failed to pay the balance of the purchase price.

14. The Defendant called **DW1** Mohammed Maalim Lealmina, a director of the defendant company, who testified that the plaintiff went to the defendant's office wanting to buy a house. She was then taken to Diamond Estate Phase II and agreed to buy house No. 262 after she had been shown the show house. That they agreed on purchase price and she paid deposit after an agreement was drawn on 2/11/2011. The purchase price was Kshs. 11,700,000 and she paid Kshs. 1,200,000, followed by other payments leaving a balance of Kshs. 3.5 million. He stated that the agreement they agreed are standard for the houses; thus the house was to be like the show house. That the defendant got an undertaking from the KCB's lawyers; that the defendant has been waiting for the plaintiff to pay and take her house as the title deed is in her name. **DW1** relied on his bundle of documents marked "**D exhibit 1**". **DW1** stated the undertaking was for Kshs. 5,000,000/- but Kshs. 2,000,000/- was paid. That M/s Robson Harris & Co. Advocates through a letter dated 26/9/2012 at page 34 of the bundle asked for the Title Deed, occupation certificate and other documents which were supplied by the defendant's advocate. That the plaintiff's counsel stated the house required to be repaired. That the plaintiff even had stated they had agreed to re-sale the house which the defendant was not aware of. That the issue of the house being inhabitable according to the defendant came only after KCB withdrew. **DW1** stated the house is good even now terming the quantity surveyor's report not truthful as the house is the same as the show house and has no problems. That the defendant though the agreement had 90 days to pay. She has not completed paying and that even KCB lawyers have not paid. That the property was transferred to the plaintiff on 8/3/2013 as per title **L.R. 110828** notwithstanding non-payment of the balance of Kshs. 3,000,000/-.

15. **DW1** further testified that the house was built as per the show house, and that the plaintiff's claim for repairs and lost rent is not correct. That the plaintiff should pay Kshs. 3,000,000 but the defendant also wants her to forfeit the amount, give them back the title and refund her the amount urging that the defendant have lost and spent money on security. The defendant testified it is the plaintiff who is in breach of the contract.

Site visit by Court

16. After close of the defence case, the court opted to visit the site. The site visit was held on 7/2/2018 by the late Hon. Justice J.L.O Onguto, in presence of the parties and their advocates where the court noted with the parties convenience the following:-

- a) **Bathtub is plastic, not ceramic.**
- b) **Fixing of wardrobe not stated by PW1 to be bad, loose wiring and electricity fitting seen or braking. DW1 explains that this was to be done once house is being occupied to avoid vandalism – loose sockets not properly installed.**
- c) **Ceiling of PVC not gypsum. PW1 says this is different from the show-room but DW1 says variations to material was allowed.**
- d) **Leakages evident on the walls in master bedroom, kitchen also. DW1 denies knowledge of leakages.**
- e) **Under ground water tank reservoir not finalized, tiles to be fitted.**
- f) **PW1 complains kitchen sink area sloppy – finishing.**
- g) **Sockets missing in sitting room and evident wall leakages.**
- h) **Cabro works on packing area not level and poorly done as per PW1 but not DW1.**
- i) **Water meter missing but electricity meter installed.**
- j) **Staircase: falling tiles;**

17. Second site: Show House comparatively found to be as follows:-

- a) Windows have suite frames and glasses. DW1 says house No.262 has aluminum frames which is better and durable.
- b) The ceiling is gypsum.
- c) The bathrub is plastic like in House 262.
- d) Leakages evident, electrical fittings also missing

Noted that staircase is solid and well fitted tiles.

- e) Wardrobes is also MDF like show house.

Common ground

18. In the instant case, there is no dispute that an agreement dated 2/11/2011 was entered into by the plaintiff and the defendant; that the plaintiff has paid Kshs. 8,700,000/- leaving a balance of Kshs.3,000,000/- for which the bank's Advocates gave a professional undertaking for Kshs.5,000,000/- and which undertaking still is in force; that the suit property was incomplete as at the time of the agreement and the plaintiff relied on the basis of the sample shown to her; the sample house formed an integral part of the agreement for sale. The house first completed in 2013; the plaintiff having given an undertaking way above the balance of the price, through her banker's Advocates; that the trial Judge visited the site and noted the conditions of the suit property and the show house; that the defendant gave certificate for partial occupation but not certificate of practical completion; that the suit property has already been transferred to the plaintiff who has charged the same with her bank for Kshs. 7,000,000/- and lastly the plaintiff has not occupied the house for being inhabitable.

19. The Law applicable in determination of this matter is as follows:-

- a) The law of Contract Act.
- b) The law of Evidence Act.
- c) The constitution of Kenya 2010.

Issues of determination

20. I have very carefully considered the pleadings; evidence on record, counsel rival written submissions as well as the oral submissions and all exhibits produced as well as the relevant law in this matter and having done so I have narrowed the issues for determination as follows:-

- a) Whether there is a breach of the contract as between the plaintiff and the defendant and if so who is in breach of the contract?
- b) Whether the defendant's counterclaim can be granted?
- c) What relief can be granted to the plaintiff or the defendant (if any)?

A. Whether there is a breach of the contract as between the plaintiff and the defendant and if so who is in breach of the contract?

21. In the instant case, the sale and purchase of the suit property is not disputed by any of the parties herein, however what is in contention is the deliverable of the Sale Agreement entered into on 2nd November 2011 (*P exhibit 1*) and more particularly none completion as regards finishes of the massionette.

22. In getting to answer to what the deliverable are and to answer the issue paused herein above, it is of paramount importance to go back to the sale agreement and examine what the parties agreed to be bound by.

23. In the case of *Attorney General of Belize et al Vs Belize Telecom Ltd & Another (2009)*, 1WLR 1980 at page 1993, citing Lord Person in *Trollope Colls Ltd Vs North West Metropolitan Regional Hospital Board (1973)* 1 WLR 601 at 609, it was held as follows:-

"The court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves. If the express terms are perfectly clear and from ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable."

24. Further the importance of interpreting contracts strictly was further reiterated in the case of *Curtis Vs. Chemical Cleaning & Dyeing Co. Ltd (1951)*, ALL ER 631 in which Lord Denning held as follows:-

"If a party affected signs a written document, knowing it to be a contract which governs the relations between him and the other party, his signature is irrefragable evidence of his assent to the whole contract, including exception clauses, unless the signature is shown to be obtained by fraud or misrepresentation."

25. The Agreement dated 2nd November 2011 set out the parties duties and obligations: under Clause 3.1 and 3.2 of the Agreement of the parties it is provided:-

"Clause 3.1 - The Vendor will cause to be erected the Massionettes in accordance with plans and specifications approved by the City Council of Nairobi. The sample house, elevations plans and specifications of the said dwelling house are available for inspection by the Purchaser and the Purchaser hereby admit and acknowledge that she has seen the said sample house, elevations plans and specifications and has approved and is satisfied with the same.

Clause 3.2 – 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 the carrying of the works and finishes, workmanship and 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."

26. The completion as per the parties agreement, is spelled out under clause 5.1 which provides:-

"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."

27. Under **Clause 3.2** of the parties agreement it is stipulated that in all matters relating to the carrying of the works and finishes, workmanship and in authorizing any necessary variations the decision of the Vendor’s Architect shall be final and upon 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.

28. It is plaintiff’s case that the defendant did not meet his part of the bargain as no certificate of practical completion was issued by the Vendor’s Architect to the plaintiff and secondly the suit property was to be similar to the show house, however the purported completed house had a list of defects as enumerated by plaintiff, **PW3** and **PW4**. **PW2** testified they could not release money as per undertaking of the suit property had not been completed and as per **PW1**, **PW2**, **PW3** and **PW4** the suit property is inhabitable.

29. It is further noted during the site visit by the trial Judge several defects were noted in the suit property and further that it’s finishes were not as per the show house contrary to what the defendant had caused the plaintiff to believe the suit property would be.

30. The defendant in his evidence averred the suit property was expected to be similar to show house which was complete and that the defendant had offered to complete the house exactly or similar to the sample house. He agreed under Clause 11.2 the suit property was to be like the sample house. He agreed during cross-examination and site visit the suit property was not completed as per sample house and it had several defects. The defects noted by plaintiffs Architect have not been controverted but confirmed during site visit. The house according to **PW3**, plaintiff’s Architect is 5% incomplete. **PW3** stated certificate of practical completion is different from a partial certificate of occupation which should be issued on completion; however when he visited the premises a year after a partial certificate of occupation he had concluded there were no finishes. He enumerated several shortcomings which were confirmed by **DW1** and during the court site visit.

31. As per **Clause 3.2** of the agreement the Vendor’s Architect was to issue certificate of practical completion. According to **PW3**, the Plaintiff’s Architect, certificate of practical completion precedes that of certificate of occupation. That as per **PW1**, the plaintiff and all her witnesses **PW2**, **PW3** and **PW4** the suit property has not been completed and is inhabitable.

32. In the instant suit, the suit property was as per evidence of **PW1**, **PW2**, **PW3** and **PW4** incomplete at the time the defendant purported to have completed the same and released certificate of occupation. Certificate of occupation do not as per evidence of **PW3** confirm that the building is completed. In the Black Law Dictionary Tenth Edition page 272 certificate of occupation is defined as follows:-

"Certificate of occupancy. (1880) – A document indicating that a building complies with zoning and building ordinances, and is ready to be occupied. A certificate of occupancy is often required before title can be transferred and the building occupied."

33. In the instant suit, I find the sample house formed an integral part of the agreement for sale. That the suit property was purported completed in 2013 by which time the plaintiff had Kshs. 3,000,000/- to pay through her bank lawyers, who had given an irrevocable undertaking for Kshs.5,000,000/-, which undertaking is still valid and which covered the entire balance of the purchase price. The plaintiff having paid Kshs. 8,700,000/- and with her valid undertaking still in force and the defendant having not issued certificate of practical completion through the architect and the **PW3**; Plaintiff’s Architect having found that the house was 5% incomplete, and court site visit having exposed several defects, which **DW1**, also confirmed and gave unjustified excuses for the same and **PW4** having through **P-exhibit 5**" confirmed the incompleteness of the suit property for occupy ,as well as several notable differences noted during site visit by the court between the suit property and sample house, I find the plaintiff is not in any breach of the contract on her part. She has demonstrated that she was ready and able to have the amount due released to the Defendant upon issuance of certificate of practical completion by the defendant’s Architect, which has not been issued at any role and even if issued it should consider the similarity of the suit premises and sample house which forms part of an integral part of the agreement.

34. The issuance of the certificate of practical completion and handing over a house completed exactly as the sample house, shown to the plaintiff was as per agreement between the parties a pre-condition to completion. The issuance of the title deed in the name of the plaintiff itself cannot be substituted for clear and unambiguous terms of the contract, which demands issuance of certificate of practical completion and which should not ignore the agreed similar finishing of the suit property as per the show house.

35. The doctrine of estoppel is well captured under section 120 of the Evidence Act which provides:-

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

The defendant who has not complied with particular clauses of the agreement is estopped from alleging that it performed its part of the agreement simply because it gave certificate of occupation to the plaintiff and that the plaintiff has transferred the property into her name. The court cannot allow the defendant to run away from its obligation nor attempt to re-write the agreement between itself and the plaintiff but will endeavor to uphold the sanctity of the lawful commercial transactions existing between the parties (*see the case of Eunice Grace Njambi Kamau & another Vs. Attorney General & 5 others (2013) eKLR and Hassan Zubeidi Vs. Patrick Mwangangi Kibaiya & another (2014) eKLR*).

36. Having said that much, I find that the defendant breached the contract between itself and the plaintiff dated 2nd November 2011.

B. Whether the Defendant's counter-claim can be granted?

37. The defendant urges the plaintiff was in breach of the contract. That the firm of M/s Robinson Harris & Company Advocates had undertaken to pay the balance of Kshs. 5,000,000/- within 14 days of receiving the documents enumerated in their letter. One of the documents being certificate of occupation from the Nairobi City Council delivered on 8th April 2013. Whereas other completion documents had been forwarded on 20th February 2013. That there is no dispute the plaintiff and her Advocate acknowledge the balance due is Kshs. 3,000,000/- as per letter dated 12th April 2013 and that the balance was demanded through a letter dated 15th May 2013.

38. Having found that as per parties agreement dated 2nd November 2011 the defendant has not furnished the plaintiff with certificate of practical completion and the defects enumerated by **PW1**, **PW3** and **PW4**, also noted by court during site visit, I find the defendant in breach of the contract. I also find the defendant has no basis of demanding payment of the balance of Kshs. 3,000,000/- admitted to be due by the plaintiff, as the defendant is yet to comply with terms of the agreement dated 2nd November 2011.

39. I therefore find and hold the defendant counter-claim is not proved to the required stand and of proof and should not be granted.

C. What relief can be granted to the plaintiff and the defendant?

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 B Q Report "**P-exhibit 6**" 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.

41. Under prayer (d) the defendant submits that "**P-exhibit 1**" is clear on the mode of termination of the contract in which the plaintiff had the option of issuing a notice to rescind the contract under Clause 9.2 but choose through her advocate to issue 21 days completion notice to the defendant. **PW2** indicated no 21 days completion notice was issued but the plaintiff instead of rescinding the contract, went ahead and even transferred the title in her favour. She even changed the property and obtained a loan with her bank for Kshs. 7,000,000/- which she is still enjoying. I find the plaintiff's prayer to be premature as she is seeking such a prayer having not exhausted the rescission option as provided in the contract. From her conduct I am satisfied save for the defects noted and which can be remedied the plaintiff had made her mind to keep the property. Having transferred the property into her name and having charged the property with her Bankers, she has implied that she is not willing to take the rescission option but to proceed to keep the property. I find no basis for ordering refund to the plaintiff of any deposit paid leave alone Kshs. 8,700,000/-.

42. The plaintiff under prayer (e) is seeking in addition to either (a) (b) (c) and (d) in her plaint, the defendant do compensate the plaintiff for loss of use from December 2013 till payment in full. She avers, the court should award her mesne profit at a rate of Kshs. 50,000/- per month being the sum of the rent available in the neighborhood. The plaintiff in her evidence did not produce a Valuation Report on the rent payable to similar house within the neighborhood nor did she adduce evidence on how she arrived at such a figure. She gave what she referred to as generally charged rent in the neighborhood. I find that her evidence amounts to mere speculation in absence of a professional or Valuer's Report to back her allegation. She did not further adduce evidence supported by any data on financial loss arising out of non-user of the suit property. **PW3** stated the house was incomplete and inhabitable. I am alive to the fact that the plaintiff has had the property transferred to her in 2013, charged the same with her bankers for Kshs. 7,000,000/-. She has indeed not lost user of the premises as she has the title and has charged the property from which she has benefitted. There is further no evidence that she tried to let the premises or occupy the same. She has not paid in full the balance of the purchase price nor did she take any option to rescind the contract. I find no justification in this matter for awarding the plaintiff mesne profit for non-user of the premises. The evidence tendered do not meet the parameters for granting the amount sought under prayer (e) of the plaint.

(See the case of **Greenspan Investment Limited Vs Benedicta Gatwiri Moroga & another (2018) eKLR** page 4 prayer 17).

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/-.

44. The upshot is that the plaintiff succeeded in her claim. The defendant counter-claim fails. I make 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 (i), (ii), (iii), (iv), (v) not proved and is dismissed.

i) The plaintiff is awarded cost of the counter-claim.

Dated, signed and delivered at Nairobi this 27th day of September, 2018.

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J .A. MAKAU

JUDGE