



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**ELC CIVIL SUIT NO 47 OF 2013**

**SBI INTERNATIONAL HOLDINGS AG (KENYA).....PLAINTIFF**

**VERSUS**

**REUBEN KIPKORIR J.T. BORE.....DEFENDANT**

**JUDGEMENT**

1. This matter was initially filed vide a Plaint dated the 19<sup>th</sup> July 2013 which was subsequently amended on the 23<sup>rd</sup> November 2017 in which the Plaintiff herein sought for judgment against the Defendant for;

- i. General damages
- ii. Special damages
- iii. Costs of the suit with interest at commercial rate.

2. In response, the Defendant herein filed their defence, dated the 14<sup>th</sup> February 2018, to the amended Plaint, denying the contents of the Plaintiff's claim to the effect that the lease agreements dated 18<sup>th</sup> August 2010 and 18<sup>th</sup> of August 2012 were not registered as per the provisions of the Land Act and therefore not only voided by the court, but had lapsed and therefore not enforceable against the Defendant.

3. That further the Defendant was not served with a demand notice to institute legal proceedings and therefore the Plaintiff was not entitled to any costs. The Defendant further averred that the court had no original jurisdiction to hear the Plaintiff's suit and further that the same was fatally defective and disclosed no cause of action. The Defendant contended that the Plaintiff's suit had not only been caught up with time limitation but that the same was res judicata, the subject lease having been avoided by the court on 28<sup>th</sup> May 2014.

4. Both parties having complied with the provisions of Order 11 of the Civil Procedure Rules, the matter was set down for hearing.

**Plaintiff's case**

5. Fred Malebo Odanga testified as PW1 to the effect that he had recorded his witness statement on 5<sup>th</sup> October 2018 to which he sought the court to adopt as his evidence. He then went ahead to produce his bundle of documents dated 27<sup>th</sup> September 2018 and filed on 12<sup>th</sup> October 2018, as Pf exh 2.

6. He testified that he had worked as a Logistics Manager and the CEO to the Plaintiff (SBI) for 11 years wherein his duties included checking the operations of the company, which in turn included the signing of tenancy agreements and ensuring that the Company was running smoothly.

7. That being a construction company, they dealt with gravel holders and other building materials. That when they were awarded the contract to construct the Kericho-Mau Summit road, they had to look for the relevant materials. He referred to their contract at pages 1-4 of their bundle of documents and proceeded to testify that the project, whose value was Kshs. 6,835,477,486.36/= was to last for some time.

8. That after signing the contract with KenHa, they had sought for an appropriate site where they could get the materials so as to implement the project, as per page 11 of their bundle of documents. That they had sampled a few sites before they found suitable materials in the Defendant's property wherein they had talked to the Defendant who had agreed to enter into an agreement with them. The Defendant's land on which the materials had been found was L.R No. Kipkelion/Chepseon Block 2 (Kisabo)/88. That the material had been approved by KenHa as per page 15 and 16 of their bundle of documents.

9. Subsequently, they had entered into a 4 year contract/lease with the Defendant which period run from 18<sup>th</sup> August 2012 to 18<sup>th</sup> August

2016 as seen at pages 17-22 of their bundle. Earlier the lease had been for 2 years from 2010 -2012 wherein the rent had been Kshs. 200,000/= per acre per annum. They leased 2<sup>1</sup>/<sub>2</sub> acres at Kshs. 500,000/=.

10. That after signing the agreement, they had to get the relevant approvals from NEMA and Kipkelion Town Council, as per pages 27-35 of their bundle of documents, wherein they had mobilized their equipment to the site. They installed a crushing and Asphalt machines, erected some storage facilities e.g. water tanks and other equipment which took a while. That in total, the equipment they erected had cost over Kshs. 100,000,000/= and that this had been after paying the agreed rent to the Defendant as per a copy of the cheque paid to Reuben Kipkorir J.T Bore, the Defendant herein, dated the 5<sup>th</sup> September 2012. He confirmed that they had complied with the terms of the lease.

11. His evidence was that by a notice dated 31<sup>st</sup> January 2013, which was back dated, and which had been received in May, 2013, the Defendant terminated their lease contrary to the terms of the lease agreement which had provided for termination upon giving notice of 6 months and upon their failure to pay rent, which they had not failed to pay.

12. The witness' evidence was therefore that that the termination of the lease was unfair and unlawful as it led to loss and damage on their part because after the Defendant closed the site, they could not operate according to schedule because they had to source for materials from very far.

13. That Clause 8.7 of the contract with KenHa had provided for penalties in the event of delay in that they were liable to pay damages. That the termination of the lease had also occasioned them losses of an average of Kshs. 2.1 million per day as they used to crush 3000 tons of ballast daily. That they also had workers on site whom they had to pay despite them not working. That they had also lost time and incurred transportation costs as they had to ferry materials from Awasi which was far away.

14. His evidence was that according to lease agreement, it had been the responsibility of the Defendant to obtain the relevant consent from the Land Control Board.

15. That whereas Clause 6(d) of the lease provided for compensation in the event that they suffered damages, Clause 7 (a) provided that the Defendant would compensate them the cost of developing the leased area. He put the value of setting up the site at Kshs. 100,000,000/=.

16. On cross-examination, the witness stated that he had done a course in Highway Engineering and was able to draw and approve lease documents. That the contract documents had been executed by the Managing Director of the Plaintiff and that he did not execute any of the documents in the Plaintiff's bundle of documents.

17. That the lease agreement was dated 18<sup>th</sup> August 2012. That the earlier lease had been from the year 2010 to 2012 but that the same had not been included in their bundle of documents because the court had made a finding that it was void. He conceded that they had not appealed against the said ruling.

18. He confirmed that when the Defendant breached the terms of the lease, they had sought alternatives but also filed the resent suit in which they had sought for interim orders of injunction. That the lease had been for 4 years and was supposed to end on 17<sup>th</sup> August 2016 but had been terminated before the 4 years lapsed despite the fact that they had paid the rent for the whole year of 2013.

19. He responded that the Defendant had blocked the quarry in August, 2013 wherein the annual rent had been Kshs. 500,000/=. That in the second year, there was supposed to be an increment of 10%. Wherein they had paid Kshs. 550,000/= on 27<sup>th</sup> August 2013 for the period ending August, 2014.

20. Upon being re-examined, the witness reiterated that the payment for the second year of the lease had been made on condition that the Defendant would make no further claim against the Plaintiff. That the contract documents had been signed by the proper parties and were therefore valid and further that he had been aware of what was happening at the site. He sought to be granted the prayers for both special and general damages together with costs.

21. The next Plaintiff witness PW2, Stanley Wafula Sara testified that he had recorded his witness statement on 28<sup>th</sup> September 2018 to which he sought to be adopted as his evidence. That he had been employed by the Plaintiff as a Security Officer wherein his responsibility had been to ensure that the sites of SBI were secure. That he was also concerned with the safety of the staff.

22. His evidence further was that on the 20<sup>th</sup> August 2013 he had received information that the Defendant had placed a second padlock on their gate at the Kipkelion site. That he had requested his junior officer to find out the reasons why, wherein on the 21<sup>st</sup> August 2013, he had visited the quarry site on parcel L.R No. Kipkelion/Chepseon where they had installed a number of machines valued at about Kshs. 400,000,000/=.

23. That upon arrival at the site, he had found goons armed with crude weapons who insisted that work must stop. From his investigations, he had managed to find out that the owner of the quarry Mr. Reuben Kipkorir Bore (Defendant) had been the one who had ordered the goons to disrupt operations at the site.

24. That thereafter he had advised his assistant to report the matter to Chepseon Police Station wherein they had been issued with an OB. That he had further been informed by the police that the Defendant had made a report to them wherein he had informed them that there was a civil matter on the issue, pending in court. That after reporting the matter, he had organized to secure their equipment on site.

25. When cross-examined, the witness confirmed that he was a retired Police Officer. That he had received the report from one Kassim Abubakar wherein he had visited the scene. That the report to the police had been made by his assistant Kassim who had been advised that

this was a civil matter. There had been no arrests made and no one had been charged in court.

26. In his re-examination, the witness confirmed that it had not been within his capacity to force the police to make arrests. That the work at the site had been disrupted and everyone had fled for their lives. The Plaintiff thus closed their case.

**Defendant's case.**

27. The Defendant, Reuben Kipkorir testified as DW 1 to the effect that he was a retired KDF officer who was currently doing some business and was also a farmer. That he entered into an agreement with SBI, the Plaintiff herein, to use his land parcel No. Kipkelion/Chepseon Block 2 (Kisabo)/88 comprising of 2 ½ acres, for extraction of road materials to be used for upgrading of the road from Mau Summit via Kericho to Nyamasaria. That the said agreement was to run from 2011-August 2014, that is for 4 years.

28. That he had been paid before the expiry of the term and upon the expiry of the term, the SBI had removed their equipment and left. That although the case had been filed by SBI, yet as per the lease agreement, there was some pending issues from their side which was for them to put back the top soil in 2 ½ acres and to demarcate the side of the beacons on the main road which had been removed by their vehicles as this was now a concern with his neighbors. That the Plaintiff also needed to put back the fence and to pay rent overdue from August 2014 to date.

29. The Defendant sought to rely on his defence statement filed on 14<sup>th</sup> February 2014 and proceeded to further testify that apart from being the SBI landlord, he too had been one of the security officers and that his defence did not touch on what the witness testified in court.

30. That the agreement was between him and the management of SBI and that the witness' evidence had nothing to do with the lease which lapsed in August, 2014. He further stated that this case had been dismissed in June, 2016 wherein the SBI was to meet the cost of the suit. That he now sought that court gives him the chance to use his land and to dismiss the case as the same was long overdue. He also sought that the SBI do meet the cost of the suit.

31. The Defendant also confirmed that what he had stated initially was that he had no case with SBI in regard to the rent, what he just wanted was for them to establish the boundaries, return the top soil and to pay the overdue rent.

32. During his cross examination, the Defendant stated that he had made reference to an agreement between him and the Plaintiff and that he did not have issues with regard to rent. He also stated that he did not know why the Plaintiff brought him to court. That after the case had been dismissed in the year 2016, he was unaware of any pleadings that were filed.

33. He was referred to paragraph 13 of the amended Plaintiff to which he read and responded that he had two parcels along the quarry area being plot No. 35 which was about 700 meters from the quarry and on which he had built a permanent house.

34. He went further to testify that when the Plaintiff were blasting the rocks he had taken the management of SBI to his house to witness the vibration and damage it had caused therein wherein they had agreed to pay for the damages caused. That a Mr. Toodo who had been the site manager had summoned him and his wife to the office where they used to mix sand and tar and that was the place they had agreed to compensate him with Kshs. 6,000,000/=. That he been given some forms, of which he was not given a copy as there was no photocopier, to sign so that they could seek authority from Israel to release the money. His testimony was that after the Plaintiff filed suit against him, he closed down the quarry as time was passing and he had not been paid.

35. When referred to a letter dated the 31<sup>st</sup> January 2013, he confirmed that the same was from his advocate and that he agreed with the facts therein which had been the reasons for terminating the lease. He stated that he had not been asked to bring anything to court to show that the Plaintiff had failed to comply with the terms of the lease or statutory obligations.

36. When referred to a lease agreement of 18<sup>th</sup> August 2012 of the Plaintiff's supplementary list of documents at Paragraph 5 (a-d), The Defendant confirmed that the Plaintiff had complied with the rent terms and that he had no problem with the Plaintiff save that the lease agreement was running out and they had not compensated him for the damage caused to his house.

37. He stated that his house had no relation with this agreement and that his site was only for the crash. He confirmed once again that he had no issue with payment of rent. He then made a reference to paragraph 13 of a ruling delivered by Justice L. Waithaka, and after counsel reminded him of the reason they were in court, he confirmed that the lease expired on August 2014 and the SBI removed their equipment. He also confirmed that he knew the reason why the SBI was on the land which was for the construction of a Government project. He confirmed that he only closed the quarry for 1 (one) week but opened it after he had been ordered by the court to open it. That he was not aware that the closure had led to slowing down of the project as the materials were on another site and the working had continued. (The court noted the demeanor of the Defendant in that he was a truthful witness)

38. In re-examination, the Defendant's response was that the crushing machine and not the quarry had been on the side of the land where his house stood. He reconfirmed that he had an adjacent parcel of land No. Kipkelion/Chepseon Block 2 (Kisabo)/35 where he had built his house and which land was 700 meters from the quarry.

39. He reiterated that the management visited his house wherein they had seen the cracks on the floor and walls and wherein after, they had signed the forms. That even whilst they were in his house, a blast had occurred and there had been some vibration and wherein one of the managers had ran out of the house. That was when they had agreed to compensate him. That to date they had not made any payments.

40. When the Defendant was questioned by the court, he responded that there was another site called Marine. That there were three sites in the quarry, one part was for extraction of rocks, which was not his. The second site was the crush site which was his, and the third site was the marine site which was for mixing up all the materials. That he was positioned in the middle. The defence then closed its case and parties

were directed to file their written submissions.

### **The Plaintiff's Submissions.**

41. The Plaintiff's submission was to the effect that they had been awarded a contract by the Government of Kenya to undertake the rehabilitation and upgrading to bitumen standards of the Mau Summit Kericho road. That they subsequently entered into a contract with the Defendant to use the suit parcel of land as their construction site. That on the 20<sup>th</sup> August 2013 and 21<sup>st</sup> August 2013, Defendant herein closed the lower gate of the quarry and chased away the Company's employees thereby disrupting and stopping work on site which necessitated the Plaintiff to file suit against him to compel him to comply with the terms of the lease agreement dated 18<sup>th</sup> August 2012 in respect of land reference number Kipkelion/Chepseon/Block 2(Kisabo)/88 and consequently allow the Plaintiff to peacefully occupy and use the said land for the remainder of the lease period provided that they continued to pay the agreed rent.

42. The Plaintiff raised their issues for determination as follows;

- i. Whether the Defendant breached the terms of the lease.
- ii. Whether the Plaintiff suffered loss due to the Defendant's breach and whether the Plaintiff was entitled to the reliefs sought.

43. On the first issue for determination, it was the Plaintiff's submission that upon complying with the terms of the lease agreement between them and the Defendant and having heavily invested over Ksh. 200,000,000/= shillings in the property, undertaking the necessary processes that culminated into the issuance of an Environmental Impact Assessment license, the Defendant proceeded to forcefully evicted the Plaintiff from the suit property in total disregard to their duly executed the lease agreement. The said eviction caused the Plaintiff to close the investments on the suit property, thus suffering loss.

44. The Plaintiff relied on clause 6(a) and (d) their lease agreement to submit that the same expressly stipulated that the Defendant fully indemnify them in the event that there was any loss or damages their property or in any other manner arising from the breach of the agreement. The Plaintiff relied on the decided case in **Nginyo Investments Limited vs Mobile Pay Limited [2020] eKLR** to submit that a breach of the lease agreement by the lessor had amounted to limiting the lessee's right of peaceful and quiet enjoyment.

45. That through oral evidence of their two witnesses as well as documentary evidence in their bundle of documents dated 27<sup>th</sup> September 2018, they had proved that indeed they had been awarded a Government project to rehabilitate the Mau Summit via Kericho road (B1) contract number RD 0421 and Kericho Nyamasaria road A1-B1 contract 0422.

46. That they had subsequently sourced for materials from lands adjacent to the road which led them to the Defendant's parcel of land measuring 2<sup>1</sup>/<sub>2</sub> acres. Upon verification of some samples taken therein, parties had subsequently entered into the lease agreement of 18<sup>th</sup> August 2010 that was later reviewed by another agreement of 18<sup>th</sup> August 2012 which was to run for a period of four (4) years at the rate of 200,000/= Ksh annual rent per acre with a 10% increment totaling to 550,000 per year.

47. That the Plaintiff thereafter commenced operations on the ground, by installing machinery that cost Ksh. 200,000,000/-, secured relevant government (E I A) and local permits and paid the annual rent all totaling to Ksh. 810,000/=

48. On 21<sup>st</sup> May 2013, the Plaintiffs received a backdated termination letter from the Defendant's Counsel dated the 21<sup>st</sup> January 2013 terminating the lease agreements without any reason. The said letter, it was the Plaintiff's submission, did not comply with the terms of their lease agreement, the nature of notice and breach of the terms of agreement.

49. That subsequently on the 20<sup>th</sup> August 2013 the Defendant closed the lower gate to the site blocking access to the premises wherein on the morning of 21<sup>st</sup> August 2013 he stopped the work on site and the chased away the Plaintiffs staff members thereby disrupting the work which subsequently led to delays in completion of the project as well as loss of the taxpayers' money. The Plaintiffs were thus forced to relocate to another premises at a huge cost. That a report had been made to the Chepseon police station and recorded under Ob 7/21/08/2013.

50. That the Defendant's action of breaching the terms of their lease agreements therefore amounted to interfering with the Plaintiff's peaceful and quiet possession and enjoyment of the lease promises contrary to the implied provisions of Section 65 of the Land Act.

51. On the second issue for determination, the Plaintiff relied on clause 7(a) of the lease agreement to submit that it had carried out renovations on this suit land to a tune of Ksh. 200,000,000/=-, sought and obtained permits at a cost of Ksh 810,000/= and other expenses before their occupation on the suit property. That the Defendant, who was also working on the suit land/site as a security officer, was aware of the timely requirement of the uninterrupted completion of the project as well as the value of the materials obtained and used thereto. Clause 6(d) of the lease agreement expressly stipulated that the Defendant would fully indemnify the Plaintiff in the event it incurred any loss or damages in terms of time, property or any other manner arising from the breach of the agreement.

52. That the Plaintiff had demonstrated and produced documentary evidence to the effect that they had paid rent on 5<sup>th</sup> September 2012 of Ksh.500,000/= and a further sum of Ksh.550,000/= on 27<sup>th</sup> August 2013 making it a total of Ksh.1,050,000/= a sum which was recoverable as per the ruling of Justice. Lucy N Waitthaka and pursuant to Section 7 of the Land Control Act.

53. That the Court of Appeal in the case of **Willy Kimutai Kitilit vs Michael Kibet [2018] eKLR**, whilst faced with a similar scenario, had applied the doctrine of proprietary estoppel to give rise to the freedom of contract as well as a meaning to what the parties contracted on.

54. Lastly, the Plaintiff submitted that as a general principle, the purpose of damages for breach of contract was, subject to mitigation of loss, to restore it (Plaintiff) to the position it was prior to the Defendant's blatant interference with its rights. That the contract was binding to parties who enter into such agreements and the party cannot be said to abrogate the duly enforceable contract on the basis of technicalities.

#### **Defendant's submissions'.**

55. This Defendant's submission on the other hand was to the effect that the Plaintiff moved the court vide a Plaint dated the 19<sup>th</sup> July 2013 and a Notice of Motion of an equal date which sought the same prayers as those contained in the Plaint. That by the court's ruling of 28<sup>th</sup> May 2014, which dismissed the Plaintiff's application, the court voided the agreement dated 18<sup>th</sup> August 2012 which meant that the Plaintiffs a suit had no grounds to stand on to warrant a cause of action. That thereafter the Plaintiff successfully filed an application dated 22<sup>nd</sup> February 2017 thereby introducing a totally new cause of action against the Defendant which issue was not determined and the Defendant now seeks for the determination of the same by the court.

56. The Defendant framed their issues for determination as follows:

- i. Did the Plaintiff comply with the court's directions on the amendment of pleadings that were issued on 3<sup>rd</sup> November 2017?
- ii. Did the Plaintiff introduce the totally new cause of action in its amended Plaint of 21<sup>st</sup> and December 2017?
- iii. Has there been a suit before court worth being heard and determined?
- iv. Does the Plaintiff's suit meet the expected threshold of proof on a balance of probabilities?
- v. Who should pay costs?

57. On the first issue for determination the Defendant relied on the ruling delivered on 3<sup>rd</sup> November 2017 to which the court had allowed the Plaintiff's draft amended Plaint as being duly filed, and thereafter directed the parties to comply with order 11 of the Civil Procedure Rules within 45 days from the date therein. The Defendant's contention was that the amended Plaint was not an annexure to the supporting affidavit of the application dated 27<sup>th</sup> February 2017 that gave rise to the above ruling, which was contrary to the provisions of Section 61 of the Oaths and Statutory Declaration Act and Rule 10 of the rules of the court. That further, the amended Plaint bore the court stamp of 21<sup>st</sup> December 2017 which was 48 days later wherein no payment of the requisite court fee had been made. That clearly the Plaintiff's so called amended Plaint was incompetent, had improperly found its way to the court, and was of no consequence.

58. On the second issue for determination, the Defendant submitted that as per the ruling delivered on the 3<sup>rd</sup> November 2017 to which the court had found that the matters raised in the application amounted to a new cause of action and could be canvassed at a full hearing, that indeed the Plaintiff herein via their impugned amended Plaint, at paragraph 21A had introduced a totally a new cause of action in clear violation of the court's directives and all rules pertaining to amendments of pleadings. In essence therefore the court was made to preside over a nonexistent suit.

59. The pending the third issue for determination as to whether there had been suit before court worth being heard and determined, the Defendant relied on the provisions of Order 8 Rule 6(sic) to submit that the Plaintiff having not paid fees for the amended Plaint and the same not having been filed within 14 days, the provision of the law was not complied with and therefore there was no suit before court worth being heard and determined.

60. On the issue as to whether parties were bound by their pleadings, the Defendant's response was in the affirmative and further that in the strict sense of word, the Plaintiff had no suit. That the Plaintiffs testimony was not based on any pleadings and therefore the court could safely make a finding that there had been nothing to determine other than to dismiss the Plaintiff's suit.

61. On the fifth issue for determination as to whether the Plaintiff's suit met the expected threshold of proof on a balance of probability, the Defendant's submission was in the negative to the effect that the Plaintiff had no pleadings on to which to make a determination. That the testimony given in court was not proved on a balance of probability as the court could only fall back to the Plaint dated the 19<sup>th</sup> July 2013. That a claim for special damages must be pleaded for specifically, prayed for specifically and specifically proved. The Defendant thus sought for the Plaintiff to be condemned to pay costs to them.

62. The Defendant further submitted that the Plaintiff's suit was bad in law frivolous and disclosed no cause of action. That the Plaintiff, being a corporate body known as SBI International Holdings AG (Kenya) no authority had been obtained to file suit against the Defendant. The verifying affidavit, to the Plaint, dated the 19<sup>th</sup> July 2013 had been sworn by one Shay Skeif who was not the Plaintiff's director, but its financial controller. That he had not filed any authority in court authorizing him to file suit on behalf of the Plaintiff.

63. That the verifying affidavit dated 5<sup>th</sup> December 2017 that accompanied the amended Plaint had been sworn by one Shaul Cohen who was an employee of the Plaintiff in the capacity of the operations manager. Again there had been no authority filed authorizing him to file suit on behalf of the Plaintiff.

64. The Defendant further submitted that the court in its ruling of 28<sup>th</sup> May 2014 voided the lease agreement dated 18<sup>th</sup> of August 2012 upon which the Plaintiff had extensively relied on during the hearing of the suit. That the said lease agreement could not therefore be relied upon as evidence in court. That further, by the time the suit was brought in court, the voided lease agreement had lapsed and therefore there was no privity of contract between the Plaintiff and the Defendant. Further that the Plaintiff's issues had been determined by the ruling of 28<sup>th</sup> May

2014 and therefore the present suit was res judicata.

65. That whereas the law did not bind the Defendant to obtain the consent from the Land Control Board, there was no impediment that stopped the Plaintiff from obtaining the same, as provided for under Section 8 of the Land Control Act. The voided lease agreement of 18<sup>th</sup> August 2013 expired by the 18<sup>th</sup> of August 2017 and had been caught up by the time limitation of three years as at 3<sup>rd</sup> November 2017.

66. That the Plaintiff's submissions and authorities were irrelevant and had been displaced by the Defendant's solid defence and submissions. They sought for the suit to be dismissed. authority

**Determination.**

67. Vide a ruling delivered in open court on the 3<sup>rd</sup> November 2017, the Plaintiff's draft amended Plaintiff of 23<sup>rd</sup> November 2017 was deemed as properly filed wherein the same was filed on the 21<sup>st</sup> December 2017 in which the Plaintiff sought for judgment against the Defendant for;

i. General damages

ii. Special damages

iii. Cost of the suit with interest at commercial rates

68. After parties had complied with the provisions of Order 11 of the Civil Procedure Rules, the matter had been set down for hearing where the Plaintiff's two witnesses testified and closed their case.

69. On the 18<sup>th</sup> February 2021, by consent, parties took directions that the matter, being a part heard, should proceed from where it had stopped thus giving room for the Defendant's case.

70. From the evidence adduced thereto, the Plaintiff's cause of action is founded on lease agreement, between them and the Defendant, dated 18<sup>th</sup> August 2012. That pursuant to the Government of Kenya awarding the Plaintiff a contract to rehabilitate the Mau Summit via Kericho road (B1) vide contract number RD 0421 and Kericho Nyamasaria road A1-B1 contract 0422, the project, whose value was Kshs 6,835,477,486.36/=, and after signing a contract with KenHa, they had sought for an appropriate site from where they could source for the materials for the implementation of the project. They settled on 2<sup>1/2</sup> acre of the Defendant's parcel of land L.R No. Kipkelion/Chepseon Block 2 (Kisabo)/88 as appropriate because it had the suitable material, which had been approved by KenHa, for their project.

71. Thereafter they had entered into a 2-year contract/lease with the Defendant for the period starting 2010 -2012 which lease was subsequently extended to run for 4 years from 18<sup>th</sup> August 2012 to 18<sup>th</sup> August 2016, The same was in respect to 2<sup>1/2</sup> acres of land at Ksh.200,000/= per acre per annum with a 10% increment thus totaling to Ksh.550,000/= per year. The Plaintiff then commenced operations on the ground, by installing machinery that cost Ksh.200,000,000/=, secured relevant government (E I A) and local permits and paid the annual rent all totaling to Ksh.810,000/=

72. On the 21<sup>st</sup> May 2013, however the Plaintiff received a backdated termination letter from the Defendant's counsel dated the 21<sup>st</sup> January 2013 terminating the Lease agreements without any reason. Thereafter on the 28<sup>th</sup> August 2013, the Defendant closed a lower gate to the site blocking access to the premises wherein on the following morning of 21<sup>st</sup> August 2013, he stopped the work on site and the chased away the Plaintiff's staff members thereby disrupting the work. This subsequently led to delay in completion of the project as well as loss of the taxpayers' money. The Plaintiff was also forced to relocate to another premises at a huge cost. The Plaintiff's assertion is thus, that the action by the Defendant was in breach of the terms of their lease agreement which in turn cost them great loss and damage.

73. The Defendants defence on the amended Plaintiff was that indeed he had entered into an agreement with SBI, the Plaintiff herein, to use his land parcel No. Kipkelion/Chepseon Block 2 (Kisabo)/88 comprising of 2½ acres, for extraction of road materials to be used for upgrading of the road from Mau Summit via Kericho to Nyamasaria. That the said agreement was to run from 2011- August 2014, that is for 4 years.

74. That he had been paid before the expiry of the term and upon the expiry of the term, the SBI had removed their equipment and left. That although the case had been filed by SBI, yet as per the lease agreement, there was some pending issues from their side which was for them to put back the top soil in 2 ½ acres and to demarcate the side of the beacons on the main road which had been removed by their vehicles as this was now a concern with his neighbors. That the Plaintiff also needed to put back the fence and to pay rent overdue from August 2014 to date.

75. That the agreement was between him and the management of SBI and that the witness evidence had nothing to do with the lease which lapsed in August, 2014. He further stated that this case had been dismissed in June, 2016 wherein the SBI was to meet the cost of the suit. That what he now sought was for the court to give him the chance to use his land and to dismiss the case as the same was long overdue. He also sought that the Plaintiff do meet the cost of the suit.

76. In their submission, the Defendant submitted that the lease agreements dated 18<sup>th</sup> August 2010 and 18<sup>th</sup> of August 2012 were not registered as per the provisions of the Land Act. That not only had they also been voided by the court, but that they had lapsed and therefore not enforceable against the Defendant. It was further the Defendant's defence that he had not been served with a demand notice prior to the institution of the legal proceedings and therefore the Plaintiff was not entitled to any costs. The Defendant further submitted that the court had no original jurisdiction to hear the Plaintiff's suit. The Plaintiff had no authority to file suit which was fatally defective and disclosed no cause of action. That the Plaintiff's suit had not only been caught up with time limitation but that the same was res judicata, the subject lease having been avoided by the court on 28<sup>th</sup> May 2014.

77. I have anxiously considered the arguments/submissions by Counsel for both parties herein, the suit as a whole, the authorities herein cited and find the matters that arise for determination herein as follows:

- i. Whether the court has jurisdiction over this matter the same being res judicata the ruling of 28<sup>th</sup> May 2014.
- ii. Whether the Plaintiff is entitled to the remedies sought.

78. On the first issue for determination, wherein the Defendant has attacked the jurisdiction of the court, I find that this issue ought to be determined in the first instance keeping in mind the principles set down in the case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1**. It is the Defendant's case inter alia that this suit should be dismissed with costs as the Court had no jurisdiction to hear and determine it, the same having been disposed by the court in its ruling of 28<sup>th</sup> May 2014. That the matter herein was res judicata.

79. The test in determining whether a matter is *res judicata* as stated was summarized in **Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2 Others (2010) eKLR**, as follows that:

The matter in issue is identical in both suits;

- i. The parties in the suit are the same;
- ii. Sameness of the title/claim;
- iii. Concurrence of jurisdiction; and
- iv. Finality of the previous decision.

80. The rationale behind the rule is simple, there has to be an end to litigation and a person who has approached the courts and had his dispute decided must learn to live with it. It is not open to him to relitigate or reargue the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other

81. In the present suit the Defendant has alluded to the court's ruling of the 28<sup>th</sup> May 2014. I have gained cite of the said ruling (see **SBI International Holdings Ag (Kenya) v Reuben Kipkorir J.T. Bore [2014] eKLR**) in which it is not contested that the Plaintiff herein in their interlocutory application via a notice of Motion dated the 19<sup>th</sup> July 2013 had sought for the following interim orders against the Defendant;

- i. A temporary injunction to restrain the respondent by himself, his agents, servants, employees or in any other manner whatsoever from evicting, alienating or in any other manner interfering with its occupation and use of Land reference No. KIPKELION/CHEPSEON BLOCK 2 (KISABO)/88 or in any way varying the terms of the Lease agreement dated 18<sup>th</sup> August, 2012 pending the hearing and determination of the suit.
- ii. A mandatory injunction to compel the respondent to comply with the terms of the Lease Agreement dated 18<sup>th</sup> August, 2012 in respect of the suit property; and allow the applicant peaceful occupation and use of the suit property for the remainder of the lease period, provided that the applicant continues to pay the agreed rent.
- iii. Costs.

82. The court had subsequently delivered its ruling on the application wherein it had held as follows:

*'19. In Wamukota v. Donati (1987) KLR 280, while reiterating that an agreement to be a party to a controlled transaction becomes void for all purposes if consent of the Land Control Board was not obtained, the Court of Appeal held:-*

*"The respondent has no legal or equitable claim, and the only redress available is to recover the money or valuable consideration paid in the course of the void transaction as per the Land Control Act (Cap 302) Section 7."*

*20. In view of the foregoing, unless the applicant can demonstrate that it falls under the exemptions provided under Section 6(3) of the Land Control Act, it must suffer the harsh reality of the law as espoused in the authorities quoted hereinabove.*

*27. I am sure that by calling itself an agent of the government, the applicant does not mean it can call upon the government to do the above acts on its behalf. That being the case, its claim that it's merely a disclosed agent of the government fails.*

*28. Although the respondent has challenged the application herein on many other questions of law, having found the agreement hereto to have been void, it would be superfluous to consider the other issues raised in the application.*

*29. The upshot of the foregoing is that the applicant's application has no merit and is dismissed with costs to the respondent."*

83. Quite clearly from the above ruling, the court while making its finding, considered the statutory provision of the absence of the consent

from the Land Control Board in the agreement between the parties in relation to a controlled transaction, whose satisfaction was necessary towards legitimate implementation of the lease agreement. Its absence therefore voided the lease agreement between the Plaintiff and the Defendant dated the 18<sup>th</sup> August, 2012. No appeal was preferred. In my humble opinion and in concurrence with the Defendant's submission, the ruling of the court of 28<sup>th</sup> May 2014, in the absence of an appeal thereto, brought a finality to the Plaintiff's suit in which there was sameness of parties, sameness of the title as well as concurrence of jurisdiction. I find that the Plaintiff's suit herein was Res judicata the court's ruling of 28<sup>th</sup> May 2014.

84. The impugned agreement having been so voided by the court cannot therefore be enforced by this Court. In **Mistry Amar Singh vs Kulubya 1963 E.A 408**, the Privy Council, on appeal from a judgment and order of the East African Court of Appeal, at page 414. Lord Morris of Borth-y-Guest, in his speech, quoted with approval the following passage from the judgment in **SCOTT V BROWN, DOERING, McNAB & CO, (3), [1892] 2 QB 724 Lindley LJ at p. 728**:

*“Ex turpi causa non oritur actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principal which is not confined to indicate offences. No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves illegality, the Court ought not to assist him”* See also the case of **MAPIS Investment [K] LTD v Kenya Railways Corporation [2006] eKLR**.

85. On the second issue for determination, I find that there are the salient aspects that gave rise to this suit vide an application dated the 22<sup>nd</sup> February 2017, the Plaintiff sought leave of the court to amend its Plaintiff as per the terms of an attached draft amended Plaintiff dated 22<sup>nd</sup> February 2017. Upon obtaining leave, the Plaintiff filed an amended Plaintiff on 21<sup>st</sup> December 2017 that was different from the draft Plaintiff in terms of the amendments in paragraph 10 (c), paragraph 21, insertion of para 21(a) as well as the reliefs sought, which were a new set of the cause of action. Quite clearly in the present instance the Plaintiff threw caution through the window in presenting to court an amended Plaintiff that was different from the draft amended Plaintiff that they had presented to court. Indeed, as aptly pointed out by **Apaloo, JA in Philip Chemwolo vs. Augustine Kubende [1985] KLR 492**, the duty of the Court is to do justice to the parties and not to punish them for their mistakes or omissions. The Learned Judge expressed his viewpoint thus:

*“I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”*

86. The Plaintiff herein has sought for General damages, Special damages and Costs of the suit with interest at commercial rate. It is trite law that a claim for special damages must not only be specifically pleaded, it must also be strictly proved to the required standard. This is because a claim for special damages represents what the party has actually lost in the form of the amount used to put him where he is before the loss. He therefore would want the court to put him back to the position he would have been had the loss not occurred, hence the need for strict proof of the claim, for no man should gain for losing nothing.

87. The Plaintiff's assertion that the Defendants' action of chasing them out of the suit site where they had put up machinery worth over Ksh. 200,000,000/= had led to delay in completion of the project as well as loss of the taxpayers' money and further that there was a huge cost incurred for relocation to another premises, in my view did not strictly prove the special damages with as much particularity as circumstances permitted, as was held by the Court of Appeal in **Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited [2016] eKLR**.

88. In **David Bagine v Martin Bundi [1997] eKLR**, the Court of Appeal, referred to the judgment by **Lord Goddard CJ in Bonhan Carter v Hyde Park Hotel Limited [1948] 64 TLR 177**), and observed that:

*“It is trite law that the Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to note down the 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.”*

89. I thus find that the Plaintiff's claim for damages special damages having not been specifically pleaded and strictly proved to the required standard must fail. In **Daniel Toroitich Arap Moi & Another -vs- Mwangi Stephen Murithi & Another (2014) e KLR** held that:

*“Submissions cannot take place of evidence. The Respondent had failed to prove his claim by evidence what appeared in submissions could not come to his aid---Submissions are generally parties “marketing language----”*

90. Finally in the circumstances of this case and in view of the voided agreement between the Plaintiff and the Defendant and the intervening events that necessitated the termination of the Plaintiff's occupation and use of LR No. Kipkelion/Chepseon Block 2 (Kisabo)/88, I have no legal basis to enforce the voided lease agreement. The Plaintiff's suit is herein dismissed with costs to the Defendant.

**DATED AND DELIVERED IN KERICHO VIA MICROSOFT TEAMS THIS 21<sup>ST</sup> DAY OF OCTOBER 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**