Gulamhussein v Kenya Railways Corporation Limited (Environment & Land Case 46 of 2018) [2025] KEELC 2845 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KEELC 2845 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 46 OF 2018

LL NAIKUNI, J

MARCH 21, 2025

BETWEEN

GULAMHUSSEIN FAKRUDIN GULAMHUSSEIN ..... PLAINTIFF

AND

KENYA RAILWAYS CORPORATION LIMITED ..... DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable court pertains to a civil suit instituted vide the Further Amended Plaint dated 27th September, 2021. It was by Gulamhussein Fakrudin Gulamhussein, the Plaintiff herein against Kenya Railways Corporation Limited, the Defendant herein.

2. Upon service of the pleading and summons to enter appearance, the Defendant entered appearance and subsequently filed their amended Statement of Defence dated 15th October, 2021.

3. It is instructive to note that pursuant to the consensus by the parties, on 6th December, 2024, the Honourable Conducted a site visit ("Locus in Quo"). Subsequently, a report to that effect was prepared and shared with parties for their further input and which has been attached as part of this Judgement for ease of reference hereof.

II. Description of the parties

4. The Plaintiff was described as an adult male of sound mind who lived in Mombasa within the Republic of Kenya. The Defendant was described as a Corporation established under the State Corporation Act, Cap 446 of the Laws of Kenya.

III. Court directions before the hearing

5. Nonetheless, all the parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010, the Honourable Court fixed the Plaintiff's case for hearing by adducing of "Viva Voce" evidence on 14th March, 2022. Thereafter, the Plaintiff which they marked his case closed on 19th March, 2024 and opened the Defendant's case. The Defendant called one witness - DW 1 who testified on 22nd July, 2024 and closed their case on the same day.

IV. The Plaintiff's case

6. From the filed pleadings, it is the Plaintiff's case that on or about the time between 29th August and 7th September, 2009, the Defendant offered to lease out one acre or thereabout of its land situated at Changamwe to the Plaintiff. Pursuant to that offer and understanding, the Plaintiff entered into a Lease Agreement with the Corporation to lease the said land for the term of six years from the 1st day of October, 2009 until the 30th of September, 2015 at an annual rate of Kenya Shillings Six Hundred and Fifty thousand (Kshs. 650,000/-).

7. However, in the course of time, the Defendant were in total breach of the contract as they outrightly failed to fulfill all its terms and conditions stipulated thereof. The Plaintiff relied on the following particulars of breach of contract:-

    a. The Defendant evicted the Plaintiff contrary to the terms of the agreement. The Defendant illegally terminated the lease agreement contrary to the period of determination of the lease as provided in the terms without reason or notice and proceeded to issue a lease to the 3rd Party over the same premises to the detriment of the Plaintiff.

    b. In breach of the said contract and in total disregard thereof the Defendant had failed to deliver the vacant possession of the land as per evicted the Plaintiff contrary to the agreement. Despite the terms of the lease agreement and request made by the Plaintiff to the Defendant, the latter has failed, refused and /or ignored to honor its obligations under the agreement.

    c. As a result the Plaintiff had suffered loss as he continue to be denied entry in to the property. He had also been restrained to commence any construction and business on the property all of which he held the Defendant liable.

8. On the particulars of loss the Plaintiff relied on the following:-

    a. Application fees for the lease Kshs. 5,000/-

    b. Forfeited-payment Loss of construction materials Kshs. 6,800,000/-

    c. Loss of use and revenue from parking space - Kshs 22,500/- (per day from 1st October, 2009 to 30th September, 2015)

    d. Quarterly paid rent in advance - Kshs.162,500/-

    e. Costs of drawing lease agreement - Kshs.11,600/-

    f. Costs of registration of lease agreement - Kshs. 8,840/-

    g. Surveyor's fee for demarcation of the plot - Kshs. 25,000/-

9. Therefore, the Plaintiff claimed for damages for breach of contract and for loss of income from the Defendant. The subject matter land was designed to hold a minimum of 45 vehicles parking at a

daily rate of Kenya Shillings Twenty Thousand Five Hundred (Kshs. 22,500/-) cumulatively hence the plaintiff suffered loss of income to the same extent until the 30th September 2015.

10. Despite demands and notice of intention to sue given to the Defendant, it had failed, refused, and/or neglected to pay the said sum or any amount thereof. There was no pending suit or previous proceedings in any other court in the Republic of Kenya against the Defendant filed by the Plaintiff in respect of the same matter. The Cause of Action arose at Mombasa within the jurisdiction of this Honourable court.

11. The Plaintiff prayed for Judgment against the Defendant for:-

    a. Special damages for Kshs. 7,012,940/-.

    b. Loss of income at Kshs. 22,500/- per day from 1/10/2009 to 30/09/2015 till payment is in full.

    c. Interest on (a)and (b) above.

    d. Costs of this suit.

    e. Such further other reliefs as this Honourable court may deem fit and just to grant.

12. The Plaintiff called his witness on 14th March, 2022 at 12.00 noon who testified as follows:-

A. Examination of PW 1 by M/s. Maiga Advocate.

13. PW - 1 testified under oath and in English language. He identified himself as Gulamhussein Farkrudin Gulamhussein. He was a citizen of Kenya with all the particulars as indicated in his national identity card shown to court. He stated that he resided at Mombasa and was a dealer of Kenol Petrol Station on Jomo Kenyatta street. He signed a further witness statement dated and filed on 31st January, 2022. It was endorsed and adopted as his evidence in chief. The Plaintiff filed a further supplementary list of documents dated 31st January, 2022 which was also admitted. PW – 1's evidence was that he was in search of buying a plot owned by Kenya Railways Corporation Ltd. The witness proceeded and inquired for the property. Upon making the inquiry, he was told it was available upon paying a sum of Kenya Shillings Five Thousand (Kshs. 5,000/-).

14. PW - 1 paid for the sum as shown from the Plaintiff Exhibit Number 2 dated 29th May, 2009. He then submitted the application on page 2 - Plaintiff Exhibit Number 3. PW - 1 was issued with a Letter of Offer dated 7th September, 2009 addressed by the Defendant to himself with terms and conditions – lease land for a duration of 6 years from 1st October, 2009 for parking bay purposes. It was a 1 acre Admonish charges Kshs. 100,000/-, Annual rent Kshs. 650,000/- per year escalating every two years security deposit of Kshs. 108,000/- and stamp duty Kshs. 840,000/- and parking fees Kshs. 15,000/-.

15. PW - 1 told the court that he was to pay the sum in 14 days from signing the Letter of Offer. On 9th September, 2009, he paid a sum of Kenya Shillings Three Eighty Five Thousand Five Hundred (Kshs. 385,500/-) and issued with a receipt as proof of payment/deposit to K.C.B. This was Plaintiff Exhibit Number 4. He was issued with an official receipt No. 94839 and dated 8th November, 2009 of the said amount by Kenya Railways – Plaintiff Exhibit Number 5. They sent him to their lawyer M/s. Miller & Company Advocates who prepared the Lease Agreement. He paid a sum of Kenya Shillings Eleven Thousand Six Hundred (Kshs 11,600/-) and was issued with a receipt dated 28th September, 2009 produced as Plaintiff Exhibit Number 6. He signed the Lease Agreement as seen from Pages 8 -18 – "Plaintiff Exhibit Number 7".

16. With reference to clause 20 of the Lease Agreement on the Termination of Lease. The witness confirmed that the Lease Agreement was based on the terms and conditions on the Letter of Offer. He

also wished draw Court's attention to Clause 22.4 on arbitration. He received the lease for signing on 29th September, 2009. He signed the same in the presence of his advocate – the Plaintiff and Mr. Eric Otieno advocate and sent it back to Nairobi. They send it back to him after registration and payment of stamp duty - on 22nd April, 2010 and stamped Kenya Railway signed by one of the Directors. It bore then Serial No. for the seal/Director – S. No. 00130, (Serial Number for the property). The Lease was attached to the Development Plan for the Plot – Plaintiff Exhibits Numbers 8 and 9 were the stamp Duty receipt No. 520134 Issued on 22nd April, 2010 and the Plan for the Plot – stamp duty of a sum of Kenya Shillings Eight Thousand Eight Fourty Hundred (Kshs. 8,840/-) paid to the M/s. Cecil Miller Advocate. They generated it on the witness' behalf.

17. PW - 1 told the court that, despite of all this, he was not able to take possession. The Kenya Railways kept on telling him that surveying had not been done. There had been a lot of frustrations despite numerous visits to the estate properties manager but they never responded and hence the handing over. They followed up with surveying departments. They called them for so many times i.e. the Property Manager. By this time, PW - 1 had already committed Contractor and even paid a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/-) which he would lose. Arising from this delays, on 27th November, 2009 he wrote a letter to Kenya Railways on the 2nd last paragraph. The was Plaintiff Exhibit Number 12.

18. PW – 1 decided to file the suit through a Plaint. Under Paragraph *5* were the particulars of the Breach of Contract – further Amended Plaint was dated 27th September, 2021 – Paragraphs *5* and *6*. He was not in possession of the suit property. From the Clause No. recital. Clause 14 of the Letter of Offer – upon the execution of the lease agreement; he wrote another letter dated 5th December, 2009 – Plaintiff Exhibit Number 13. By then he had taken possession. There was an internal letter by Kenya Railways - Plaintiff Exhibit Number 14 that he should be in possession of the plot by 26th March, 2010. He received a letter from Kenya Railways – Plaintiff Exhibit 15. However, when he went to the property, he found another party - M/s. Habiba Buri - who claimed to have been allocated by Kenya Railways. There was resistance by the security guards by the Kenya Railways who stopped him from taking possession.

19. PW - 1 stated that they wrote another letter as he was never given any possession. They responded by stating that the plot was no longer available but it was for Kenya Railways development (letter dated 9th June, 2010). He received it on 23rd July, 2010 he had paid rent. He had lost close to a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/-) and that was part of the claim he was making. The plot had been leased to HASH Petroleum Limited. They refunded the Plaintiff a sum of Kenya Shillings Three Eighty Five Thousand (Kshs. 385,000/-). He had never requested for a refund as he had wanted the Leased land. The witness prayed for all the prayers on the foot of the Further Amended Plaint.

20. On 19th March, 2024 at 12.30 pm the PW - 1 was cross examined as follows:-

B. Cross examination of PW - 1 by Mr. Karina Advocate.

21. PW – 1, on being referred to the supplementary witness statement, confirmed that the plot allocated to him was still vacant. The lease was for 1st October, 2009 to 30th September, 2015. The contractors were to start work from 1st February, 2010. With reference to the witness statement of 1st January, 2022 – the witness told the court that it was the state construction which was to begin on 5th September, 2009. They could not start due to a threat from M/s. Habiba Buri and not the Kenya Railways Corporation Ltd.

22. PW – 1 was referred to the letter dated 1st December, 2009, the Defendant Exhibit Number 2. The witness told the court that it was addressed Gulamhussein. The amount was to be refunded to him.

But the letter was not valid as it was not signed. From the Letter of Offer dated 7th September, 2009, under Clause 14 – he was to be given possession immediately after the Lease was executed. By the time of his testimony he had not been given possession.

23. PW - 1 confirmed that what was on page 18 was his signature. It was the lease. It was not witnessed. It contained termination clause of 3 'months – clause 20 i.e. on 20th February at page 16 of the lease. In this letter was dated 27th November, 2009 – Page 23. There was no indication of the Contractor having been hired by him nor any payment having been paid. He paid a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/-) to the hired Contractor. He confirmed there was no proof of payment. He never got any invoice from the Contractor nor was there an ETR payment receipt. He confirmed the Contractor would not be testifying in this case.

24. PW – 1 was referred to page 25 on the land project. He told the court that on page 29 of the Plaintiff's documents was the agreement. It never mentioned the land reference he was contracting the contractor to build. Although he had not taken possession but he still paid a sum of Kenya Shillings Six Million Eight Thousand (Kshs. 6,800,000/-) to the Contractor. His intention was to move in and take material to the land. Clause 5.0 of the Agreement on completion date. It was for 6 months – the lease contract was signed on 26th March, 2010 which should have been to 26th September, 2010. The money was not refundable. He was confident he would get possession.

25. PW - 1 was referred to page 34. He told court that it was a letter dated 28th July, 2009 by KR to M/s. Habiba Huri Ibrahim. It was clear evidence showing that KR had given Lease to another person. M/s. Habiba Buri. With reference to page 36, it showed M/s. Habiba Huri had paid premium of a sum of Kenya Shillings One Hundred and Twnty Thousand (Kshs. 120,000/-) dated 8th April, 2010. Indeed, on page 37 there was an official receipt bearing No. 103329 and dated 12th April, 2010.

26. PW – 1 was referred to page 42. He told the court that it was a letter dated 9th June, 2010. According to its contents, it indicated that the suit land was not available. Thus, the execution of the Lease was un-procedural. Therefore, it was cancelled. To him, it was the Kenya Railways Corporation Limited which was the problem. They kept on twisting matter. It stated that any payments paid to the corporation would be refunded to him. He was referred to page 46 – a letter dated 19th September, 2010 from Kenya Railways to M/s. Omwenga & Mabeya Advocates. He confirmed that it stated that the land was not available for leasing.

27. With reference to page 48. It was a letter dated 9th November, 2010 addressed to Messrs. Mogaka Omwenga & Mabeya Advocate enclosing a cheque for a sum of Kenya Shillings Three Hundred and Eighty Five Thousand (Kshs. 385,500/-) being a refund. Reference was made to page 50 – it was the Valuers report dated 28th October, 2021. The said report was made while he had already taken possession. The report was done when the civil case was on going. The witness confirmed it was for parking bays – there was no 3rd Party contract for leasing it. He run a petrol station. It was a yard. They had a yard for parking of vehicles. He confirmed that there had been no 3rd party contract for being denied parking.

28. PW - 1 was further referred to page 80. It was a letter dated 13th July, 2011. He told the court that it gave the exact area/ land reserved for Kenya Railways Corporation. He did not have any proof of the loss of material nor where they nor the Contractor bought them from. The contractor was not a party to this suit. He confirmed that he had been denied possession by Kenya Railways Corporation. With reference to the lease under Clause 22 – (page 17). The witness told the court that in case of dispute they were to refer the matter for arbitration. With reference to Clause 20 on Termination i.e. 20.1. The witness told the court that there was a fraudulent transaction. He had not reported any person to the police.

C. Re - examination of PW - 1 by M/s. Maiga Advocate.

29. PW - 1 confirmed that he summoned to the police. On being referred to page 43, the witness told the court that it was letter dated 29th July, 2010 from Kenya Railways to him. He received it on 30th July, 2010. He as being told to hold on the Lease. By that time he had already entered into agreement with the contractor i.e. he entered into agreement with the Contractor on 26th March, 2010 (page 26). Being referred to a letter dated 5th December, 2009 by Kenya Railways to him, PW - 1 told the court that he took up the land as it was very suitable to him for parking purpose.

30. With reference to page 3, being the Letter of Offer dated 7th September, 2009. He stated that it meant Kenya Railways were always aware of the purpose of the lease. Further reference to a letter dated 1st December, 2009 in the Defendant's document, the witness told the court that the same was not filed. He came to know about it from his Advocates. On further reference to the Letter of Offer, the witness told the court that clause 14 i.e. Kenya Railways were to give possession once the Lease Agreement was duly executed by all parties. The Lease Agreement on Pages 9 to 20 was prepared by Messrs. Miller & Co. Advocates. It was duly executed by all parties.

31. PW - 1 confirmed with reference to clause 20 on the termination clause. He was never given any 3 months' notice by Kenya Railways to qualify for the termination of the Lease. With reference to page 29; the witness told the court that he paid a sum of One Million Eight Hundred Thousand (No. 103329Kshs 1,800,000/-). He never paid it in full as per clause 3.1 of the agreement. According to Clause 4 of the Lease, the contract was to commence immediately upon signing of the lease. From the agreement there was no clause indicating the money was non- refundable. The police could not allow him to take possession. With reference to Page 27 – Letter dated 26th March, 2010 on the permission on taking possession. Hence, he allowed the contractor to take material.

32. According to the witness, by the time he had not known about M/s. Habiba Huri. He brought her documents to court for it to fully appreciate the issues. He had a letter at page 32 which showed that the lease to M/s. Huri was cancelled. On the letter dated 20th April, 2010 by the Kenya Railways to him the witness told the court that the same informed him that her lease had been cancelled. He was referred to page 29. The witness told the court that the Agreement to the Contractor left blank the land reference numbers. Thus was the case as even Kenya Railways in their Letter of Offer at page 3 never made any reference to the Leased land. Equally, the Letter of Offer to M/s. Habiba Huri on Page 34 never indicated nor made any reference to any leased Land Reference Numbers.

33. It was only the Lease Agreement which showed or referred to the land for lease. With reference to Page 48 on the letter 9th November, 2010. The witness told the court that it was addressed to his Advocate on the refund of the money he had paid. He stated that what triggered the refund was referred to in the contents of the letter dated 11th October, 2010. He indicated he was not interested in the refund as he had wanted to establish the parking bay. By this time, he had already incurred a lot of money.

34. The witness told the court that he undertook the valuation as he wanted to know the value of the land. The contractor had no issue with him as he had already paid him off. On the arbitration clause page 17 – clause 22.4 of the lease. The witness told the court that it did not stop him from coming to court. His quest was that he needed to be compensated as a Kenyan citizen.

35. At this juncture, the Plaintiff closed his case.

V. The Defendant's case

36. The Defendant filed its Amended Statement of Defence on 15th October, 2021. The Defendant averred that it was the bona fide owner of the suit property. The Defendant denied paragraphs 3 and 4 of the Further Amended Plaint and averred that there was no valid lease agreement between the Plaintiff and the Defendant. Further, the Defendant averred that the purported lease stood frustrated as at 1st December, 2009 when the suit property was alienated for railway purposes making the Defendant incapable of performing its contractual obligations.

37. In addition to the contents made under Paragraphs 3 and 4 of the Further Amended Plaint, the Defendant averred that the contractual amount of Kenya Shillings Three Eighty Five Thousand Five Hundred (Kshs. 385,500/-) paid to the Defendant in respect of the purported lease which was fully refunded to the Plaintiff vide cheque number 003778 on 9th November, 2010. In the alternative and without prejudice to the foregoing, the Defendant averred that the parties were mistaken over the subject matter because the suit property was alienated for the railway purposes and could not have been available for leasing to the Plaintiff.

38. The Defendants prayed that the Plaintiffs' suit be dismissed with costs. Consequently, the Defendant denied he contents of Paragraph 5 of the further amended Plaint and avers that it has no contractual obligations to the Plaintiff. The Defendant further averred that the Plaintiff was sufficiently notified of the reason why the purported lease stood frustrated and incapable of being finalized within a reasonable time vide the letter dated 1st December, 2009. The Defendant further denied that it has issued a lease over the same premises to a 3rd party. The Defendant denied Paragraph 6 of the further amended Plaint and averred that it had no contractual obligations to the Plaintiff and that the Plaintiff had never taken possession of the suit property.

39. The Defendant denied the alleged loss in Paragraphs 7 and 8 of the further amended Plaint and the particulars in paragraph 7 (i) to (VII) therein. In further response to Paragraphs 7 and 8 of the further amended Plaint, the Defendant averred that the Plaintiff had suffered no loss or the damages alleged because the Plaintiff had never taken possession of the suit property. In the alternative and without prejudice to the foregoing, the Defendant averred that in view of the said frustration which frustrated the performance of the lease, the Plaintiff knowingly and negligently failed to mitigate his losses, if any at all. The demand and notice of intention to sue is denied and the Defendant avers that the same was of no consequence in view of the foregoing.

40. According to the Defendant, the suit herein was premature and expressly barred by the provision of Section 87 (a)(b) of the Kenya Railways Act, Cap 397, and Laws of Kenya with the cause of action having arisen more than a year next after the alleged act. The Jurisdiction of this Honourable court was denied because the provision of Section 83 (1) of the said Cap. 397, Laws of Kenya compulsorily enjoined the Plaintiff to attempt direct negotiations with the corporation and to refer the matter to a single arbitrator appointed by the Chief Justice.

41. The Defendant prayed for the Plaintiff's suit to be dismissed with costs.

42. The Defendant on 19th March, 2024 called its first witness - DW - 1 who testified as follows:-

A. Examination in Chief of DW - 1 by Mr. Karina Advocate.

43. DW - 1 gave a sworn testimony in English language. He was called Justine Oyagi Omoke, a citizen of Kenya with all the particulars as shown in his national identity card presented to Court. He told the court that he worked with Kenya Railways Corporation at Nairobi headquarters as an Estate

Valuation Manager for Kenya Railways Corporation Property. He recorded a witness statement on 15th December, 2015 which he adopted as his evidence in chief. Further, he also filed a list of documents which he produced as Defendant Exhibit Numbers 1 to 7. The property was located in Changamwe area, on Mombasa Nairobi Highway. They had the Changamwe Kenya Railways Station.

44. It was leased to the Plaintiff pursuant to the lease dated 7th September, 2009 terms and condition stipulated thereof. Despite of this, the Plaintiff never took possession because the site was never handed over to them. They were notified of the new development. The site was required for operation. He was referred to a letter dated 1st December, 2009. It was notifying the Plaintiff that the property would not be handed over to him and the reasons for that change. The lease was for September 2009. It was for a period of 2 months.

45. According to the witness, and on being referred to a letter dated 29th September, 2010 – the land was reserved for railway purposes. The Kenya Railways refunded the money to the client vide a letter dated 9th November, 2010. It was signed by the Managing Director – Mr. Maina. It enclosed a Cheque No. 003778 for a sum of Kenya Shillings Three Eighty Five Thousand Five Hundred (Kshs. 385,500/-) dated 19th October, 2010. On being referred to the letter dated 27th November, 2009 by the Plaintiff to the Kenya Railways, particularly the contents of the 2nd last paragraph which commenced with the words "Kindly consider our request .....".

46. By this time he had not been given the site. He had not taken any possession of the suit land. There was no land for construction nor had there been any development plan for the approval by Kenya Railways Corporation. To date, the Plaintiff had not taken possession of the suit land.

B. Cross examination of DW - 1 by Ms. Maiga Advocate.

47. DW - 1 reiterated that he was the Regional Estate Manager. He did not object to the documents produced by the Plaintiff. He confirmed that there two legal documents - a Letter of Offer and a Lease Agreement. These documents were prepared by the Kenya Railways Corporation. With reference to page 33 the Plaintiff's documents. There was a Letter of Offer dated 7th September, 2009 to the Plaintiff. Changamwe was an industrial area generally and on some other parts it was Residential. There were many trucks moving in an out of the area. It may be an ideal place for parking but the Plaintiff was never granted the site as yet.

48. He never took any possession. With reference to Page 27 of the Plaintiff's bundle, the witness told the court that the letter dated 26th March 2010 by the Annanciata Kivindyo – G.M. there were instructions that the Plaintiff takes vacant possession of the property. With reference to the list of documents by the Defendant, the witness told the court that a letter dated 27th November, 2009, the Plaintiff first requested he wanted to take possession. Further with the reference to a letter dated 12th May, 2010 by M/s. Wambo & Company Advocates – the Plaintiff second request to take possession. With reference to Page 4 of the Plaintiff's documents – Letter of Offer – Clause 14 – on possession i.e. Kenya Railways Corporation would only give possession of the property once the lease agreement was duly executed by parties.

49. On being referred to the contents of Paragraphs *4* to *18*, he told the court that page 18, DW – 1 told the Court that it was the execution page. He confirmed that it had been executed by Kenya Railways Corporation. On being referred to a Letter dated 27th November, 2009, the witness told the court that in the Defendants documents the Plaintiff informed Kenya Railways Corporation of the loss if he was not granted possession. It was not on if there was a breach of contract. With reference to pages 22 and 46, the witness told the court that the letter dated 1st December, 2009 was not was not available. It was

neither on Kenya Railways Corporation Letter Head nor it was it signed. There was no way to confirm the letter was received by the Plaintiff.

50. The witness told the court that the letter dated 29th September, 2010 confirmed that the land was not available for leasing to 3rd parties. This was because it was only reserved for railways purposes. This was one year after the Plaintiff had executed the lease. With reference to the Defendant documents, DW - 1 told the court that the letter dated 9th November, 2010 refunding him a sum of Kenya Shillings Three Eighty Five Thousand Five Hundred (Kshs. 385,500/-) and not what he had claimed as being a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/-). DW – 1 confirmed that this as a vacant property. It had not been developed. He confirmed the Plaintiff complaint that there was a 3rd Party who prevented him from taking over possession. That was M/s. Habiba Huri Ibrahim.

51. With reference to page 32 of the Plaintiff's documents. The witness told the court that the letter was dated 20th April, 2010. Page 3 of the Plaintiff's documents the letter dated 28th July, 2009. He confirmed that it was a railway reserve. It was not a case of fraud by Kenya Railway Corporation. With reference to a letter dated 11th October, 2010 the Plaintiff reflecting the refund of the monies paid to the Defendant. From all these documents, there was nowhere that KR had requested the Plaintiff to provide any approval but this was a standard requirement for him to justify his claim of his claim of a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/-). DW – 1 asserted that this information was not contained in his witness statement

C. Re - examination of DW - 1 by Mr. Karina Advocate.

52. DW - 1 confirmed that the issue herein was about taking vacant possession of the leased property. It was not on ownership of the suit land. To date the Plaintiff had never taken any possession. They had never received any documents of the loss incurred by the Plaintiff for a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/-). On being referred to the provision of Clause 14 of the Lease Agreement, he stated that KR communicated to the Plaintiff through a notice to the effect that they were unable to give him possession. M/s Habiba Huri was not a party to the suit. With reference to the letter dated 6th July, 2010 by M/s. Omwenga & Company Advocate, the witness argued that the lease commenced on 1st October, 2009. But vide a letter dated 9th November, 2010, the Kenya Railways Corporation cancelled the lease. There were no building material on site. The site was vacant. The property was not available for leasing.

53. On 22nd July, 2024, the Defendant through their Legal Counsel Mr. Karina closed their case.

VI. Submissions

54. On 22nd July, 2024 upon the closure of the case by the Plaintiff and Defendant herein, the Honourable Court directed that the parties file their written submissions within stringent timeframe thereof. All parties complied. Pursuant to that on 6th December, 2024 the Honourable court reserved a date to deliver its Judgement on 19th February, 2025.

A. The Written Submission by the Plaintiff

55. The Plaintiffs through the Law firm of Messrs. S. O. Odingo Advocates dated 13th September, 2024 filed their written submissions. M/s. Maiga Advocate commenced her submissions by providing the Honourable Court with a brief background of the case. The Learned Counsel stated that the Plaintiff instituted this suit by way of Plaint dated 8th February 2012, that was amended on 10th June 2021 and further amended on 27th September 2021. The Plaint was accompanied by Plaintiffs Witness Statement filed on 29th September 2021 and the Plaintiffs Further witness statement dated 31st January 2022

sworn by Gulamhussein Fakrudin Gulamhussein, together with the Plaintiff's Supplementary witness statement of Otieno Aloys Akara dated 15th December 2021.The Plaintiff also filed a comprehensive List of Documents known as Plaintiffs Further Supplementary List of Documents dated 31st January 2022 itemized 1-41.

56. The Counsel informed Court that the Defendant filed an Amended Statement of Defence dated 15th October 2021, accompanied by the Defendant's Witness Statement sworn by Justine Omoke dated 15th December 2016 and the Defendant's List of Documents dated 9th December 2016. The objective of the Statement by Orieno Aloys Akara is that an employee at Hashi Energy Limited and was engaged to guard the property in dispute on behalf of the employer, who was the current owner of the property. The testimony of Otieno Aloys was uncontroverted. The Defendant called one witness to testify and closed their case.

57. On the facts the Learned Counsel submitted that the Plaintiff identified a vacant plot along the Mombasa-Nairobi Highway, at Changamwe opposite Bangladesh area. He followed up on its ownership and was informed that the property belonged to Kenya Railways Corporation. He reached out to the Defendant who confirmed that the said property was available for lease. Consequently, the Defendant presented the Plaintiff with a Letter of Offer dated 7th September 2009 setting out the terms of the lease, highlighting the costs, duration and purpose, inter alia, terms of engagement. Of importance to this suit were the following terms of the agreement:-

    a. The cost of the lease - Pursuant to the Lease Agreement and/or Letter of Offer, the Plaintiff was required to pay for the following:

        i. Under Clause 4 of the Letter of offer-Administration charges of Kshs.100,000.00;

        ii. Under Clause 5 of the Letter of Offer- Quarterly rent of Kshs.1, 625,500.00;

        iii. Under Clause 6 of the Letter of offer- Security deposit of Kshs.108,000.00;

        iv. Under Clause 9 of the Letter of offer-Stamp duty of Kshs.8,840.00;

        v. Under Clause 11 of the Letter of offer -Pegging fee of Kshs.15,000.00 and

        vi. Under Clause 15 of the Letter of offer-Legal fees of Kshs.11,600.00which is demonstrated by the official receipt from Miller & Company Advocates dated 28th September 2009

        The Plaintiff and the Defendant admitted in their testimonies that these amounts were paid in full and there was no pending arrears, thus exonerating the Plaintiff from claims of non-performance of his obligations to the terms.

    b. The purpose of the lease - The Letter of Offer clause 3 and the Lease Agreement clause 1.1 line 15specifically indicate that the permitted purpose of possession of the property by the Plaintiff was for a truck parking yard during the tenure of the Lease Agreement. This specific term forms core of the Plaintiff's claim against the Defendant for damages of breach of contract.

    c. The terms of the lease - The term of the lease was specifically scheduled for 6 years with effect from 1st October 2009, to which the Plaintiff was never granted free and peaceful possession/ occupation during its tenure.

    d. Terms of possession - Under the Agreement and the Letter of offer the Plaintiff would be granted possession of the property once the Lease Agreement was duly executed.

58. The Plaintiff submitted proof of payment of all the charges and costs required under the Lease Agreement. The Lease Agreement was duly executed and registered but upon the Plaintiff attempting to take possession of the property he was harassed by a third party known as M/s. Habibi Huri who equally claimed ownership of the property by virtue of a different lease agreement. The Plaintiff sought the Defendant's intervention to secure possession of the property, moreover, informing the Defendant of the risk, loss and or financial damage of a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6, 800,000.00/=) in the event vacant possession was not granted before 4th December 2009.

59. The Learned Counsel submitted that the Plaintiff and the Defendant engaged in a series of several correspondence in an attempt to get vacant possession, 12 months later from the date of executing the lease agreement the Defendant canceled the agreement and attempted to refund the Plaintiff the sum of Kenya Shillings Three Eight Five Thousand Five Hundred (Kshs. 385,500.00/=) even after the Plaintiff had already engaged into an agreement for the construction of a truck yard for the sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000.00) leading the Plaintiff to suffer injury and loss. 12 months into the lease agreement the Plaintiff was never granted vacant possession by the Defendant and as a result suffered immense loss and injury, which he claimed for damages of a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6, 800,000.00/=) plus incidental costs.

60. The Learned Counsel contended that the Defendant' s testimony was that the lease agreement between the parties dated 7th September 2009, which was duly executed by the parties and registered at the lands registry. The Defendant's witness confirmed that the Plaintiff was unable to take possession of property. During cross-examination, the Defendant's witness affirmed that the Plaintiff informed them that failure to grant him possession would lead to the likelihood of loss of the sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs.6, 800,000/-).

61. It was the Defendant's testimony that the lease was cancelled one year later on grounds it was a railway reserve that the Plaintiff was refunded the sum of Kenya Shillings Three Eighty Five Thousand Five Hundred (Kshs. 385,500.00/=). The Defendant also admitted that they were aware of the allegations by Habiba Huri claiming ownership over the lease property pursuant to a lease agreement dated 28th July, 2009. The Defendant's witness confirmed that the Plaintiff was initially not informed that the property was a railway reserve, rather the information was mentioned 12 months after executing the lease agreement, furthermore the property was never handed over to the Plaintiff.

62. The Defendant raised an issue of Jurisdiction on grounds that the suit was statutorily barred under the provision of Section 87 (b) of the Kenya Railways Act and that the Lease Agreement had a Clause for Alternative Dispute Resolution, which they addressed in their Rules and analysis section.

63. On the rules and analysis and on whether this suit was statutorily barred, the provision of Section 87 (b) of the Kenya Railways Act, the Learned Counsel submitted that the provision of Section 87 (b) of the Kenya Railways Act did not apply to circumstances of the case because they fall outside the purpose of the Act which is to regulate the carriage and transit of goods by Rail. Section 2 of the Act provides that the purpose of the Act:-

> '....Goods shall be deemed to be in transit from the time the goods are accepted by the Corporation for carriage until the expiration of twenty-four hours after the goods have arrived at the place to which, in respect of their carriage by the Corporation, the goods have been consigned, and thereafter the goods shall, so long as they remain in the custody of the Corporation, be deemed to be in such custody otherwise than for the purpose of carriage'

64. The Learned Counsel averred that the Kenya Railways Act did not regulate the transmission, registration and administration of Land between the Defendant and third parties, such fall under the provisions of the *Land Act*, No. 6 of 2012 and the *Land Registration Act*, No. 3 of 2012 inter alia, provisions of the law. In conclusion, this dispute was well within the time period for claiming possession of the property and/or seeking damages for loss incurred due to breach of a lease agreement.

65. To buttress on this point, the Learned Counsel relied on the case of: "Telkom Kenya Limited – Versus - Kenya Railways Corporation (2018) eKLR", Justice L Onguto observed that:-

> 'In my view too, Section 87 of the KRC Act was inserted by legislature to protect the very nature of the core of business of KRC; the transportation and carriage of both passenger and goods. This must have been the legislative intent and interest there being no rational relation with matters outside the scope of the *Kenya Railways Corporation Act*.'
>
> Further the Judge stated..... 'in my judgment, section 87 of the *Kenya Railways Corporation Act* is not intended by Legislature to amend Section 4 (1) of the *Limitation of Actions Act*, which still enjoys primary effect over written limitation laws unless expressly stated or provided otherwise in such written law.'

66. On whether Clause 22 of the lease agreement barred the Plaintiff from instituting a claim for damage. The Learned Counsel opined that under Clause 22.4 of the Lease Agreement reads as follows:-

> 'Referring disputes to arbitration does not affect a party's right, where appropriate, to seek an immediate remedy for an injunction, specific performance or similar court order to enforce the obligations of the other party.'

67. According to the Learned Counsel, it was clear from the interpretation of Clause 22.4 that the provision does not exclude the jurisdiction of Courts when seeking remedies such as specific performance. This suit sought remedy for specific performance by the Defendant and/or damages for breach of the Defendant's obligations to grant the Plaintiff vacant possession. The law requires that a party seeking specific performance must demonstrate that he has performed or is willing to perform all the terms of the agreement and that he had not acted in contravention of the essential terms of the said agreement. In the case of:- "Gurdev Singh Birdi and Marinder Singh Ghatora – Versus - Abubakar Madhubuti *CA No.165 of 1996*" it was held that:-

> "……..It cannot be gainsaid that the underlying principle in granting the equitable relief of specific performance has always been that under all the obtaining circumstances in the particular case, it is just and equitable so to do with a view to doing more perfect and complete justice. Indeed...a plaintiff must show that he has performed all the terms of the contract which he has undertaken to perform, whether expressly or by implication, and which he ought to have performed at the date of the writ in the action."

68. All circumstances considered the Plaintiff is entitled to move this Honourable Court vested with Jurisdiction to hear and determine the facts in issue between the parties.

69. On whether the Lease Agreement and the Letter of Offer dated 7th September, 2009 was binding. The Learned Counsel submitted that it was not in dispute that the Plaintiff and the Defendant signed a Letter of Offer dated 7th September 2009 and the Lease Agreement executed on 29th September 2009 in respect to the suit property. The Defendant in its testimony did not dispute the existence of the said

agreement nor the validity of the same. The Learned Counsel concluded that the agreement and the Letter of offer fall within the meaning of Section 3 (1) of the Law of Contract that provides as follows:-

> 'No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suits is brought or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized.'

70. The requirement for a valid agreement under the above section were that:-

    a. The agreement must be in writing; and

    b. Signed by the person or its duly authorized representative

71. The Learned Counsel averred that legal relations in any agreement was invariably based on terms of agreement, rights and obligations of the parties involved. Agreements are based on the general principles of contract which are: Offer, Acceptance, contractual capacity, Intention and consideration. He argued that all this element existed between the parties thus binding effect of the lease agreement executed on 29th September 2009, which had a clear provision in respect to termination of the lease under clause 20 of the agreement.

72. On whether failure to grant vacant possession amounted to breach of the Lease agreement. The Learned Counsel submitted that failure or refusal by one party to perform his obligations under the contract conferred upon the offended party the right of action to either enforce complete performance or to recover compensation for loss or damage arising from the offending breach. In this case, the Plaintiff testified that he fulfilled all his obligations in respect to the Letter of Offer and Lease Agreement, such had paying all the required costs, executing all the relevant documents, amongst others. It was the Plaintiff's testimony that upon taking possession of the property he was harassed by a third party, M/s. Habib Huri, claiming ownership of the same plot. The Plaintiff reached out to the Defendant in a bid to access vacant possession of the property and also verify the allegations by M/s. Habib Huri. The Defendant testified and confirmed that M/s. Habib Huri was not a stranger but had no legal claim over the property for failing to execute the lease agreement and/or perform the terms of the letter of offer.

73. Despite this situation, the Plaintiff was never granted vacant possession during the tenure of the lease, 12 months into the lease, the Defendant proceeded to terminate the lease agreement without granting the Plaintiff vacant possession and exposing the Plaintiff to loss and damage. Majanja J, in the case:- "Ranji Meghi Gudka Limited – Versus - Kisii University (2019) eKLR", was of the view that:-

> " the fact that the agreement between the parties was for a fixed term of 6 years did not exclude the possibility of termination. It only means that termination would amount to a breach for which the party at fault would have to pay damages."

74. The Learned Counsel on whether the Plaintiff was entitled to damages and the prayers sought in the Further Amended Plaint. The Plaintiff testified that he paid a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/-) pursuant to an agreement dated 26th March 2010 for the construction of a yard on the suit property. The Plaintiff and the Defendant testified that vide a letter dated 27th November 2009, the Plaintiff notified the Defendant that failure to grant vacant possession would subject him to the loss of this amount that was non-refundable, which the Plaintiff now claimed from the Defendant as special damages.

75. To support his argument, the Learned Counsel referred Court to the case of "Chimanlal Meghji Naya Shah & Another – Versus - Oxford University Press (E.A) Limited", Justice Warsame went on to hold that:-

> " .....In essence my position is that a lease agreement properly registered is a form of a contract and therefore when there is a default, the terms of breach of a contract aptly applies."

76. The Learned Counsel prayed that the Honourable Court allows the Plaintiff's prayer in pursuit of the further Amended Plaint dated 27th September 2021 and award the Plaintiff the prayers sought therein. The Learned Counsel urged the Court to be guided by the case of "Consolata Anyango Auma – Versus - South Nyanza Sugar Company Ltd (2015) eKLR", where the Court stated that:-

> " As a general principle, the purpose of damages of breach of contract is subject to mitigation of loss, the claimant is to be put as far as possible in the same position he would have been if the breach contained of had not occurred. This is the principle encapsulated in the Latin phrase restitution in integrum."

77. Thus what would the appropriate damage be in this circumstance, "CBA Property Holdings Limited – Versus - Ahmednsasir Maalim Abdullahi & another (Environment & Land Case E277 of 2020)[2022] KEELC 2564 (KLR) (12 July 2022) (Judgment)", Justice M D Mwangi observed that 'the general rule for the assessment of such damages was reviewed by the Supreme Court of Canada in the case of: "Keneric Tractor Sales Ltd. – Versus - Langille (1987), 43 D.L.R. (4th) 171 at p.181 (S.C.C.)". In that decision Madame Justice Wilson for the Court stated:-

> " The general rules for the assessment of damages for breach of contract is that the award should put the plaintiff in the position he would have been in had the defendant fully performed his contractual obligations. This principle is qualified by the doctrine of remoteness. As Baron Anderson stated in Hadley v. Baxendale:
>
> > 'Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it...'

78. The Learned Counsel submitted that the Plaintiff computed that the damages payable as the loss of income unpaid for the entire period of the lease, subject to the 6-year term lease agreement. The Plaintiff produced a valuation report to demonstrate the material income he would expect from the investing in the parking yard. As was granted in the case of "CBA Property Holdings Limited – Versus - Ahmednsasir Maalim Abdullahi & another (Environment & Land Case E277 of 2020)[2022] KEELC 2564 (KLR) (12 July 2022) (Judgment)" Justice MD Mwangi. The valuation Report was adopted by consent of the parties and the contents were not challenged, consequently. They prayed that the Honourable court award the Plaintiff loss of income as prayed in the Further amended plaintiff dated 22nd September 2021.

B. The Written Submissions by the Defendant

79. The Defendant through the Law firm of Messrs. Ndegwa Muthama Katisya & Associates Advocate filed their written submissions dated 26th September, 2024. Mr. Karina Advocate submitted that these were the final submissions for the Defendant. It was with regards to the Plaintiff's suit as contained in the Further Amended Plaint dated 27th September, 2021. According to the Learned Counsel, it was the Defendant's case that the Plaintiff had not exhausted the statutory mechanism set out in the Kenya Railways Act for compensation of the loses allegedly caused by KRC in exercise of its power to let immovable properties. In addition, the Plaintiff had not proved that he took possession of the demised premises and made it ready for occupation and therefore loss of business.

80. On the Plaintiff's case, the Learned Counsel submitted that in pursuant to leave granted by this Honorable Court on 22nd September, 2021, the Plaintiff filed a Further Amended Plaint dated 27th September, 2021 and filed on an even date. The Plaintiff's case against the Defendant as pleaded in the Further Amended Plaint was for an alleged breach of a lease agreement dated 1st October, 2009 which was meant to be effective for six years, until 3rd September, 2015. It was the Plaintiff's case that at a date which the Plaintiff had not specified, the Defendant unlawfully terminated the lease agreement and evicted the Plaintiff from the suit property. Further, the Plaintiff alleged that the Defendant unlawfully leased the property to a 3rd Party.

81. The Plaintiff claimed that the Defendants actions had caused the them a loss of a sum of Kenya Shillings Seven Million Twelve Thousand Nine Hundred and Fourty (Kshs.7,012,940/-) which the Plaintiff claimed as special damages and a loss of income of a sum of Kenya Shillings Twenty Two Thousand Five Hundred (Kshs. 22,500/=) per day from 1st October, 2009 to 30th September, 2015. Thus, the Plaintiff sought compensation for both these alleged losses plus interest on the same.

82. On the Defendant's case, the Learned Counsel submitted that the Defendant opposed the Plaintiff's suit vide an Amended Statement of Defence dated 15th October, 2021. The Defendant denied that there was valid agreement between the Defendant and the Plaintiff. The Defendant averred that although the Defendant offered the Plaintiff a lease, the offer was rescinded due to the discovery by the Defendant that the suit property was unlawfully offered for lease to the Plaintiff as the same had been alienated for railway purposes. The Defendant averred that the Plaintiff never took possession of the suit property.

83. It was the Defendant's case that the Defendant's decision to rescind the offer was duly communicated to the Plaintiff vide a letter dated 1st December, 2009 and the contractual amount of a sum of Kenya Shillings Three Eighty Five Thousand Five Hundred (Kshs. 385,500/-) which was fully refunded to the Plaintiff by the Defendant herein. The Defendant denied that the Plaintiff suffered any loss as alleged in the Plaint. If at all the Plaintiff suffered any loss, he knowingly and negligently failed to mitigate any loss suffered. Thus, the Defendant prayed that the court dismisses the Plaintiff's suit with costs.

84. The Learned Counsel relied on the following documents:-

    a. The Amended Statement of Defence dated 15th October, 2021 and filed on 25th October, 2021.

    b. The Witness Statement dated 15th December, 2016 filed on 16th December, 2016 and the oral evidence of both the defense and plaintiff witnesses.

    c. The List and bundle of Documents dated 7th December, 2016 filed on 14th December, 2016

85. Further, the Learned Counsel relied on the following issues of determination:-

a. Whether this Honorable Court has jurisdiction to hear and determine this suit?

b. Whether there was a valid Lease Agreement between the Plaintiff and the Defendant?

c. Whether the Plaintiff had proved on a balance of probability that the Defendant unlawfully evicted the Plaintiff from the suit property?

d. Whether the Plaintiff had proved on a balance of probability that it suffered the losses alleged in the Further Amended Plaint?

e. Whether the Plaintiff knowingly and negligently failed to mitigate any alleged losses suffered?

86. On whether this Honorable Court has jurisdiction to hear and determine this matter. The Learned Counsel submitted that this Honorable Court lacked jurisdiction to determine this suit as pleaded in paragraph 15 of the Amended Defence dated 15th October, 2021 for three reasons:-

> Section 83 (1) expressly prohibits Actions or suits against Kenya Railways Corporation for any act done pursuant to the corporation's powers under the Act as pleaded in paragraph 15 of the Amended Defence This suit arises from the Defendant's exercise of its statutory right under Section 13 (2) (a) and (h) of the Kenya Railways Act to let immovable property. The said section 83(1) mandatorily enjoins the plaintiff to attempt direct negotiations with the corporation and to refer the matter to a single arbitrator appointed by the Chief Justice.

87. On this premise, the Honorable court had no jurisdiction to entertain a suit that is expressly ·barred by express statutory provisions and or to grant any injunction on such a suit. Secondly, the present suit is premature and expressly barred by the provision of Section 87(a) of the Kenya Railways Act as pleaded in paragraph 14 of the Amended Defence. The said section provides that legal action shall not be commenced against the corporation for any act done in pursuance or execution, or intended execution of the Act until one month after written notice containing the particulars of the claim and of intention to commence the action or legal proceedings has been served upon the managing Director.

88. The Learned Counsel relied on the decision of the Court of Appeal in the case of "Joseph Nyamamba & 4 others – Versus - Kenya Railways Corporation [2015] eKLR" where the Court, in upholding the decision of the ELC dismissing a suit which had been filed before the issuing of the mandatory notice under the provision of Section 87 (a) of the Kenya Railways Act held as follows:-

> " ...the plaint and application was filed in contravention or violation of an express provision of a statute which is couched in clear and mandatory terms. We see nothing impairing access to justice and it is for the parties and their advocate to know the law and its consequences."

89. Similarly, the Court of Appeal in the case of "Michael Otieno Nyaguti & 2 others – Versus - Kenya National Highway Authority (2021) eKLR", while upholding the decision of the Environment and Land Court dismissing a suit wherein the Petitioners had not adhered to the provision of Section 67 of the *Kenya Roads Act*, a provision of the law with identical import to the provision of Section 87 of the Kenya Railways Act, the Court held as follows:-

> "Being a mandatory provision of the law, there is no way the learned Judge can be faulted in the conclusion reached when sustaining this element/ingredient of the P. O. The Trial court also rightly held a position we affirm on appeal that the P.O left no room for exercise of discretion by the trial court and now us on appeal." (Emphasis ours).

90. The Learned Counsel also relied on the decision of the Environment and Land Court in the case of "Fredrik Chege Kinuthia – Versus - Kenya National Highways Authority (2021) eKLR" where the Court upheld a Preliminary Objection brought pursuant to the provision of Section 67 (a) of the *Kenya Roads Act*, a provision which was a replica of Section 87 of the Kenya Railways Act. In its decision, the Court held as follows:-

> " It was the Defendant's/Objector's Submissions that where a party fails to observe the mandatory requirement under Section 67 (a) ofthe *Kenya Roads Act* No. 2, as the Plaintiff did herein, this Court is not properly vested with jurisdiction as the Plaintiff or the partly omitted or neglected a clear procedure for redress of a grievance as stipulated in the Act.
>
> The Objection hinges on Section 67 (a) of the *Kenya Roads Act* No. 2 of 2007 which provides that;
>
> "67. Where any action or other legal proceeding lies against an Authority for any act done in pursuance or execution, or intended execution of all order made pursuant to this Act or of any public duty, or in respect of any alleged neglect or default in the execution of this Act or of any such duty, the following provisions shall have effect?
>
> the action or legal proceeding shall not be commenced against the Authority until at least one month after written notice containing the particulars of the claim and or intention to commence the action or legal proceedings, has been served upon the Director-General by the plaintiff or his agent;
>
> From the above provisions of law, it is not in doubt that the requirements to give a one month written Notice to the Authority before commencing of the civil suit are mandatory as the words that have been used are Shall, therefore coaching the requirements as mandatory.
>
> The Court acknowledges that there are instances in which the Courts have held that the thirty days' notice is not mandatory. However, the Court further recognizes that these are instances where the Courts have dealt with Petitions as opposed to an ordinary Suits. The instant case is an ordinary suit, and therefore the Court finds and holds that the written notice was therefore mandatory before the suit could be filed".

91. The Learned Counsel submitted that in the present matter before this Honourable court is a normal civil suit and not a Constitutional Petition. The Plaintiff was thus bound by the mandatory terms of the provision of Section 87 of the Kenya Railways Act to serve a notice containing the particulars of the claim and of intention to commence the action or legal proceedings upon the Managing Director of the Defendant.

92. In the case of "Michael Otieno Nyaguti & 2 others – Versus - Kenya National Highway Authority (2015) eKLR" which decision was subsequently upheld by the Court of Appeal in "Michael Otieno Nyaguti & 2 others – Versus - Kenya National Highway Authority (2021) eKLR" the Court held as follows with regards to the importance of serving the mandatory notice 67 of the *Kenya Roads Act*,2017, a provision of similar import to Section 87 of the Kenya Railways Act:-

> " The Court holds the view that the requirement of a notice to the Director General would not amount to hindering a litigant from accessing the seat of justice (court). It only creates

an opportunity to the Director General's office of exploring an out of Court settlement and is in line with the provision of Article 159 of *the Constitution* which at Sub - Article 2 (c) encourages 'alternative forums of dispute resolutions. The provision of Section 67 of the *Kenya Roads Act*, 2017 is not in contravention with *the Constitution* of Kenya 2010."

93. Further, in its decision, the Court in "Michael Otieno Nyaguti (supra)" held as follows:-

> "An import tenet of the rule of law is that this Court before exercising its jurisdiction under Article 165 of the Constitution1 in general must exercise restraint. It must give the opportunity of the relevant constitutional bodies or state organs to deal with the dispute under the relevant provision of the parent statute. If the Court were to act in haste, it would be presuming bad faith or inability by that body to act. Where there exists sufficient and adequate mechanisms to deal with a specific issue or dispute by other designated constitutional organs, the jurisdiction of the court should not be invoked until such mechanism has been exhausted."

94. In the present case, the Plaintiff filed the initial Plaint in February of 2012. The Defendant filed its Defence in March of 2012 and brought the Plaintiff to notice of the fact that there is a mandatory provision requiring that they serve a notice to the Director of Kenya Railways. On 27th September, 2021, the Plaintiff filed a Further Amended Plaint which the Defendant responded to vide the Amended Statement of Defence dated 15th October, 2021 and filed on 25th October, 2021. Again, the ·brought the Plaintiff to notice of the fact that there was a mandatory provision requiring that they serve a notice to the Director of Kenya Railways.

95. The Plaintiffs case was heard on 14th May, 2022. By that time, the Plaintiff had still not served any such notice on the Defendant despite being put on notice of the existence of the requirements under section 87 (a) of the Kenya Railways Act. The suit was nullity. Third, the Plaintiff's suit was time barred under the provision of Section 87 (b) of the Kenya Railways Act as pleaded in paragraph 14 of the Amended Defence the section provides as follows:-

> "Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect;
>
> (b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof."

96. Primarily, the Learned Counsel argued that the present suit was for breach of contract and not a continuing injury or damage, thus the Plaintiffs were bound to institute the suit within one year. The Plaintiff claimed the Defendant terminated the purported contract in September of 2010, thus the Plaintiff was bound by section 87 (b) to institute the suit by September 2011. The Plaintiff first brought this suit before this Honorable Court in February of 2012, more than one year after the alleged breach. While dismissing a suit based on a preliminary objection premised on the provision of Section 87 (b)

of the Kenya Railways Act, the Employment and Labour Relations Court in the case of "Lucas O Odonya – Versus - Kenya Railways Corporation [2021] eKLR" held as follows:-

> "There is a catena of Judicial Authorities, establishing that Section 87 [b] of the Kenya Railways Corporation Cap 397 the Laws of Kenya, and Section 90 of the *Employment Act*, 2007 are jurisdictional laws. These Judicial Authorities include Joseph Sebastian Ringo – Versus - Kenya Railways Corporation [2015] e-KLR and Alloyce Obama – Versus - Kenya Railways Corporation [2019] e-KLR, which have been cited by the Respondent. The limitation under Section 87 [b] of the Kenya Railway Corporation Act, is replicated across most Legislation establishing State Corporations. Section 66 of the *Kenya Ports Authority Act*, for example, has a limitation period of 1 year for presentation of Claims against the Corporation before the Court, from the date the cause of action arises. The 1-year limitation, under the KPA Act, has been affirmed in among others, Court of Appeal decisions, Kenya Ports Authority – Versus - Cyrus Maina Njoroge [2018] eKLR".

97. Accordingly, for all these reasons, the Learned Counsel submitted that Honorable Court never had jurisdiction to hear and determine this suit and should down its tools and not take any further step in this matter. On whether there was a valid lease agreement between the Plaintiff and the Defendant that took effect, the Learned Counsel submitted that there was no valid lease agreement between the Plaintiff and the Defendant as pleaded in paragraph 4 of the Amended Defence dated 15th October, 2021. There was no dispute between the parties as to the fact that on 7th September, 2009 the Defendant offered the Plaintiff a lease agreement. The Defendant had produced the agreement as Defendant Exhibit Number 1 at page 8 of the Defendant's List and Bundle of Documents dated 7th December, 2016 and filed on 14th December, 2016. The Plaintiff and the Defendant differ on whether or not a valid lease agreement was executed following the offer.

98. It was the Plaintiff's case that a valid lease agreement was executed. To prove this assertion, the Plaintiff produced a purported lease agreement as Plaintiff Exhibit no. 7 in the Plaintiff's supplementary list of documents dated and filed on 31st January, 2022. The document was at page 8-19 of the said Supplementary List and Bundle. The document was both undated and the alleged signing of the same by the 'one of the Directors' of the Defendant was not witnessed by any person as required. It failed to satisfy the requirements of the provision of Section 3 (3) of the *Law of Contract Act*, Cap. 23 in relation to agreements disposing interest in land. As such, the document by itself could not be taken as an agreement between the parties.

99. It was a given fact that the legality of the lease agreement was in question. Further, the said agreement was not duly executed. Thus, for this Honorable Court to determine whether or not there was a valid lease agreement between the parties, the court was bound to look at the events succeeding the signing of the agreement and the conduct of the parties. This was the position taken by the High Court in the case of "Mamta Peeush Mahajan [Suing on behalf of the estate of the late Peeush Premlal Mahajan] – Versus - Yashwant Kumari Mahajan [Sued personally and as Executrix of the estate and beneficiary of the estate of the late Krishan Lal Mahajan][2017]eKLR", where the Plaintiff argued that there was a valid lease and the Defendant argued that the lease was not valid as the same was undated and the signing by the Defendant had not been witnessed. The Court held as follows:-

> "It was also Counsel's submissions that there existed no agreement as the signed agreement was not only a draft but had not been dated and neither was the signature witnessed... What matters and is crucial are the events succeeding such signatures and especially the conduct

of the parties. In these respects, I find that the evidence of events after the execution of the agreement ....is just as relevant as any evidence of events at the time of execution."

100. Thus, the question before this Court was what was the conduct of the parties after the alleged execution of the purported lease agreement. Did it point to the existence of a lease agreement?. It was the Learned Counsel submission that the conduct of the Defendant in particular showed that there was no valid lease agreement between the Plaintiff and the Defendant and if at all there was any, the same did not take effect as it may have been intended by the parties. On 1st December, 2009, the Defendant informed the Plaintiff that the Defendant would be unable to complete the transaction and advised the Plaintiff that the amounts paid to the Defendant would be duly refunded. The Defendant had produced the letter dated 1st December, 2009 as Defendant Exhibit Number - 2 at page 9 of the Defendant's List and Bundle of Documents dated 7th December, 2016 and filed on 14th December, 2016. PW - 1, the Plaintiff, gave testimony to the effect that the letter dated 1st December, 2009 was addressed to him.

101. On 23rd April, 2010 the Defendant sent a letter to the Plaintiff informing the Plaintiff that concerns had been raised with regard to the suit property. The Defendant advised the Plaintiff not to undertake any activities on the property. The Plaintiff had produced the letter dated 23rd April, 2010 as exhibit no. 21 at page 39 of the Plaintiff's supplementary list and bundle of documents dated and filed on 31st January, 2022. On 9th June, 2010 the Defendant informed the Plaintiff that any alleged allocation of the suit property to the Plaintiff was unprocedural as the Defendant's Board of Directors had never approved the allocation of any of the Defendant's land to the Plaintiff as was the procedure. The purported execution of the lease agreement was that unprocedural and therefore cancelled. The Plaintiff had produced the letter dated 9th June, 2010 as exhibit no. 24 at page 42 of the Plaintiff's supplementary list and bundle of documents dated and filed on 31st January, 2022.

102. The Learned Counsel submitted that on 29th July, 2010, the Defendant informed the Plaintiff that the suit property had been allocated to the Plaintiff unprocedurally. The Defendant invited the Plaintiff to appear before a Committee appointed to investigate the matter on 3rd August, 2010. The Plaintiff had produced the letter dated 29th July, 2010 as document no. 27 at page 43 of the Plaintiff's supplementary, list and bundle of documents dated and filed on 31st January, 2022. On 9th November, 2010,the Defendant refunded a sum of Kenya Shillings Three Eighty Five Thousand Five Hundred (Kshs. 385,000/-) being the monies paid by the Plaintiff to the Defendant. The Defendant produced the letter dated 9th November, 2010 forwarding Cheque no. 003778 for the refunded said amount as Defendant Exhibit Number 4 at page 12 of the Defendant's list and bundle of documents dated 7th December, 2016. Additionally, the Plaintiff, by his own admission, never took possession of the suit property.

103. The Learned Counsel submitted that it was clear from the conduct of the parties, particularly the Defendant, that the purported lease agreement was never executed as the suit property was not available for leasing to the Plaintiff. In any event, the consideration for the agreement was refunded back to the Plaintiff.

104. On whether the Plaintiff had proved on a balance of probability that the Defendant unlawfully evicted the Plaintiff from the suit property. The Learned Counsel submitted that the allegation of eviction was pleaded in paragraph 6 of the Further Amended Plaint dated 27th September, 2021. The Plaintiff failed to prove on a balance of probability that the Defendant unlawfully evicted the Plaintiff from the suit property. As submitted under issue 'a' above, it was common ground that the Plaintiff never took possession of the suit property. The Plaintiff himself admitted during the hearing of the suit that he never took possession of the suit property. For that reason, therefore, there would be no acts of eviction as alleged.

105. Black's Law Dictionary (7th Edition) defines eviction as such:-

> " The act or process of legally dispossessing a person of land or rental property."

106. It was clear that possession was a key element in eviction. A party could not claim to have been evicted from land which they had admitted severally to have never been in possession of. Thus, the Counsel urged the Court to find that the Defendant had never unlawfully, or otherwise, evicted the Plaintiff from the suit property as alleged.

107. On whether the Plaintiff had proved on a balance of probability that it suffered any special or general damages. The Learned Counsel submitted that the allegation of loss and damages was pleaded in paragraph 7 of the Further Amended Plaint dated 27th September, 2021 and denied in paragraphs 10 and 11 of the Amended Defence dated 15th October, 2021. As a matter of evidence, the Plaintiff had not proved on a balance of probability that it suffered the losses alleged in the Further Amended Plaint. At Paragraph 7 of the Further Amended Plaint, the Plaintiff claims to have suffered a loss of a sum of Kenya Shillings Seven Million Twelve Thousand Nine Fourty Hundred (Kshs. 7,012,940/-) as special damages due to the alleged breach of contract by the Defendant. It was trite law that special damages had to be specifically pleaded and strictly proved. The Learned Counsel submitted that they would submit on each category of damages pleaded separately.

108. On the special damages and under Paragraph *7* "ii" the Plaintiff alleged that he suffered a loss of construction materials amounting to a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/-). The losses were denied in Paragraphs 10 and 11 of the Amended Defence dated 15th October, 2021. The Plaintiff produced a contract dated 26th March, 2010 as Plaintiff Exhibit no. 15 at pages 29 to 31 of the Plaintiff's Supplementary list and bundle of documents dated and filed on 31st January, 2022. It introduced this contract vide the Supplementary list and bundle of documents dated 31st January, 2022 four years after instituting the case. The Plaintiff admitted during the hearing of the suit that the document did not contain the description of the suit property and there was nothing in the document to show that it related to the suit property or the subject matter. In any event, the agreement dated 26th March, 2010 was for 'construction of a yard' not construction materials as pleaded in the Further Amended Plaint. It was for the work and not for the alleged materials.

109. The Plaintiff never provided any evidence to show how he acquired and settled on the raw materials and the price. The Plaintiff himself was not a Quantity Surveyor and could not have settled on a contract of over a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/)- without any basis. No good basis was established by way of an expert witness or a report on the Bill of Quantities of the intended construction. Again, no invoice was produced for the said amount of over a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/=) to facilitate the alleged payment.

110. In addition, the Plaintiff never proved the manner, the dates and the mode of paying the alleged sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/-). The Plaintiff confirmed on cross examination that he had not provided any proof of payment before this Court. He testified that he never got an invoice from the contract nor an ETR. With a sale or a transaction of over Kenya Shillings Six Million Eight Hundred (Kshs. 6,800,000/=) it was ridiculous how such payment would be made without a Bill of Quantities, invoice, ETR, delivery order, receipts, transport charges, labour charges, or any other document that would be readily available in such an ordinary transaction. The Plaintiff never provided even the source of this amount allegedly paid in cash. The Plaintiff never called the alleged contractor as a Witness to testify that the Plaintiff had paid the alleged amount. The lack of evidence fell far below the thresholds of strict proof required in law when proving special damages. To support his argument, the Counsel referred Court to the case of:- "Hydro Water Well (K) Limited –

Versus - Sechere & 2 others (Sued in their representative capacity as the officers of Chae Kenya Society) [2021] eKLR" the High Court explained that only a receipt will suffice where a party which alleges to have made some payments for which the party is entitled to a refund. The Court put it as follows:-

> ".....a party claiming special damages must demonstrate that they actually made the payments or suffered the specific injury before compensation is permitted. A natural corollary of this has been that the courts have insisted that a party must present actual receipts of payments made to substantiate loss or economic injury. In this regard, our courts have held that only a receipt meets the test."

111. Similarly, in the case of "Oyunge – Versus - Chweya (2023) eKLR" the Environment and Land Court in dismissing a claim by the Plaintiff therein alleging that she had purchased construction materials worth a sum of Kenya Shillings Seven Hundred Thousand (Kshs. 700,000/=) held as follows:-

> "The other bit of the plaintiff's case is hinged on the contention that she purchased the building materials which she claimed were valued at Kshs. 700,000/-. Again, you would expect the plaintiff to provide a receipt showing purchase of these materials. Not a single receipt was exhibited by the plaintiff. There is thus absolutely no evidence that the plaintiff made any purchase of building materials."

112. In the instant case, the Plaintiff produced no receipts and no other form of evidence before this Court to show that he purchased construction goods worth a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/-). It was very unlikely and virtually outside the realm of possibilities that the Plaintiff gave a contractor this amount of cash to purchase the construction materials and yet fail to have any form of documentation to show for it. No proof that approvals nor consent were obtained from the Defendants, Physical Planning department, NEMA or other regulatory authority before the purchase of the alleged constructing material alleged or at least before entering into the agreement for construction or making the alleged payment. In any case the Plaintiff admitted at cross examination that the materials were never delivered at the site and that he kept the possession of the alleged construction materials. They urged the Court to find that the Plaintiff had failed to prove this claim on a balance of probability or at all and dismiss the claim.

113. On the claim for loss of use and revenue. The Learned Counsel submitted that under prayer "III", the Plaintiff had prayed for loss of use and revenue from parking space at a sum of Kenya Shillings Twenty Two Thousand Five Hundred (Kshs. 22,500/-) per day from 1st January, 2010 to 1st January, 2016. The claim was denied in Paragraphs 10 and 11 of the Amended Defence dated 15th October, 2021. To begin with, they submitted that the Plaintiff had no basis for the date of 1st January, 2010 as the claim for loss of use and revenue. The contract produced by the Plaintiff at page 26 of the Supplementary list and bundle of documents dated and filed on 31st January, 2022 showed that the agreement for the alleged construction of a yard was to begin on 26th March, 2010 and was to last for six months, that was until 26th September, 2010. Therefore, there was no basis for the allegation that the Plaintiff would have been earning money from the parking yard from 1st January, 2010.

114. Secondly, the Plaintiff had not strictly proved that he was entitled to the above stated amount per day from 1st January, 2010 to 1st January, 2016 as loss of revenue. The Plaintiff never produced any evidence before this Court to lay a basis for the alleged above amount. This was because there was no evidence that the yard was ready or at least that materials for the construction were bought in readiness for the construction. The Valuation report filed as Plaintiff Exhibit no. 32 at pages 49 to 76 of the Plaintiff's supplementary list and bundle of documents dated and filed on 31st January, 2021 never provided any evidence for the allegation that the Plaintiff would have been earning the above amount per day from

the parking yard. The Plaintiff never summoned the person who prepared the report to explain to the Court how the above amount per day could have been arrived at. No contracts were entered into with 3rd parties for storage or parking and no licenses taken out for the yard. No comparable receipts or financial reports/records of similar yard businesses were produced.

115. At page 60 the Plaintiff's supplementary list and bundle of documents, the report asses that the suit property 'may accommodate 45 Semi-Trailer Lorries'. There was no good basis for this assertion because the valuer and the Plaintiff himself never got access to the suit property. In any cases there was no evidential basis of the charges per day, for each semi-trailer lorry so as to arrive at the above stated figure per day. In essence, the Plaintiff was inviting this Honorable Court to speculate on how much money he would have made as revenue from the parking yard. They urged the Court to decline this invitation and be persuaded by the case of "Hydro Water Well (K) Limited (Supra) where while declining to award damages for loss of profit, the High Court in the Court held as follows:-

> "……..the Plaintiff must prove is that lost profit damages are 'reasonably certain and not speculative.' Generally, the certainty of damages is sufficient if the evidence enables the court to make a fair and reasonable approximation of damages... I have carefully examined the plaintiffs claim for lost profits. I have considered the documents relied upon by the plaintiff. The plaintiff claims Kshs 106,985,953.300/- for loss of profits... such a claim requires a professional in the field to give expert evidence and explain how the amount claimed is explained and the rationale upon which the amounts are arrived at... I find and hold that it is correct to state that there is no basis at all upon which a court properly directing itself to the law and the material before me can entertain the claim for profits in this case. It follows that the claim for loss of profits has not been proved. The same is declined.'

116. To support this point, the Learned Counsel relied on the binding decision of the Court of Appeal in the case of "Kenya Tourist Development Corporation – Versus - Sundowner Lodge Limited [2018] eKLR", where the Court in setting aside an order by the High Court awarding special damages for loss of user despite the fact that the said loss had not been strictly proven held as follows;

> " The Learned Judge went on to find that the respondent 'suffered huge fundamental loss and an opportunity to complete and operate its intended business after completion.... We think that the learned Judge was correct to approach the sums claimed as quantified special damages properly pleaded. The problem, however, lay in the fact that the evidence tendered, such as there was, either failed to touch on the specific sums pleaded or was contradictory, inconclusive or speculative. This fell way short of the requirement not only of specific pleading but, also, indeed the more, strict proof."

117. The Learned Counsel on the quarterly rent of a sum of Kenya Shillings One Sixty Two Thousand Five Hundred (Kshs. 162,500/-) paid in advance, submitted that the Plaintiff alleged at paragraph *7* 'IV' that he this was the amount he paid as rent in advance for and which he was entitled to a refund. The claim was denied at paragraphs 10 and 11 of the Amended Defence dated 15th October, 2021. The Plaintiff never produced any evidence to prove this claim. At page 44 of the Supplementary list and bundle of documents by the Plaintiff dated and filed on 31st January, 2022, the Plaintiff produced cheque number 171736 for this amount which the Plaintiff relied on as proof of the allegation that he paid in advance. However, the cheque was dated 30th June, 2010 ten months after the Plaintiff allegedly entered into the purported agreement of September 2009. No evidence to show how and when the said amount was debited from the Plaintiff account to that of the Defendant. Therefore, this cheque

could not be taken as proof of rent paid in advance. This was so notwithstanding the fact that the Plaintiff never took possession of the suit property.

118. On the amount of Kenya Shillings Eleven Thousand Six Hundred (Kshs. 11,600/-) as cost of drawing the lease agreement. The Learned Counsel submitted that at Paragraph *7* 'V' of the Further Amended Plaint, the Plaintiff alleged to have paid this amount for the drawing of the lease agreement. The claim was denied in paragraphs 10 and 11 of the Amended Defence dated 15th October, 2021. The Plaintiff had produced as exhibit no. 6 the Receipt dated 28th September, 2009 from Messrs. Miller & Company Advocates at page 7 of the Supplementary list and bundle of documents dated and filed on 31st January, 2021. There was no evidence that the said receipt was for drawing of a lease agreement as it states that it was for 'legal fees'. It had no reference to the lease and no invoice was accompanied by it.

119. The Learned Counsel submitted on whether the Plaintiff knowingly and negligently failed to mitigate any alleged losses suffered, without prejudice to the submission that the Plaintiff has failed to prove on a balance of probability that he suffered the loss and damage alleged in the Further Amended Plaint, we submit that the Plaintiff knowingly and negligently failed to mitigate his losses if any. The Plaintiff's failure to mitigate his losses was pleaded at paragraph 12 of the Amended Defence dated 15th October, 2021. The Plaintiff was claiming compensation for alleged loss and damage arising out of a breach of contract. It was a fundamental principle of law that the Plaintiff's right to be compensated for such loss was qualified by a duty imposed on the Plaintiff to mitigate his losses.

120. The Learned Counsel averred that this was the position taken by the High Court in the case of:- "South Nyanza Sugar Company Limited – Versus - Donald Ochieng Mideny (2018)eKLR", where the Court held as follows:-

> " The fundamental basis is thus compensation for pecuniary loss naturally flowing from the breach; but this principle is qualified by a second, which imposes on the plaintiff the duty of taking all reasonable steps to mitigate the loss consequent on the breach and debars him claiming any part of the damage which is due to his neglect to take such steps."

121. On special damage of a sum of Kenya Shillings Six Million Eight Hundred Thousand (Kshs. 6,800,000/-) for 'Construction material'. The Learned Counsel reiterated that without prejudice to the fact that the claim for this amount had not been substantiated, it was apparent that the Plaintiff, if at all he paid the contractor the said monies, did so negligently. As at 26th March, 2010 when the Plaintiff allegedly entered into the contract for the construction of a parking yard, the Defendant had already communicated to the Plaintiff that the suit property was not available for lease. (See the letter dated 1st December, 2009 at page 9 of the Defendant's List and Bundle of Documents dated 7th December, 2016 and filed on 14th December, 2016).

122. The contract dated 26th March, 2010 at paragraph *9* provided for no liability should there be a delay ·or a complete failure by either party to carry out its obligations under the contract if the delay or failure is caused by, inter-alia, dispute on the premises. (See clause 9 of the contract dated 26th March, 2010 at page 30 of the Plaintiff's supplementary list and bundle of documents dated and filed on 31st January, 2021). Further, although the Plaintiff never informed the Court when he paid the said amount. Thus, it must have been after 26th March, 2010 when the contract was signed. As at that time, the Plaintiff had not taken possession of the property and the Plaintiff was aware that there was a dispute over the property. No reasonable person would have paid this moniesfor construction on a parcel of land he did not have possession of, and he knew in fact there was a dispute over.

123. The Learned Counsel submitted that given that the contract dated 26th March, 2010 it neither obligated the Plaintiff to pay the contractor nor imposed any liability on the Plaintiff in the event that the Plaintiff did not perform his obligations under the contract, it was clearly negligent of the Plaintiff to pay the contractor Kshs. 6,800,000/- for construction on a property he did not have possession over.

124. On the quarterly rent of Kshs 162,500/- paid in advance, the Learned Counsel, the Plaintiff alleged that he paid Kshs. 162,000/- as rent in advance for which he was entitled to a refund. He produced at page 44 of his Supplementary list and bundle of documents cheque number 171736 for Kshs. 162,000/- which the Plaintiff relied on as proof of the allegation that he paid the Kshs. 162,000/- in advance. However, the cheque is dated 30th June, 2010. As at 30th June, 2010,the Plaintiff did not have possession of the suit property. Additionally, as at 30th June, 2010, the Defendant had communicated to the Plaintiff numerous times that the suit property was not available for leasing to the Plaintiff or any other person and as such the Defendant would refund the monies paid to it by the Plaintiff. (See the letter dated 1st December, 2009 at page 9 of the Defendant's list and bundle of documents, and the letter dated 3rd April, 2010 at page 39 of the Plaintiff's supplementary list and bundle of documents).

125. In fact, on 9th June, 2010, three weeks before the Plaintiff allegedly paid these monies to the Defendant, the Defendant informed the Plaintiff that the land was not available for alienation and there had been some impropriety in the allocation of the property to the Plaintiff.(See the letter dated 9th June, 2010 at page 42 of the Plaintiff's supplementary list and bundle of documents dated and filed on 31st January, 2010). It was therefore clear if at all the Plaintiff paid the alleged Kshs. 162,000/- to the Defendant, the said amount was paid negligently as it is unreasonable for the Plaintiff to pay rent over property he does not have possession over, has been told several times is not available for alienation, and has also been told that any previous monies paid by him with regards to the said property would be refunded.

126. On the issue of the Land Surveyor's fee for demarcation of the plot, the Learned Counsel submitted that the Plaintiff also claimed a sum of Kenya Shillings twenty Five Thousand (Kshs. 25,000/-) as compensation for surveyor's fee for demarcation of the plot. At page 80 of the Plaintiff's supplementary list and bundle of documents the Plaintiff has produced the alleged demarcation report dated 13th July, 2011 and at page 79 he had produced the receipt dated 15th July, 2011. As at 13th July, 2011, even the purported lease agreement between the Plaintiff and the Defendant had long been terminated. There was no contractual relationship between the Plaintiff and the Defendant. The Plaintiff had no reason to conduct a demarcation report of the suit property. Further, there was no question as to the boundaries of the suit property to necessitate a demarcation report of the property. It was thus clear that this is a loss that the Plaintiff incurred knowingly and negligently and which the Plaintiff could have easily mitigated against.

127. On stamp duty, the learned Counsel submitted that the Plaintiff claimed a refund of a sum of Kenya Shillings Eight Thousand Eight Eighty Hundred (Kshs. 8,880/-) paid as stamp duty for the purported lease agreement. They equally submitted that this was a loss that the Plaintiff incurred knowingly and negligently. The pay-in-slip at page 21 of the Plaintiff's supplementary list and bundle of documents shows that the Plaintiff paid for the stamp duty on 22nd April, 2010. As at this time, the Plaintiff had already been informed by the Defendant that the property was not available for lease and the plaintiff had not taken possession. (See the letter dated 1st December, 2009 at page 9 of the Defendant's list and bundle of documents).

128. In fact, on 3rd April, 2010, only 19 days before the Plaintiff paid for the said stamp duty, the Defendant informed the Plaintiff that the land was not available for lease and advised that no activity should be undertaken on the suit property. (See the letter dated 3rd April, 2010 at page 39 of the Plaintiff's supplementary list and bundle of documents). It was thus clear that this was a loss that the Plaintiff

incurred knowingly and negligently and despite the Defendant's express advice. It would be unjust for the Defendant to be ordered to refund monies the loss of which the Plaintiff could have easily mitigated against.

129. In conclusion, the Learned Counsel submitted that for any or all of the reasons submitted herein, they urged this Honorable Court to dismiss the Plaintiff's suit as contained in the Further Amended Plaint dated 27th September, 2021 with costs to the Defendant.

VII. Analysis and Determination

130. I have keenly assessed the filed pleadings by all the Plaintiffs and Defendants herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.

131. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following five (5) issues for its determination. These are: -

a. Whether this Honourable Court has the Jurisdiction to determine this suit?

b. Whether there was a valid agreement duly executed between the Plaintiff and the Defendant.

c. Whether there was a breach by the Defendant?

d. Whether the Plaintiff is entitled to the orders sought in the Plaint.

e. Who bears the costs of the suit?

Issue a). Whether this Honourable Court has the Jurisdiction to determine this suit.

132. The Site Visit Report

133. As indicated above, on the 6th December, 2024 with the consensus of the parties, the Honourable Court conducted a Site Visit. Below is the report prepared produced verbatim for ease of reference.

> Environment & Land Court at Mombasa
>
> ELC No. 46 of 2006
>
> Gulamhussein Gulam .....plaintiff
>
> – Versus –
>
> Kenya Railways.....Defendant
>
> A Site Visit Report on a Visit Held at Changamwe Kenya Railways on 6th December 2024
>
> **I. Introduction.**
>
> 1. The site visit ("Locus in Quo") was conducted at an area within the Changamgwe of the County of Mombasa. It is close to 25 Kilometres from the main town of Mombasa.
>
> 2. The team assembled at around 11.30am. Brief introductions of the Court and the parties present were conducted. The Judge explained the purpose and the procedure of the visit.
>
> 3. It was agreed by the team that both the Plaintiff and Mr. John Kihio on behalf of the Defendant would lead the team.

II. The Report.

A. The Court

1. Before Hon Justice L.L Naikuni –Judge.
2. M/s. Fridaus Mbula – the Court Assistant.
3. Mr. George Omondi – the Judge's Usher.
4. Mr. John Ngari – the Judge's Driver.

B. The Plaintiff.

1. M/s. Sharon Maiga Advocate
2. Mr. Gulamhussein – The Plaintiff.
3. Mr. John Kihio - A Manager for the Plaintiff's company.
4. Mr. Samuel Ade – An Administrator with the Plaintiff's Manager..

C. The Defendants.

1. Mr. Karina Advocate for the Defendant.
2. Mr. Justin Omoke – The Property Manager for the Defendant.
3. Mr. Levy Anaya – the driver for the Defendant.

(Hereinafter all referred to as "The Team").

D. Security Operatives.

1. Inspector Simon Mweu - OCS Mombasa Law Courts.
2. Police Constable Henry Kaviti – Mombasa Law Courts.
3. Police Constable Yusuf Ali – Mombasa Law Courts.

III. The Purpose for the Site Visit.

4. It was stated that the site visit was being conducted in accordance with the provision of as Section 173 of the *Evidence Act*, Cap. 80; Order 18 Rule 11 and Order 40 Rule 10 of the Civil Procedure Rules, 2010. The provisions of Order 18 Rule 11 of Civil Procedure Rules, to wit:-

> Power to court to inspect;
>
> " The court may at any stage of a suit inspect any property or thing concerning which any question may arise"
>
> While Order 40 Rule 10 (1) (a) provided to wit:-
>
> "The Court may, on the application if any party to a suit, and on such terms as it thinks fit:-

a. Make an order for .....Inspection of any property which is the subject matter to which any question may arise therein.

5. Ideally the site visit - the Locus in quo was with a view of inspecting the land to fully appreciate its nature. Suffice it to say, Court explained to the parties that the purpose was not to adduce fresh evidence nor venture onto the veracity of the evidence already adduced this cross examination, fill in gaps the parties evidence but purely to check and confirm the evidence lest the court runs into the risk of turning itself a witness in the case. A visit is an exception rather than the rule.

6. Site Visit ELC E29 of 2022 Page 3 of 10 L. Naikuni (Judge)

Parties were advised to sustain high dignity, decorum and decency during the visit. It would be a team work driven process. While recording of the proceedings using electronic devices would be allowed, photography or video shooting was debarred due to the likely hood of being abused particularly through Social media. The report has endeavored to make some salient findings in order to expedite the hearing and final determination of the case. IV. The observations made by the team

7. The team made the following observations.

A. The location and size:-The suit property measures approximately 1 acre. It is found at Changamwe just besides and/or along the Mombasa – Nairobi highway. It is "V" shaped.The railway line passes adjacent to it. However, there is some distance between the suit land and the railway line which is around 30kms on a sloppy ground. It was evident that the railway line serves numerous god - down structures which the team saw within the vicinity.The land was flat and vacant. It was well levelled up using macadamize (Madam) material. The team learnt that levelling of the ground was undertaken by some Chinese company. Perhaps it was used as a yard for socking the building materials during the construction of either the Highway or the Standard Gauge Railway.There was no development at all on the land in terms of structures nor plantations nor habitation. The court was informed that there were fibre cables underneath the ground but this could not be verified at all and the entity that may have put them.At a close distance in the neighourhood, part of the land has been occupied by KENHA and there was also a wall between the suit land and Hass Petrol station.An issue arose as to whether Hass Petrol station was also standing on the property belonging to the Defendant property.

V. Conclusion

8. Upon completion of the tour around the site, the Court made the following directions: -

a. That the Honourable Court to prepare and share the Site Visit report accordingly.

b. That the scheduled Judgment for 18th December 2024 to be deferred to 19th February 2025.

The Site Visit Report Prepared and Dated This 6th Day of December, 2024.

.....

Hon. Mr. Justice L.L. Naikuni,

Environment & Land Court at

Mombasa

134. Now turning to the analysis under this sub title the Court shall discuss the jurisdiction of this Court to determine this matter to its conclusion. The Provision of Section 87 of the *Kenya Railways Corporation Act*, (Cap. 397 Laws of Kenya) provides that:

> " Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority the following provisions shall have effect-
>
> (a) the action or legal proceeding shall not be commenced against the corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceeding, has been served upon the Managing Director by the Plaintiff or his agent.
>
> (b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months after the cessation thereof".

135. It follows, therefore, based on the legal ration of the above provision of the law requires any person who intends to take court action against the Defendant to issue a 30 days' notice of intention to sue. This notwithstanding, the Courts from various decisions, have now interpreted this Section of the law differently particularly with regard to access to Justice. In the case of "Joseph Nyamamba & 4 Others (Supra) the Court of Appeal observed thus:

> " .....The Appellants in this appeal submit that the said Section 87 of the said Act is an impediment to access to justice which to them would be a violation of Article 48 of *the Constitution* of Kenya 2010. The Appellants therefore ask us to hold that the said section is unconstitutional and must give way to access justice rights provided in the said article of *the Constitution*...."

136. The provision of Article 48 of *the Constitution* of Kenya, 2010 provides that:-

> " The state shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice."

137. Similarly, in the case of "Kenya Bus Services Limited & Another – Versus - Ministry of Transport & 2 Others [2012] eKLR" Majanja J held thus:

> " 37. By incorporating the right to access to justice, *the constitution* requires us to look beyond the dry letter of the law. The right to access to justice is a reaction to and a protection against legal formalism and dogmatism.....
>
> Article 48 must be treated within the Constitutional imperative that recognizes as the Bill of Rights as the framework for social economic and cultural policies. Without access to justice the objects of *the Constitution* which is to build a society founded upon the rule of law, dignity, social justice and democracy cannot be realized for it is within the legal process that the rights and fundamental freedoms are realized. Article 48 therefore invites the court to consider the conditions which clog and fetter the right of person to seek the assistance of the court of law....."

138. Additionally, in the case of "Catherine Njeri Majani – Versus - Kenya Railways Corporation & Another [2021] eKLR" Angote J observed thus:-

> " Considering the provisions of Article 48 of *the Constitution* which requires the state to ensure access to justice for all persons, and the pronouncement of the superior courts on the applicability of Section 87 (a) of the *Kenya Railways Corporation Act*, it is my finding that the failure by the Plaintiff to issue to the 1st Defendant a thirty (30) days' notice, if at all, is not fatal to the suit".

139. In view of the foregoing legal position and authorities, I am strongly guided in finding that the failure by the Plaintiff herein to issue notice of intention to sue the Defendant before institution of this suit would amount to unconstitutional requirement. Thus, I discern that is not fatal to the suit. It follows that the Honourable Court is well clothed with Jurisdiction to hear and finally determine the matter hereof.

Issue No. b). Whether there was a valid agreement duly executed between the Plaintiff and the Defendant

140. Under this Sub – heading, the Honourable Court will endeavor to deliberate on issues of legality and efficacy of Contract in Law. Undoubtedly, the matter before this Court is not on ownership of the land nut breach of contract. However, before proceeding further, it is trite law that a contract over land that does not satisfy the requirements of Section 3(3) of the *Law of Contract Act* is unenforceable. Section 3(3) of the *Law of Contract Act* provides that "no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit founded is:-

a) In writing;

b) It is signed by all the parties thereto; and

The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.'

141. Likewise, the provision of Section 38 (1) of the *Land Act*, No. 6 of 2012 provides:-

38 (1) Validity of contract in sale of land:-

> "Other than as provided by this Act or by any other written Law, no suit shall be brought on a contract for a disposition in an interest in land unless the contract upon which the suit founded is:-
>
> a) In writing;
>
> b) It is signed by all the parties thereto; and
>
> The signature of each party signing has been attested by a witness who is present when the contract was signed by such party.
>
> In the Court of Appeal the case of:- "Jane Catherine Karani – Versus - Daniel Mureithi Wachira" held/observed that:-
>
> > "It is clear from the reading of Section 3 (3) of the *Law of Contract act* that the signature of each party is required to be attested by a witness who was present during the execution of the agreement. We have perused the agreement and we find that it is only the appellants signature that was attested by her husband. This was clearly contrary to Section 3 (3) of the Law of Contract."

142. The wording of the above provisions is mandatory. According to PW - 1, he was issued with a Letter of Offer dated 7th September, 2009 to himself with terms and conditions – lease land - duration 6 years from 1st October, 2009 for parking bay/yard, 1 acre Admonish charges of Kenya Shillings One Hundred Thousand (Kshs. 100,000/-), Annual rent a sum of Kenya Shillings Six Fifty Thousand (Kshs. 650,000/-) per year escalating every two years security deposit of as um of Kenya Shillings One Hundred and Eight Thousand (Kshs. 108,000/-) and stamp duty a sum of Kenya Shillings Eight Fourty Thousand (Kshs. 840,000/-) and parking fees a sum of Kenya Shillings Fifteen Thousand (Kshs. 15,000/-). PW - 1 told the court that he had to pay in 14 days from signing the letter of offer. He paid on 9th September, 2009, a sum of Kenya Shillings Three Eighty Five Thousand Five Hundred (Kshs. 385,500/-) and issued with receipt – proof of payment/deposit to KCB. – Plaintiff Exhibit – 4. He was issued with an official receipt dated 8th November, 2009 of the said amount by Kenya Railways – Plaintiff Exhibit - 5 No. 94839. They sent him to their lawyer M/s. Miller & Company Advocates who prepared the Lease Agreement. He paid – Kenya Shillings Eleven Thousand Six Hundred (Kshs. 11,600/-) and issued with a receipt dated 28th September, 2009 – P. Exhibit 6. He signed the lease agreement Pages 8-18 – "Plaintiff Exhibit – 7". The Defendant vehemently argued that the agreement was invalid and illegal as it was not signed and hence there was legally binding agreement.

143. With reference to clause 20 of the Lease Agreement for the Termination, the witness confirmed that the Lease Agreement is based on the terms and conditions on the Letter of Offer. He also wished take the attention of the court to Clause 22.4 on arbitration; he received the leased for signing on 29th September, 2009. He signed the same in the presence of his advocate – the Plaintiff and Mr. Eric Otieno Advocate sent it back to Nairobi and send it back to him after registration and payment of stamp duty - on 22nd April, 2010 and stamped Kenya Railway signed by one of the Directors Serial No. for the seal/Director – S. No. 00130, (Serial Number for the property) and The Lease was attached to the Development plan for the Plot – Plaintiff Exhibits Numbers 8 and 9 was the stamp Duty receipt No.

520134 Issued on 22nd April, 2010 and the Plan for the Plot – stamp duty of Kenya Shillings Eight Thousand Eight Fourty Hundred (Kshs. 8,840/-) paid to the M/s. Cecil Miller & Company Advocate.

144. In my own view, the agreement duly executed between the Plaintiff and the Defendant was valid as all the conditions necessary for a valid land agreement/ lease under Section 38 of the *Land Act*, No. 6 of 2012 and Section 3(1) of the Law of Contracts Act, Cap. 23 had been fulfilled. All the issues raised by the Defendant while trying to oppose the validity of the Lease Agreement are purely academic and without any basis whatsoever.

Issue No. c. Whether there was a breach of agreement by the Defendant

145. The Plaintiff's case is that the lease agreement between him and the Defendant herein, the purpose of the lease - The Letter of Offer clause 3 and the Lease Agreement clause 1.1 line 15 specifically indicate that the permitted purpose of possession of the property by the Plaintiff was for a truck parking yard during the tenure of the Lease Agreement. This specific term forms core of the Plaintiff's claim against the Defendant for damages of breach of contract.

146. The terms of the lease - The term of the lease was specifically scheduled for 6 years with effect from 1st October 2009, to which the Plaintiff was never granted free and peaceful possession/occupation during its tenure. Under the Agreement and the Letter of offer the Plaintiff would be granted possession of the property once the lease agreement was duly executed. The plaintiff submitted proof of payment of all the charges and costs required under the Lease Agreement. The Lease Agreement was duly executed and registered but upon the Plaintiff attempting to take possession of the property he was harassed by a third party known as Habibi Huri who equally claimed ownership of the property by virtue of a different lease agreement. The Plaintiff sought the Defendant's intervention to secure possession of the property, moreover, informing the Defendant of the risk, loss and or financial damage of Kshs. 6,800,000.00 in the event vacant possession is not granted before 4th December 2009.

147. The Plaintiff relied on the following particulars of breach of contract:-

a. The defendant evicted the plaintiff contrary to the terms of the agreement. The defendant illegally terminated the lease agreement contrary to the period of determination of the lease as provided in the terms without reason or notice and proceeded to issue a lease to the 3rd party over the same premises to the detriment of the plaintiff.

b. In breach of the said contract and in total disregard thereof the defendant has failed to deliver the vacant possession of the land as per evicted the plaintiff contrary to the agreement. Despite the terms of the lease agreement and request made by the plaintiff to the defendant, the latter has failed, refused and /or ignored to honour its obligations under the agreement.

148. PW 1 confirmed with reference to clause 20 on the termination, that he was never given any 3 months' notice by Kenya Railways. Vacant possession in the present situation meant that the suit land was to be made available for the Plaintiff to move in and /or take possession. It therefore required the Defendant to remove all his goods and/or asserts from the property to enable the Plaintiff possess it. The consequences of failure to give the said vacant possession would therefore only lead to one thing and that would be breach of contract. There is no any other way to define vacant possession. So where does that leave us? At this end I find that the Defendant were in breach of the lease agreement providing a lease for 1st October, 2009 to 30th September, 2015 from the letter of offer dated 7th September, 2009 – Clause 14 – he was to be given possession once the lease was executed.

Issue No. d). Whether the Plaintiff is entitled to the orders sought in the Plaint

149. Under this substratum we shall examine the prayers sought by the Plaintiff. The Plaintiff also sought for:-

a. Special damages for Kshs. 7,012,940/-

b. Loss of income at Kshs. 22,500/- per day from 1/10/2009 to 30/09/2015 till payment is in full

c. Interest on (a)and (b)above,

d. Costs of this suit,

e. Such further other reliefs as this Honourable court may deem fit and just to grant.

150. The plaintiff was obligated to prove those claims which are claim in special damages, as was stated in the Court of Appeal decision "Capital Fish Kenya Limited – Versus - Kenya Power & Lighting Company Limited (2016) eKLR" as follows:-

> " Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board Of Trustees Vs. Sifa International Limited (2016) eKLR, Macharia & Waiguru Vs Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance CO. EA LTD Vs Mordekai Mwanga Nandwa, KSM CACA 179 OF 1995 (UR). In the latter case this Court was emphatic that "... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ..."

151. It is the duty of the Plaintiff to prove its claim for damages as pleaded. It is not enough simply to put before the court a great deal of material and expect the court to make a finding in his favour. It was said by Lord Goddard, CJ in "Bonham Carters Hyde Park Hotel Limited [1948] 64TR 177":-

> " The Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to write down particulars and, so to speak, throw them at the head of the court, saying, "this is what I have lost, I ask you to give me these damages." They have to prove it."

152. PW 1 paid for the sum – Plaintiff Exhibit 2 dated 29th May, 2009. He submitted the application page 2 - Plaintiff Exhibit 3. PW 1 was issued with a letter of offer dated 7th September, 2009 to himself with terms and conditions – lease land - duration 6 years from 1st October, 2009 for parking. 1 acre Admonish charges Kshs. 100,000/=, Annual rent Kshs. 650,000/- per year escalating every two years security deposit of Kshs. 108,000/- and stamp duty Kshs. 840,000/- and parking fees Kshs. 15,000/-. PW 1 told the court that he was to have paid in 14 days from signing the letter of offer. He paid on 9th September, 2009, Kshs 385,500/- and issued with receipt – proof of payment/deposit to K.C.B. – P. Exhibit – 4. He was issued with an official receipt dated 8th November, 2009 of the said amount by Kenya Railways – Plaintiff Exhibit - 5 No. 94839. They sent him to their lawyer M/s. Miller & Company Advocates who prepared the Lease Agreement. He paid Kshs 11,600/- and issued with a receipt dated 28th September, 2009 – P. Exhibit 6. He signed the lease agreement Pages 8-18 – "Plaintiff Exhibit – 7".

153. Being that this Court has already determined that the Defendant was in breach of the lease agreement between it and the Plaintiff, I find that with the receipts provided for by the Plaintiff, there has been prove of special damages through the exhibits produced by the Plaintiff.

154. On the loss of income at Kshs. 22,500/- per day from 1/10/2009 to 30/09/2015 till payment is in full; Loss of earnings or income is a special damage claim, and it is trite law that special damages must be pleaded and strictly proved. Where there is no evidence regarding special damages, the Court will not act in a vacuum or whimsically. In "S J – Versus - Francessco Di Nello & another [2015] eKLR" the Court of Appeal held that: -

> "Claims under the heads of loss of future earnings and loss of earning capacity are distinctively different. Loss of income which may be defined as real actual loss is loss of future earnings. Loss of earning capacity may be defined as diminution in earning capacity. Loss of income or future earnings is compensated for real assessable loss which is proved by evidence. On the other hand, loss of earning capacity is compensated by an award in general damages, once proved."

155. From the above-cited authorities, loss of income and/or future earnings must be pleaded and proved as they are in the nature of special damages. Nevertheless, the Court of Appeal also cited with approval the decision of Apaloo, J. (as he then was) in "Wambua – Versus - Patel & another [1986] KLR 336", where the Court had found the Plaintiff had not kept proper records of what he earned but stated: -

> "Nevertheless, I am satisfied that he was in the cattle trade and earned his livelihood from that business. A wrong doer must take his victim as he finds him. The Defendants ought not to be heard to say the Plaintiff should be denied his earnings because he did not develop more sophisticated business method" .... But a victim does not lose his remedy in damages because the quantification is difficult." See also Jacob Ayiga Maruja & Another vs. Simeone Obayo [2005] eKLR for the proposition that the proof of 'profession of a person must be by production of certificates and that the only way of proving earning is equally the production of documents.

156. In the absence of proof of income, the claim becomes unrealistic. PW 1 had no proof of the loss of material nor where they bought and from whom the contractor bought from. I reiterate the case law in ELC Appeal No. 13 of 2020 Court of Appeal in "Abson Motors Limited – Versus - Dominic B. Onyango Konditi [2018] eKLR" overturned the High Court award for loss of business income that was based on invoices alone reiterating that loss of business must be specifically pleaded and proven. I find the claim not proved and decline to make any award.

Issue d: Who bears the costs of the suit

157. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of "Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR and "Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of "Hussein Muhumed Sirat – Versus - Attorney General & Another [2017]

eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

158. In "Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus - Mutula Kilonzo & 2 others [2013] eKLR" quoted the case of "Levben Products – Versus -Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227" the Court held;

> "It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at....In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."

159. In the present case, for the fact that the Plaintiff proved his claim they shall have costs of the suit to be borne by the Defendant herein.

VIII. Conclusion and Disposition

160. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiffs have established their case against the Defendants. Thus, the Court proceeds to make the following specific orders:

a. That Judgment be and is hereby entered in favour of the Plaintiff in respect to the Further Amended Plaint dated 27th September, 2021 in its entirety with costs.

b. That a Plaintiff be and is hereby awarded Special damages for a sum of Kenya Shillings Seven Million Twelve Thousand Nine Hundred and Forty (Kshs. 7,012,940/-) as proved through receipts.

c. That interest is awarded on (b) above from 1st October, 2009 to payment of the amount in full.

d. That costs of the suit to be awarded to the Plaintiff and borne by the Defendant herein.

It is so ordered accordingly

JUDGMENT DELIVERED THROUGH THE MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 21ST DAY OF MARCH 2025.

.....

HON. MR. JUSTICE L.L. NAIKUNI

ENVIRONMENT AND LAND COURT AT

MOMBASA

Judgement delivered in the presence of: -

a. M/s. Firdaus Mbula – the Court Assistant.

b. M/s. Maiga Advocate holding brief for Mr. Attancha Advocate for the Plaintiff.

c. Mr. Karina Advocate for the Defendant