



**Muriuki v Njuguna & 3 others (Environment & Land Case
666 of 2009) [2023] KEELC 17346 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEELC 17346 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 666 OF 2009**

MD MWANGI, J

APRIL 25, 2023

BETWEEN

KENNETH KIMANI MURIUKI PLAINTIFF

AND

JAMES CHEGE NJUGUNA 1ST DEFENDANT

CITY COUNCIL OF NAIROBI 2ND DEFENDANT

THE HON. ATTORNEY GENERAL 3RD DEFENDANT

EMMANUEL KAZUNGU MASHA 4TH DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide the Plaint dated 28th December, 2009. The said Plaint was amended twice with the last amended plaint being that of 6th May, 2013 filed in court on 14th May, 2013. The Plaintiff seeks the following orders:-
 - a. A Permanent injunction restraining the 1st Defendant, his servants and/or agents in any manner howsoever from trespassing, constructing, alienating, selling, transferring, wasting, leasing and/or disposing of the suit property being PLOT NO. B-90 UMOJA INNERCORE SECTOR II NAIROBI/ BLOCK 83/14/112.
 - b. An order of eviction against the 1st Defendant from the suit property being PLOT NO. B-90 UMOJA INNERCORE SECTOR II NAIROBI/ BLOCK 83/14/112.
 - c. A declaration that the Plaintiff is the rightful owner of the suit premises being PLOT NO. B-90 UMOJA INNERCORE SECTOR II and the letter of Allotment dated 18th January, 1994 issued by the 2nd Defendant be revoked and/or cancelled.



- d. An order directed at the Land Registrar, Nairobi to revoke or cancel the Certificate of Lease issued in favour of the 1st Defendant in respect of that property known as Nairobi/ Block 83/14/ 112.
 - e. In the alternative to prayers a-d, an order directed at the 4th Defendant to refund the sum of Kshs. 900,000/= paid for the purchase of Nairobi/Block 83/14/112 as well as general damages as may be determined by this Honourable Court.
 - f. Costs of this suit.
 - g. Interest on (d) above.
 - h. Any other relief that this Honourable Court may deem fit to grant.
2. The Plaintiff's claim is that he purchased Plot No. B- 90 Umoja Innercore Sector II (herein after known as "the suit property") from the 4th Defendant in May 2009 at a consideration of Kshs. 900,000/=. That after the said purchase, the 4th Defendant executed a Special Power of Attorney in his favour. The Plaintiff then took possession of the suit property.
 3. It is the Plaintiff's case that vide a Letter of Allotment dated 20th August, 2002, the 2nd Defendant repossessed the suit property from its previous owner and allocated it to the 4th Defendant. That it was only upon instituting this suit that the Plaintiff was informed by the 1st Defendant that he too had purchased it from one James Kimotho Kiboi who had been issued with a Letter of Allotment dated 18th January, 1994 by the same 2nd Defendant.
 4. That 1st Defendant further informed the Plaintiff that the suit property had since been registered at the Lands Office and a Certificate of Lease issued being Nairobi/ Block 83/14/112.
 5. The Plaintiff claims that he has all along paid the relevant City Council rates and Land Rent to the 2nd Defendant in respect of the suit property.
 6. The Plaintiff claims that on or about 21st December, 2009 the 1st Defendant illegally trespassed upon the suit premises and commenced construction works including fencing the suit property with some iron sheets. This was despite the 1st Defendant knowing that the Plaintiff was the lawful owner of the suit property. That is what prompted him to seek for a restraining order against the 1st Defendant to stop the trespass.

1st Defendant's case

7. The 1st Defendant filed a statement of Defense dated 7th April, 2010. He avers that the suit property had been allocated to one James Kimotho Kiboi by the defunct Nairobi City Council way back in the year 1994. The said James Kimotho was issued with a Certificate of Lease and the property registered as LR No. Nairobi/ Block 83/14/112. The 1st Defendant purchased the suit property from the said James Kimotho and got registered as the proprietor thereof.
8. The 1st Defendant further avers that contrary to the Plaintiff's allegations that the plot had been allocated to one Emmanuel Kazungu Masha in 2002, the suit property had already been registered at the Land Registry and was not available then for re-allocation and or re-possession.
9. The 1st Defendant asserts that he is indeed the lawful proprietor of the suit property and it is in fact the Plaintiff who is making unlawful attempts to trespass thereupon. That the Plaintiff has no proprietary rights whatsoever over the suit property.



10. He claims that the Plaintiff's suit is fatally defective for want of locus standi as the Power of Attorney relied upon is not registered. The Sale Agreement equally offends the provisions of the [Stamp Duty Act](#) and cannot be admitted in evidence and it cannot confer ownership. The Plaintiff's suit should therefore be dismissed with costs.

2nd Defendant's case

11. The 2nd Defendant's Statement of Defence is dated 20th May, 2014 and filed on the same day. The 2nd Defendant admits that the Plaintiff being in possession of Plot No. B 90 Umoja Innercore, Sector II and having purchased the same from one Emmanuel Kazungu Masha, the 4th Defendant herein.
12. The 2nd Defendant avers that on 12th July, 2002 vide a Notice in the Daily Nation Newspaper it warned undeveloped property owners of impending repossession. Subsequently, the Plaintiff's Plot was repossessed for being undeveloped and allocated to the 4th Defendant vide the Letter of Allotment Ref. HDD/64.pa/nkm/408 dated 20th August, 2002.
13. The 2nd Defendant denies having cleared and receipted payments in respect of a Certificate of Lease for Nairobi/ Block 83/14/172. It further denied giving any approval in respect of any construction on the suit premises as alleged by the 1st Defendant. It therefore prays that the Plaintiff's suit be dismissed with costs.

4th Defendant's Defence

14. The 4th Defendant's Statement of Defence is dated the 30th April, 2014 and filed on the 2nd May, 2014. He avers that when he was allocated the suit property in 2002 by the 2nd Defendant he paid all the dues. He was even issued with a Clearance Certificate. According to the 2nd Defendant's records, the suit property was originally allocated to one Gilbert Githuku Njoroge and not James Kimotho Kiboi as alleged by the 1st Defendant.
15. The purported Letter of Allotment in the name of James Kimotho Kiboi is not a genuine document but a photocopy produced to justify the 1st Defendant's illegal acquisition of ownership documents. Therefore, the registration of a lease and the Certificate of Lease issued therein in favour of one James Kimotho Kiboi is a nullity.
16. The 4th Defendant avers that the records held by the 2nd Defendant do not reflect any genuine payments of stand premium and annual rent made by the alleged James Kimotho Kiboi. This, according to the 4th Defendant proves forgery of the allotment letter resulting into the issuance of an illegal lease and certificate of lease. Consequently, the 1st Defendant's title can only be vindicated through the production the original letter of allotment, receipts for payment of stand premium, annual rent and the original lease issued dated them 2nd Defend.
17. He avers that he has no obligation to refund the purchase price to the Plaintiff and asserts that he is the bona fide allottee of the suit property.

Plaintiff's reply to Defence

18. In his reply to the Defence by the 1st Defendant, the Plaintiff avers that he conducted due diligence and confirmed the authenticity of the 4th Defendants ownership.
19. The Plaintiff avers that he is entitled to quiet possession of the suit property since he is a bona fide purchaser for value and that the 1st Defendant's title should be cancelled having been acquired fraudulently.



Evidence adduced

20. The case proceeded to hearing with each party calling one witness.

Evidence adduced on behalf of the Plaintiff

21. Mr. Samuel Muiruri Gito testified as PW 1. He stated that the Plaintiff is his son. He is a donee of the Plaintiff's Power of Attorney dated 21st August, 2009. He adopted his Witness Statement dated 7th December, 2011 as his evidence in chief. He also produced sequentially the documents contained in the Plaintiff's List of Documents dated 10th December, 2009, 7th December, 2011, 16th March, 2012 and that of 22nd June, 2015 as Plaintiff's Exhibits.
22. In cross-examination by the 1st Defendant's Counsel, PW1 admitted that the Power of Attorney was not registered. He further stated that he was not aware that the title was first registered in the name of James Kimotho Kiboi. He too was not aware of the transfer from James Kimotho Kiboi to the 1st Defendant with the consent of the 2nd Defendant. He however confirmed that he had seen the Stamp of the 2nd Defendant on the 1st Defendant's documents authorizing the transfer to the 1st Defendant.
23. The witness further affirmed that it was indeed the 1st Defendant who was in occupation of the suit property though illegally. He confirmed that he had not sued James Kimotho Kiboi as a party in the proceedings herein.
24. When cross-examined by Counsel for the 3rd Defendant, PW1 stated that he bought the plot from the 4th Defendant after he had shown him an Allotment Letter. He was not aware whether the 4th Defendant had paid the charges payable to the 3rd Defendant or whether he had documents in support of the payments.
25. PW1 while referring to the Allotment Letter stated that the 4th Defendant ought to have paid at least 30% of the payable amounts in 30 days but he apparently paid after a period of 7 years. The Allotment Letter stated that the offer would be withdrawn without notice to the allottee and given to another person in case of non-compliance. Unfortunately, PW 1 stated that he had not read the allotment letter.
26. PW1 further claimed that he never attempted to process the title at the Ministry of Lands. That he was satisfied confirming with the City Council of Nairobi. He had sued the Attorney General on behalf of the Land Registrar for issuing the title to the 1st Defendant. He had no document from the Ministry of Lands showing the 4th Defendant owned the Plot.
27. In re-examination, PW 1 asserted that he bought the Land from the 4th Defendant in 2009 as per the filed agreement. He claims that the 4th Defendant showed him a Letter of Allotment from the 2nd Defendant. The receipt he had been given by the 4th Defendant confirms payment of Survey Fees and bears the stamp of the 2nd Defendant. It is the stamp of the 2nd Defendant that convinced him to buy the plot. He does not know why the 2nd Defendant accepted money from the 4th Defendant after 7 years as shown in the documents.
28. He further states that the 1st Defendant erected a fence after he filed this suit. That he visited the land with his son after buying it and there were no developments on the land at all. The other developments in the suit property were done in 2013.

4th Defendant's case

29. Mr. Emmanuel Kazungu Masha, the 4th Defendant herein, testified as DW 1. He adopted his Witness Statement dated 12th October, 2015 as his evidence in chief. He further produced the documents on



the 4th Defendant's List of Documents dated 12th October, 2015 as DE 1-5 in the order in which they are listed.

30. During cross-examination by the Plaintiff's Counsel, DW1 stated that he sold the suit property to the Plaintiff in 2009. The plot had been allocated to him in 2002. He had been in possession of the plot for all that time and it had been vacant. He claims that he showed the Plaintiff the plot physically and the purchase price of the plot was Kshs. 900,000/=.
31. The 4th Defendant confirmed with the 2nd Defendant-City Council of Nairobi that there was no allocation to one James Kimotho Kiboi- whom the 1st Defendant claims to have bought from. Much later, they learnt that 1st Defendant had erected a building on the plot.
32. The witness testified that the 2nd Defendant in their Defence confirms that they had no records of one James Kimotho Kiboi. He supports the Plaintiff's case and the prayers he has sought before the Court.
33. In re-examination, DW1 stated that he didn't support prayer (e) by the Plaintiff in the Re-amended Plaint of 6th May, 2013. That he was genuinely allocated the plot by City Council of Nairobi after he paid all the monies required by the Housing Department at Dandora.

1st Defendant's case

34. James Chege Njuguna, an accountant based in the USA-Indiana State testified virtually as DW 2. He adopted his Witness Statement dated 6th August, 2014 as his evidence in chief. He also produced the documents on the 1st Defendant's List of Documents dated 6th August, 2014 as exhibits and marked as 1st DE 1-6 in the order in which they are listed.
35. DW2 testified that the person who sold him the land had a title. The City Council of Nairobi issued the consent to transfer and did not raise any issues/objections to the legal ownership of James Kimotho Kiboi. He stated that he acquired the land regularly and procedurally.
36. In cross-examination by Counsel for the Plaintiff, DW2 confirmed that he bought the property from one James Kimotho Kiboi. By the time the case was filed, Mr. Kimotho Kiboi had died. He could not recall exactly when he passed away. He confirmed that he got a consent from the City Council of Nairobi.
37. He asserted that he took possession of the suit property in either December 2008 or early 2009. He constructed a block of flats on the land around 2011. By 2009, he had not put up a structure on the property.
38. DW2 case was that when he bought the land, Kimotho gave him the certificate of Lease but did not tell him how he had acquired the property. He stated that he was not aware if Emmanuel Kazungu Masha, the 4th Defendant had been allocated the plot, or made any payments to the City Council of Nairobi.
39. In re-examination, DW 2 stated that as indicated in his Witness Statement he had explained that the High Court declined to issue an order of injunction as prayed for by the Plaintiff in his application. He urged the court to look at the totality of the records before it. The agreement between Mr. Kimotho and himself had been annexed in one of the affidavits before the court.

Further Plaintiff's case

40. Kenneth Kimani Muiruri, the Plaintiff in the case, testified as PW 2. He informed the court that Samuel Muiruri, PW1 was his father and he was the one who had transacted on his behalf. He too was the one who had located the piece of land and PW2 authorized him to proceed on his behalf since he was based in the USA.



41. He adopted his Witness Statement dated 6th November, 2022 as his evidence in chief. He further associated himself with the testimony of PW 1 together with the documents that were produced in court.
42. In cross-examination by the 1st Defendant's counsel, PW2 confirmed that he did not conduct due diligence on the suit property. He had entrusted his father.
43. In Re-examination, it was PW 2's evidence that he had been paying rates to the Nairobi City Council.
44. He further stated that he had seen some documents acknowledging Kazungu as the owner of the property. PW 1 had been paying the rates on his behalf. He claims that he had bought the plot for purposes of investment and earning an income.

Court's Directions

45. At the close of the hearing, the court directed parties to file written submissions. The Plaintiff and the 1st Defendant complied and the court has had the opportunity to read their submissions that now form part of the record of this court.

Issues for determination

46. Having considered the pleadings filed by the parties in this matter, the evidence adduced at the hearing and the submissions by the parties, this court is of the considered opinion that the issues for determination in this matter are as follows:-
 - a. Whether the Plaintiff has made a case for the revocation or cancellation of the certificate of lease in the name of the 1st Defendant.
 - b. Whether the plaintiff has proved ownership or any valid claim over the suit property.
 - c. Whether the Plaintiff is entitled to the orders sought.
 - d. Whether the Plaintiff is entitled to the alternative prayer for refund of monies paid to the 4th Defendant.
 - e. Whether the Plaintiff would be entitled to reliefs other than the ones specifically pleaded in his Plaintiff.

Analysis and determination

A. Whether the Plaintiff has made a case for the revocation or cancellation of the certificate of lease in the name of the 1st Defendant

47. From the evidence presented before the court, it is clear that the subject property is registered and has a certificate of title in the name of the 1st Defendant. The Plaintiff in his Plaintiff actually prays for an order directed at the Land Registrar, Nairobi to revoke or cancel the certificate of lease issued in favour of the 1st Defendant in respect of the property known as Nairobi/Block 83/14/112.
48. The law of this country as regards the sanctity of title to land is clearly spelt out in the [Land Registration Act](#) (hereinafter referred to as "the Act"). Section 26 of the Act provides that:-

"The certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible



owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except -

- (a) on the ground of fraud or misrepresentation to which the person is proved to be a party; or
- (b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

49. I have carefully perused the re-amended Plaintiff, last amended on 6th May 2013. Though the Plaintiff prays for the revocation or cancellation of the 1st Defendant's title, it is not clear from the re-amended Plaintiff the grounds upon which the Plaintiff's prayer is based.
50. At paragraph 5A of the re-amended Plaintiff, the Plaintiff avers that upon filing the present suit, the 1st Defendant informed him that he had purchased the subject property from one James Kimotho Kiboi who had been issued with a letter of allotment by the 2nd Defendant dated 18th January, 1994 in respect of Plot No. B90 Umoja Innercore Section II. At Paragraph 5B, the Plaintiff further states that the 1st Defendant also informed him about the subsequent registration of the plot and issuance of the lease. That is how the plot became Nairobi/Block 83/14/112.
51. The Plaintiff does not raise any issue or complaint against the registration of the subject property or the subsequent transfer of the title to the 1st Defendant by the 1st registered proprietor. He merely leaves it at that in his pleadings.
52. The 1st Defendant presented before the court the evidence of registration of the suit property which demonstrates that the property was registered way back on 31st March 2003 and a certificate of lease issued in the name of one James Kimotho Kiboi. This is the certificate of lease that was subsequently transferred to the 1st Defendant James Chege Njuguna, on 31st December 2003.
53. Obviously, even if the court were to order the revocation or cancellation of the certificate of lease in the name of the 1st Defendant, the title would revert to the previous owner James Kimotho Kiboi, not to the Plaintiff nor to the 4th Defendant.
54. As I have already pointed out, the Plaintiff has not laid the basis for the cancellation or revocation of the 1st Defendant's title in any event. He has not pleaded any of the grounds enumerated under Section 26 of the [Land Registration Act](#).
55. If the Plaintiff was alleging fraud as he purported to in his evidence in chief, he ought to have specifically pleaded in his Plaintiff.
56. Tunoi J.A. (as he then was), in the case of *Vijay Morjaria Vs Nansingh Madhusingh Darbar & another* [2000] eKLR stated that:-

“It is well established that fraud must be specifically pleaded and the particulars of fraud alleged must be stated on the face of the pleading. The act alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”



57. The court in the case of *Gichinga Kibutha Vs Caroline Nduku* (2018) eKLR made a similar holding but went on to add that:-

“It goes without saying that a party is bound by their own pleadings and the evidence they adduce in court. The purpose of pleadings is to ascertain with clarity the matters on which parties disagree and points of agreement so as to ascertain matters for determination.”

58. The conclusion is that the Plaintiff has not established the grounds for the cancellation and or revocation of the 1st Defendant’s title.

B. Whether the plaintiff has proved ownership or any valid claim over the suit property

59. The Plaintiff’s case is that he purchased the suit property from the 4th Defendant who had allegedly been allocated the plot in the year 2002 by the Clerk of the City Council of Nairobi (then). The Plaintiff then purchased the plot from him in the year 2009 for a consideration of Kshs.900,000/=.

60. From the evidence before the court, the suit property was registered in the year 2003. So, by the time the Plaintiff was purportedly purchasing it from the 4th Defendant it had a title which, by that time was already in the name of the 1st Defendant.

61. In cross-examination by the 1st Defendant’s advocates, Ms. Kalinga, the Plaintiff who testified in this matter as PW2 confirmed that he did not conduct any due diligence before purchasing the suit property from the 4th Defendant. He relied on his father who informed him that the 4th Defendant had allotment letters. It was on that basis that the Plaintiff proceeded to authorize the purchase the property on his behalf.

62. In the case of *Wangui Kathryn Kimani vs County Government of Kiambu & another Nairobi ELCC 773 of 2014*, this court relying on a legion of authorities held that an allotment letter on its own does not confer title nor proprietary interests on land. It is merely a letter of offer; it is not a title to property. The 4th Defendant did not therefore have a good title which he could have passed to the Plaintiff. The 4th Defendant’s claim of ownership was premised on a mere letter of offer. That is no proof of title.

63. The clear duty on the part of the purchaser in a contract of sale of land, is to conduct due diligence and inform himself on all the relevant aspects concerning the property that he was seeking to purchase. The rule of *caveat emptor* applies to contracts for the sale of land. Where a purchaser fails to conduct due diligence on the title of the seller before committing his money, he has only himself to blame.

64. The Plaintiff placed heavy reliance on the 2nd Defendant’s statement of defence which he argued was in support of his case in regard to the allegation of the allotment letters having been issued to the 4th Defendant after an alleged repossession from the previous allottee. Unfortunately the 2nd Defendant did not call a witness during the hearing of the case. The import of the failure by the 2nd Defendant to call evidence is best summarized by the holding in the case of *Janet Kaphiphe Ouma & v. Marie Stopes International(Kenya) Limited (Kisumu HCCC No. 68 of 2009)* where Lady Justice Ali Aroni J. (as she then was), cited with approval the holding in the case of *Edward Muriga Vs Nathaniel D. Schulter (Civil Appeal No. 23 of 1997)* where the court stated that:-

“Apart from filing its statement of defence, the Defendant did not adduce any evidence in support of the assertion made therein. The evidence of the 1st Plaintiff and that of the witness remain uncontroverted and the statement in the defence therefore remain a mere assertion.”



65. That is the position in this matter. The failure by the 2nd Defendant to call a witness in evidence means that the allegations in its statement of defence remains as such; mere allegations. They have not been proved and the court cannot therefore rely on them in making the determination in this matter.
66. The court therefore finds that the Plaintiff has not proved ownership or any valid claim of ownership over the suit property.

C. Whether the Plaintiff is entitled to the orders sought against the 1st Defendant

67. Going by the findings above, the Plaintiff is not entitled to any of the orders sought against the 1st Defendant.

D. Whether the Plaintiff is entitled to the alternative prayer.

68. The plaintiff in the re-amended Plaintiff has an alternative prayer seeking a refund of the sum of Kshs.900,000/= from the 4th Defendant being the money paid for the purchase of the suit property and general damages as may be determined by the court.
69. The fact that the Plaintiff paid the sum of Kshs.900,000/= to the 4th Defendant as the purchase price for the suit property which is not disputed by the 4th Defendant. The Plaintiff produced in evidence the agreement with the 4th Defendant confirming the transaction. On the other hand, the 4th Defendant confirmed in his testimony that he entered into an agreement for sale of plot number B90, Umoja Inner-core Section II with the Plaintiff on 29th May 2009 and received the full purchase price of Kshs. 900,000/-.
70. From the foregoing findings of the court, the 4th Defendant did not pass a good title to the Plaintiff. The Plaintiff is therefore entitled to a refund of the consideration paid pursuant to that impugned sale agreement.
71. The court's finding is that the Plaintiff's claim against the 4th Defendant has been proved. I therefore allow the Plaintiff's claim against the 4th Defendant for a refund of the sum of Kshs.900,000/=. This being a specific damages claim, it shall attract interest at court rates from the date of filing suit against the 4th Defendant, that is, 14th May 2013 until payment in full.
72. Regarding the claim for general damages, I will be forthright and state that the law is settled that general damages are not awardable for breach of contract or breach of contractual obligations. The holdings in *Dhavamshi Vs Karsan (1974) EA 41*, *Securicor Courier (K) Ltd Vs Benson David Onyango & another [2008] eKLR* and *KWFT Vs Martha Wangari Kamau (2021 eKLR)* are clear on that issue of general damages. Accordingly, the claim for general damages by the Plaintiff against the 4th Defendant fails.

E. Whether the Plaintiff would be entitled to reliefs other than the ones specifically pleaded in his Plaintiff

73. In his submissions, the Plaintiff pointed out that the last prayer in his Plaintiff is for "any other relief the court may deem fit to grant". He prays that under this prayer, the court orders the 2nd Defendant to not only pay general damages prayed for but exemplary damages as well.
74. I have already made a finding to the effect that general damages are not payable in cases of breach of contract.
75. I must however emphasize that parties are bound by their pleadings. For the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case, or relief for that matter, without amending his pleadings appropriately. The court itself is bound by



the pleadings. It is pleadings that demarcate the scope of a suit in terms of the issues for determination and the kind of orders to be granted.

76. In that regard I am guided by the decision in the case of the Independent Electoral and Boundaries Commission – Vs – Stephen Mutinda Mule & 3 others (2014) eKLR. The court quoted with approval the Malawi Supreme Court of Appeal in the case of Malawi Railways Limited Vs Nyasulu (1998) MWSC 3, where the court had in turn quoted an article by Sir Jacob entitled “The Present Importance of Pleadings” published in 1960, where the author had stated that:-

“As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice.

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called “Any Other Business” in the sense that points other than those specific may be raised without notice.”

77. This court declines the invitation by the Plaintiff to venture outside the agenda set by the parties themselves in this matter through their pleadings. The prayer for general and exemplary damages against the 2nd Defendant is disallowed.
78. On the issue of costs, the court awards the 1st Defendant costs of the suit as against the Plaintiff only. The real dispute in this matter was between the Plaintiff and the 1st Defendant. As between the Plaintiff and the 4th Defendant, the court awards the Plaintiff costs against the 4th Defendant to be assessed on the basis of the award of Kshs.900,000/= under the Schedule applicable to claims before the Magistrate Courts in the Advocate Remuneration (amendment) Order.

Final disposition

79. The final disposition is that:-
- a. The Plaintiff’s case against the 1st, 2nd, and 3rd Defendants is dismissed with costs awarded to the 1st Defendant only.
 - b. The Plaintiff’s alternative prayer against the 4th Defendant is allowed for the sum of Kshs. 900,000/ with interest at court rates from the date of filing suit against the 4th Defendant, that is, from 14th May 2013 until payment in full.
 - c. The Plaintiff is awarded costs against the 4th Defendant to be assessed on the basis of the award of Kshs.900,000/= under the Schedule applicable to claims before the Magistrate Courts in the Advocate Remuneration (amendment) Order.



80. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 25TH DAY OF APRIL,
2023**

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kalinga for the 1st Defendant

No appearance for the Defendants

Court assistant - Yvette

M.D. MWANGI

JUDGE

