Ng'ang'a v Rioki Real Estate Co. (1970) Ltd (Environment & Land Case 364 of 2014) [2023] KEELC 19194 (KLR) (13 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19194 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 364 OF 2014

EK WABWOTO, J

JULY 13, 2023

BETWEEN

DAVID WAKAHU NG'ANG'A ..... PLAINTIFF

AND

RIOKI REAL ESTATE CO. (1970) LTD ..... DEFENDANT

JUDGMENT

1. David Wakahu Ng'ang'a the Plaintiff herein seeks the following reliefs vide his amended plaint dated July 9, 2020.

    a. The Defendant to give the Plaintiff, a nine months' notice of its intention to sell the suit properties, and the first option to purchase the two parcels of land, namely L.R. No. 13330/368 and L.R. No. 13330/369, at a fair open market value, if and when it decides to sell the two suit properties and in the event that the Plaintiff is unable to purchase the two suit properties for any valid reason; the Plaintiff prays the court grant prayer (c) and (d) herein.

    b. An order of Mandatory Injunction to compel the Defendant to register the two Lease Agreements both dated November 17, 2008, against the titles of the respective parcels of land and the Plaintiff to be provided with the evidence of the registration of the two lease agreements within 30 days of the decree being served upon the Defendant.

    c. As an alternative to prayers (a) and (b) above, the Defendant be ordered to pay the Plaintiff specific damages in the sum of Kshs 43,649,425.00 being the value of developments on Plots L.R. No. 13330/368 and L.R. No. 13330/369 Nairobi County.

    d. Compensation for loss of rental income in the sum of Kshs 221, 539,138.55 for the remaining lease period.

e. A declaration that the Defendant has unlawfully breached the terms of the two Lease Agreements both dated November 17, 2008.

f. General damages for breach of contract.

g. Compensation for premature termination of the two Lease Agreements both dated November 17, 2008.

2. The suit was contested by the Defendant who filed an amended statement of defence dated February 17, 2021. The Defendant sought for the dismissal of the Plaintiff's suit in its defence.

The Plaintiff's case.

3. It was the Plaintiff's case that at all times material to this suit, the Defendant was and is still is the registered owner of the two parcels of land, namely L.R. No. 13330/368 and No. 13330/369, Nairobi, hereinafter called the "suit premises".

4. The Plaintiff has been in occupation of the suit properties since the year 1988, first under an oral tenancy agreement, and since 1992, under different written Lease Agreements, which were renewed from time to time.

5. By way of two separate Lease Agreements, both dated November 17, 2008, the Defendant leased out the suit properties to the Plaintiff for a period of Thirty (30) years each, with effect from January 1, 2009 at the initial rent of Kshs 10,000.00 per month, which rent would be reviewable in terms of the said lease Agreements as at May 7, 2013 when this suit was instituted.

6. It was averred that it was an express term of the two lease agreements that should the defendant ever decide to sell the said two parcels, priority should be given to the Plaintiff who shall be given at least nine (9) months of the Defendant's intention to sell.

7. The Plaintiff averred that to date, he has not been given any notice by the Defendant of its intention to sell and that it is apparent that the Defendant does not intend to give him the first option to purchase.

8. The Plaintiff averred that since he took possession of the suit premises he has undertaken developments on and improvements of the suit properties for purposes of carrying out various business. The developments were quantified at Kshs 43,649,425.00.

9. It was also averred that in event of termination of the two leases, the subleases between him and the sub-tenants will automatically terminate thereby occasioning him loss of rental income amounting to about Kshs 221,539,133.55.

10. At the trial, the Plaintiff testified as (PW1). He adopted his witness statement as his evidence in chief and also list and bundle of documents that were on record.

11. On cross-examination, he stated that the parties had not appended their signatures on each and every page of the lease agreement. He also stated that the lease which was considered as the "fake" lease had been taken to DCI for forensic examination by his lawyer. He also stated that the defendant had written a letter offering him a counter offer after the case had been filed in court. He stated that initially he had offered Kshs 20,000,000/- to purchase which he increased to Kshs 30,000,000/- only for the Defendant to offer Kshs 80,000,000/-

12. On further cross-examination, he stated that he still has the original lease agreement and he would be happy to have the registration of the two leases effected. He also stated that he had been in the suit properties for over 34 years.

13. When asked about the developments undertaken on the property, he stated that he had filed a report to confirm the same and he also stated that if the lease were to be terminated, he would lose over Kshs 221,000,000/- as rental income for the remaining period of the lease.

14. On re-examination, he stated that he was not required to sign on each and every page of the leases. He also stated that the defendant had presented a "fake" lease and that is why it did not have his signature. He also stated that the report from the document examiner supported his case.

15. He also stated on re-examination that he was given an offer to purchase in the year 2014 which was after the case had been filed. He also stated that the said leases had never been registered.

16. Kenneth Mungai Ng'ang'a a Quantity Surveyor testified as PW2. He made reference to his witness statement dated July 19, 2020 during trial and he relied on the same as his evidence in chief. He also made reference to the valuation report dated 19th July 2019 which was prepared in respect to two parcels of land L.R. No. 13330/368 and L.R. 13330/369. He stated that the developments on the property were valued at Kshs 43,649,425/-.

17. On cross-examination, he stated that he received instructions from the Plaintiff and visited the property on July 19, 2019 which was the same day he received the instructions. He also stated that he had not produced any photos since they had already been produced by the Plaintiff.

18. He further stated that he had not relied on the said photos to prepare his report but had relied on actual measurements on the ground.

19. On re-examination, he reiterated that he visited the actual site and the figures stated in his report were based on what was found on the ground.

20. CPA Peter Maina Kimani testified as PW3. He relied on his witness statement dated 29th July 2020 as his evidence in chief. He stated that the Plaintiff had some sub-tenants on the properties. He also stated that the computations for the loss of rental income for the projected duration was based on the duration of each tenant as per the subsisting tenancy agreement. He also stated that he was given an original lease agreement for reference.

21. He also stated that he did not visit the premises prior to preparing his report.

22. On cross-examination, he stated that he examined the lease agreements, the cash books and payment receipts in preparing his report. He also stated that his computation of the figures was based from January 1, 2020. He also stated that even though he did not visit the site, his figures were not exaggerated.

23. On re-examination, he stated that the figures were based on future projections since the leases had given projections on how long the lease would last and that with that information he was not required to visit the premises.

The Defendant's case.

24. In the amended Statement of defence dated February 17, 2021, the Defendant averred that the terms and conditions of the lease agreement did not provide for rent renewal as at May 7, 2013 when the suit was instituted.

25. It was averred that the Defendant was not aware of any subleases and that on or about October 27, 2014, the defendant gave the Plaintiff 9 months' notice of its intention to sell land parcel numbers L.R. 13330/368 and 13330/369 and in furtherance of the said notice the Plaintiff was given the first option

to purchase the two plots though his offer was way below the market value forcing the Defendant to decline the same.

26. During trial, David Njoroge, Chairman of the Defendant company testified as DW1 and the sole defence witness. He relied on his statement dated September 23, 2015, further statement dated September 17, 2021 and list and bundle of documents dated September 25, 2013 as his evidence in chief. He also produced a further list and bundle dated February 17, 2021.

27. On cross-examination, he stated that he has served as chairman since 2003. He also stated that he had not seen any signatures at the bottom page of the leases and that the Plaintiff had not signed on all pages. He also stated that the Plaintiff has the original documents and that all the documents that were presented to the DCI were done so by the Plaintiff since the Defendant never presented any document to the DCI. He also stated that the document that was examined by the DCI was different than the one presented to him. He confirmed and stated that page 55 and page 10 of his bundles showed the differences in the said documents.

28. On further cross-examination, he stated that the lease that was presented to the DCI was fake and he confirmed having read the written opinion of the document examiner.

29. He also stated that the lease signed in 1999 was to lapse in 2014 and that the Plaintiff never presented the lease for registration.

30. He also stated that the Plaintiff had been allowed to make some improvements in the property on condition that he will not be compensated once the lease expires. Even though he stated that there were no improvements made in the suit properties.

31. When asked about the notice, he stated that the letter dated October 27, 2014 was a 9 months' notice of its intention to sell the property. He stated that the Plaintiff was given the first offer of Kshs 60 million per plot but offered to pay Kshs 30 million which was considered very low. He also stated that the valuation report gave a value of Kshs 80 million even though he did not have the valuation report in court.

32. He also stated that no valuation was done in respect to the improvements that had been done by the Plaintiff.

33. When re-examined, he stated that the Plaintiff's signature was indeed missing even though all the parties had agreed to the said leases. He also stated that there was an attempt to register the lease though the same had not been done. He also reiterated that the Defendant never offered any documents for examination by the DCI since all the documents were presented by the Plaintiff.

34. He also reiterated that the Plaintiff was given a notice to purchase even though his offer was low.

The Plaintiff's submissions

35. The Plaintiff filed written submissions dated February 20, 2023 through the law firm of Kinoti Kibe & Company Advocates. The Plaintiff outlined the following issues for consideration by the court;

    i. Whether the lease agreements produced by the Plaintiff were genuine and the correct lease agreement.

    ii. Whether the Defendant is in breach of the lease agreements dated November 17, 2008.

    iii. Whether the Plaintiff is entitled to the prayers sought in the plaint.

    iv. Who bears the cost of the suit.

36. The Plaintiff submitted that it is an admitted fact that he entered into a lease agreement with the Defendant on November 17, 2008 over the two suit properties vide two lease agreements evenly dated.

37. It was the Plaintiff's contention that the lease agreements were mutually entered into and that both the Defendant's Directors and the Plaintiff executed the agreements.

38. It was also submitted that the Plaintiff was not aware of the agreements produced by the Defendant. But that he only signed the agreements he produced in court by himself. The agreements produced by the Defendant would therefore not qualify as enforceable agreements as they were not signed by the Plaintiff.

39. It was further submitted that the Defendant's Director DW1 testified that although their documents are the genuine lease agreements, they did not see the Plaintiff execute the agreements.

40. Although the agreements produced by the Defendant bears that looks like the Plaintiff's signature, the agreement was not properly entered into as DW1 conceded that the Plaintiff did not execute the same in their presence and only concluded that the Plaintiff must have executed the Agreements after they had left their advocates office.

41. When the Defendant disputed the lease agreements produced by the Plaintiff upon filing of this suit, the Plaintiff through his advocates submitted the agreements to the Director of Criminal Investigations (DCI) to undergo a forensic examination.

42. It was also submitted that as per the Kenya Police Exhibit Memo form found at page 30 of the Plaintiff's Supplementary List and Bundle of documents, it was shown that the parallel sets of lease Agreements as filed before this Court in the year 2013 were obtained for forensic analysis as to their genuineness and/or otherwise. The Defendant's Directors further participated in the examination by supplying their version of lease agreements and providing specimens of their signatures for examination.

43. At the conclusion of the analysis by the Directorate of Criminal Investigations Forensic Document Examiner –CI Alex Mwongera, a report dated April 25, 2014 was compiled and supplied to the parties.

44. The Forensic Examination Report was filed in court and produced as Plaintiff's exhibit no. 2 by consent. The report is contained at page 15 to 97 of the Plaintiff's Supplementary Bundle of Documents.

45. In the report, the Forensic Examiner agrees with the Plaintiff that indeed the Lease Agreements produced at page 1 to 14 of the Supplementary bundle are the true and genuine lease agreements over the suit properties as the signatures therein matched the specimen provided by the Defendant's Directors and the Plaintiff.

46. The specimen lease agreement obtained from the defendant's bundle of documents and appearing at page 54 to 59 of the Plaintiff's supplementary list and bundle of documents could not be ascertained to have been made and executed by the parties who produced the same. This is because the same was a photocopy of a lease agreement asserted by the Defendant to be original but whose original copy was not provided by the Defendant for examination. These findings can be found on page 20 of the Plaintiff's Supplementary List and bundle of documents at paragraph 6 thereof.

47. The Plaintiff contended that the Court has only had the chance to be referred to a single forensic document examiner's report as produced in evidence. It was submitted that the Defendant had failed to convince the court of its assertion by producing a second and/or counter forensic report by an expert in the said field. To buttress this point, the Plaintiff relied on the case of Ali Mohammed Sunkar vs Diamond Trust Bank Ltd (2011) eKLR quoted in the case of John G Kamuyu & Another vs Safari

'M' Park Motors Nairobi ELC No. 1013 of 1999 where the court stated that an expert report can only be challenged through a counter expert report.

48. In Care Mission Kenya & 4 others vs Benta Akinyi Otieno & 2 others (2021) eKLR this court in agreeing with a forensic examination report admitted as evidence by consent without calling the examiner held:

> " This court takes note that what is contested by the defendant as particularized in their counter-claim is the manner in which the Plaintiffs acquired the titles into their names. The plaintiffs did not present the contested documents for expert examination hence the findings of the examiner on the contested signatures on the documents of application for consent of Land Control Board to transfer and the transfer form transferring the suit title from the names of Deity E.C.D./Primary to the 2nd Plaintiff have not been contradicted. The burden placed on the defendant' to discharge on proof of the fraud has been discharged."

49. It was argued that the assertion by the Defendant that the leases produced as exhibits in this suit by the Plaintiff are not the genuine is neutered by its failure to produce evidence rebutting the document examiner's report and his findings thereof are therefore uncontroverted.

50. Based on this findings of the report and lack of any evidence to the contrary, the Defendant has failed to discharge its evidentiary burden that the Lease Agreements relief on by the Plaintiff were forged and the clauses therein unilaterally amended as per Jennifer Nyambura Kamau Vs Humphrey Nandi (2013) eKLR, the Honourable Court agreed that;

> " ....allegations of fraud must be strictly proved and although the standard of proof may not be so heavy as to require prove beyond reasonable doubt, something more than a mere balance of probabilities is required."

51. It was submitted that the Defendant, other than making averments in pleadings and testimony, made no attempt to adduce any proof of fraudulent conducted by the Plaintiff with regard to the Lease Agreements he produced in court. It was further submitted that they did not satisfy the evidentiary threshold for fraud as it pleaded and asserted in evidence.

52. It follows from the discourse above that the lease agreements produced by the Plaintiff should be upheld and terms thereof be used to ascertain the rights of parties in this suit.

53. Further, it was submitted that a party to a suit is bound by its pleadings. Although the Defendant disputes the legality and veracity of the lease agreements at page 1 to 14 of the Plaintiff's supplementary Bundle, it admits at paragraph 8 A of its Amended Defense amended on February 17, 2021 that the Lease Agreements only provide for compensation of the developments on the suit properties to be negotiated.

54. The Lease Agreements annexed to the defendants list of documents dated September 25, 2013 do not provide for any compensation upon the termination of the agreement. Infact clause 6 of its agreements indicates that the improvements on the properties shall accrue to it.

55. The Plaintiff also submitted that If indeed that was the correct agreement, why would the Defendant plead that they are ready to compensate the Plaintiff for the improvements at a negotiated price?

56. The issues of compensation is only provided for in the agreements produced by the Plaintiff at clause 2(k) and 6 where it is expressly provided that the improvements shall be compensated upon termination of the lease agreement.

57. This is further proof that the Defendant indeed recognizes the lease agreements at page 1 to 14 of the Supplementary bundle.

58. The Court was informed that during the hearing it was DW1's testimony that he was aware that the properties have been sub-leased and further that the Defendant has never interfered with the sub-tenants on the properties.

59. It was argued that this admission by the Defendant goes counter to the terms of the lease agreement it seeks to rely on in court. The agreements by the defendant at clause 2(m) prohibits sub-leasing of the properties but marries with the agreements produced by the Plaintiffs at clause 2(m) which allows the Plaintiff to sublease the properties.

60. The question that the defendant did not answer is why it has acquiesced on the sub leasing of the properties if the same was indeed prohibited as per the alleged agreements. The simple answer is that the sub leasing was lawful having been provided for by the true lease agreements produced by the plaintiff herein.

61. It is also on record that the Defendant issued a nine (9) months' notice to the Plaintiff to exercise his right on priority basis to purchase the suit properties in accordance with clause 3(c) of the agreements. DW1 confirmed this in his testimony during the hearing.

62. In the leases produced by the Defendant, clause 3 (c) does not talk of any notice while in the leases produced by the Plaintiff, clause 3 (c) clearly indicates that the Defendant shall give the Plaintiff a nine (9) months' notice before selling the properties.

63. The court's attention was drawn to the fact that both the lease agreements produced by the Defendant do not have any clause for compensation of the improvements on the suit properties and neither do they have a clause giving the Plaintiff a priority to purchase the properties yet the defendant admits that the agreements allow for a negotiated compensation and gives the Plaintiff a nine (9) months' notice in accordance with the provisions of the agreements. Only the lease agreements produced by the Plaintiff have the two clauses for compensation and priority to purchase at clauses 3 (c) and 6 of the agreements.

64. The Plaintiff submitted that the question then remains as why the Defendant would be complying with the provisions of a lease agreement whose existence or genuineness it disputes. By relying on the express terms of the lease agreements produced by the Plaintiff, the Defendant should not be allowed to turn around and refute the same agreements. The Defendant cannot be allowed to benefit from its own mischief.

65. It was the Plaintiff's submissions that, as a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act* (Chapter 80 of the Laws of Kenya), which provides

> " 107.
>
> (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist."

66. Furthermore, the evidential burden that is cast upon any party the burden of proving and particular fact which he desires the court to believe in its existence. That is captured in sections 109 and 112 of the Act as follows;

> " 109. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
>
> 112. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him."

67. The Court of Appeal in Jennifer Nyambura Kamau V Humphrey Mbaka Nandi (2013) eKLR considered the applicability of these provisions as follows;

> " We have considered the rival submission on this point and state that section 107 and 109 of the *Evidence Act* places the evidential burden upon the appellant to prove that the signature on these forms belong to the Respondent. Section 107 of the *Evidence Act* provides that "whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist." Section 109 stipulates that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence. If an expert witness was necessary, the evidential burden of proof was on the appellant to call the expert witness. The appellant did not discharge the burden and as section 108 of the *Evidence Act* provides, the burden lies on that person who would fail if no evidence at all were given on either side.

68. As regards the standard of proof, the case of Central Bank of Kenya Ltd vs Trust Bank Ltd & 4 Others NAI Civil Appeal No. 215 of 1996(UR) was stated where the Court of Appeal, in considering the standard of proof required where fraud is alleged, stated that:

> " The Appellant has made vague and very general allegations of fraud against the Respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the Appellant in this case than in an ordinary civil case."

69. Likewise, in Rosemary Wanjiku Murithi V George Mainda Ndinwa NYR Civil Appeal No. 9 of 2014(2014) eKLR, the Court of Appeal held that:

> " proof of fraud involves questions of fact. Simply raising the issue of fraud in a statement of defence and counterclaim is not proof of fraud"

70. The Plaintiff further submitted that from the Forensic Examination Report coupled with its own pleadings and actions/conduct, it is apparent that the defendant recognized the lease agreements produced by the Plaintiff at pages 1 to 14 of the Supplementary bundle to be the true and genuine lease agreements in relation to the two suit properties and urge this court to find the same to be the applicable lease agreements over the suit properties.

71. On whether the Defendant was in breach of the lease agreements dated November 17, 2008, the Plaintiff submitted that it is trite law that courts cannot re-write contracts for parties, neither can they

imply terms that were not part of the contract. Reliance was placed in the case of Rufale vs Union Manufacturing Co. (Ramsboltom) (1918) L.R. 1 KB 592, Scrutton L.J. held as follows:

> " ... the first thing is to see what the parties have expressed in the contract and then an implied term is not to be added because the court thinks it would have been reasonable to have inserted it in the contract."

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

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

73. It was argued that the principal remedy under common law for breach of contract was an award of damages, with the purpose of damages being to compensate the injured party for the loss suffered as a result of the breach, rather than (except for very limited circumstances) to punish the breaching party. A contract was the source of primary legal obligations upon each party to it to procure that whatever he had promised will be done was done. Leaving aside the comparatively rare cases in which the court was able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations gave rise to substituted or secondary obligation son the part of the party in default. Those secondary obligations of the contract breaker arose by implication of law.

74. It was argued that, having established that the Plaintiff's lease agreements produced on page 1 to 14 of the Plaintiff's supplementary documents are the genuine lease agreements and looking at the circumstances of this case, it is not in dispute that the Plaintiff has been in occupation of the suit land since 1988 and had never had any problem with both previous and current board of directors until now they wanted to sell suit property.

75. It is the Plaintiff's averments that in or around April 2013, the suit properties started having frequent strangers whom he later learnt were land selling agents together with interested purchasers of the suit properties.

76. On enquiry as to their visits, the Plaintiff was told that the Defendant had instructed the agents to seek and procure potential buyers of the suit properties as they were on sale.

77. The Defendant had put the suit properties up for sale without first issuing a nine (9) months' notice of intention to sell and the first priority to purchase before seeking third party purchasers as per clause 3 (c) of the Lease Agreement aforementioned.

78. That's when he moved to court and obtained a court order restricting the Defendant from selling the suit properties pending the determination of this suit.

79. During the hearing of this suit it was the Defense testimony through DW1 that indeed before April 2013, the members of the Defendant met and passed a resolution to sell the suit properties in order to raise funds which they intend to develop another property in Eastleigh.

80. Although the Defendant disowns the lease agreements produced by the Plaintiffs, DW1 conceded in court that while the case was ongoing, the Defendant issued the Plaintiff with a nine (9) months' notice and the priority to purchase the suit properties as per clause 3 (c) of the agreements.

81. It is then apparent that there was a threat to have the properties sold without first issuing the requisite notice and before giving the Plaintiff the priority to purchase the same. This was a fundamental breach of the agreement between the parties herein which necessitated the filing of this suit.

82. It was submitted that, is also not in dispute that the parties signed two lease agreements both dated November 17, 2008, where the Defendant leased out to the Plaintiff the suit land for a period of 30 years with effect from January 1, 2009 to December 31, 2038.

83. It is further submitted that also not in dispute that it was a term of the lease agreements that should the defendant ever decide to sell the suit land, the Plaintiff shall be given 9 months' notice of the Defendant's intention to sell and priority shall be given to the Plaintiff to purchase the suit land.

84. It is also not in dispute that the Plaintiff has undertaken significant developments of the suit properties and was entitled to be compensated in case the lease agreements were to be terminated, this is as per clause 6 of the lease agreements.

85. That it is also not in dispute that the Defendant in its amended defense and through a letter dated October 27, 2014 concedes that in order to sanitize the illegality and breach of the agreement gave the Plaintiff 9 months' notice of intention to sell, this was 17 months after this present suit had been long instituted and the court order restraining the defendant from selling the land had been issued.

86. The Defendant equally has not denied that it had an intention to sell the suit land to third parties and what prompted it to give the requisite 9 months' notice to the Plaintiff was the filing of the present suit.

87. From the above submissions the Plaintiff stated that the Defendant clearly breached the terms of the lease agreements dated November 17, 2008 and in order to steal a march on the Plaintiff he only managed to give the notice as per the agreement 17 months after filing of this suit which was illegal and in complete breach of the lease agreements.

88. On whether the Plaintiff is entitled to the prayers as per the Plaint, from the submissions above the Plaintiff have established that the Defendant was in clear breach of the lease agreements therefore entitled to the prayers sought. This is a longterm lease which is required to be registered in order to protect the interest of the Plaintiff over the properties.

89. It was the Plaintiff's contention that after executing the two (2) lease agreements, he made attempts to have the lease registered at the lands office but the efforts were frustrated by the Defendant.

90. The Plaintiff submitted that DW1 testified that indeed there have been attempts to register the leases but the same was not concluded. It was also his evidence that the Defendant has the custody of the original titles which the leases ought to be registered against. DW1 accepted that the title deeds have never been released to any other person including the Plaintiff.

91. The court was urged to order the Defendant to present the original titles to the properties for registration of the lease against the suit properties.

92. The Plaintiff contended that, having demonstrated that the lease agreements produced by the Plaintiff at pages 1 to 14 are the true and genuine agreements over the suit properties we now wish to submit on the provisions of the lease agreements and whether the Plaintiff is entitled to the prayers sought.

93. In the amended plaint, the Plaintiff is merely seeking the enforcement of the lease agreements consensually entered into by the Defendant and himself.

94. The Plaintiff argued that this court has often held that it cannot rewrite a contract but ensure that the terms of an agreement are enforced by the contracting parties. Reliance was made to the case of Ngere Tea Factory Company Ltd vs Alice Wambui Ndome (2018) eKLR where it was held that;

> " ...the terms of the agreement for sale are clear and I find that the defendant herein did not breach any of them. On the contrary, I find that it was the Plaintiff that had breached the said terms by failing to remit the balance of the purchase price within the stipulated time as agreed by the parties. A party cannot run away from the terms of its agreement. It has often been stated that the court's functions are to enforce contracts that the parties enter into. The court cannot rewrite the party's agreements.
>
> In the case of Shah –Vs- Guiders International Bank Ltd (2003)KLR the court in considering the terms of the parties contract stated-"The parties executed the same willingly and they are therefore bound by it."
>
> The Plaintiff herein is clearly trying to run away from obligations lawfully imposed and with its full knowledge and participation to which I shall not aid it in that quest but will instead uphold the rights of the Defendant to recover monies lawfully owed to her."

95. It is a term of the lease agreements at clause 3 (c) that if the Defendant wishes to sell the suit properties, priority should be given to the Plaintiff through a nine (9) months' notice.

96. Clause 3 (c) gives the Plaintiff a right of first offer. This is an enforceable agreement between the parties herein and we ask this court to ensure that the same is enforced.

97. The Plaintiff argued that, It is DW1's testimony that the shareholders of the Defendant passed a resolution at a special general meeting to dispose off the properties and raise monies to develop their property in Eastleigh.

98. The resolution is found at page 141-144 of the Supplementary bundle (the Defendant's Chairman's report) for the SGM of April 6, 2013 and that after the resolution however it seems the Defendant failed to consider clause 3 (c) of the lease agreements and went ahead to engage third parties before giving the Plaintiff the first priority. This is what necessitated this suit.

99. The Plaintiff argued that during the hearing, the Defendant testified that it is willing to enforce the terms of the agreement and that it has infact given the Plaintiff the priority to purchase the property. However, the offer was made on a without prejudice basis and when there was a court order in place giving an injunction over any dealing on the suit properties. By reason of the above and in light of the subsisting orders any offers made at the time could not possibly be relied on at the hearing of this suit. Since no compromise was reached by the parties, there should be no mention of the same before this Court.

100. The Plaintiff submitted that the Defendant did not initiate the impugned process with clean hands as it continued to hike the prices with each subsequent counter offer hence frustrating the process. The offers and counter-offers made by the Defendant were not backed by any market survey price indexes/ reports. The right of first offer to purchase should be done at the current market value which right the Plaintiff is eager to exercise.

101. The Counsel for the Plaintiff asked the court to compel the Defendant to honour the terms of the lease agreements and give the Plaintiff the first priority to purchase the suit properties at the market

rate by issuing him with a nine months' notice in strict compliance with the provisions of clause 3 (c) of the lease agreements.

102. It was also argued that clauses 2(k) and 6 of the lease agreements require the Defendant to compensate the Plaintiff for the development on the properties. Clause 2 (k) and 6 of the lease agreements however require the Defendant to compensate the Plaintiff for the development on the properties once the leases are terminated.

103. The Plaintiff took possession of the suit properties through lease agreements which gave him legitimate expectations to see out the 30 years' term and earn maximum profits from the suit properties and it is on this premise that he developed and subleased the properties.

104. Being a long term lease, the Plaintiff had legitimate expectations to see out the 30 years' term and earn maximum profits from the suit properties and it is on this premise that he developed and subleased the properties.

105. The lease agreements also gave the Plaintiff a right to renew the contract at clause 7 of the agreements.

106. The Plaintiff contended that he has the right of first offer and if in any case he is unable to redeem his right to purchase the property for one reason or the other, the lease will remain terminated and as per the terms of the agreements, the Defendant will then compensate him for the development on the land. The compensation sought as per the terms of the agreements is supported by the quantity surveyor's report dated July 19, 2019 at Kshs 43,649,425/-

107. The report is filed at pages 146 to 251 of the Plaintiff's Supplementary Bundle of document and the same was produced in court by the quantity surveyor Mr. Kenneth Mungai Ng'ang'a PW2.

108. The Defendant on its part though being the proprietor of the properties and having the right of entry to the suit properties elected not to conduct any valuation of the development on the suit properties.

109. Being unchallenged/uncontroverted by another report, the court was urged to order as an alternative to the Plaintiff exercising his right of first offer; the Defendant to compensate the Plaintiff for the development at Kshs 43, 649,425/- as per the valuation report dated July 19, 2019 when the lease stands terminated.

110. Relying on the case of Samson Nzaro vs Bonface Ngari (2020) eKLR, the Plaintiff submitted that this court when faced with exact similar situation and where only one valuation report was filed held thus;

> " It was however evident that the Plaintiff relied on the Defendant's permissions and conduct to construct the building which was to house the Posho Mill. As a result of the Defendant's assurance, the Plaintiff incurred expenses in erecting the building and now stands to lose the income that he would have earned had the posho mill been operational.
>
> According to the Defendant, the building put up by his nephew was nothing more than Kshs 70,000/- in terms of its value and worth. Asked during his cross-examination whether he was willing to compensate the Plaintiff at the said sum, the Defendant retorted that he was not willing to do so as according to him some of the building materials can still be salvaged by the Plaintiff. The Defendant did not give the basis for the sum of Kshs 70,000/- nor particulars of the materials that were capable of being salvaged. Nor did he state what the Plaintiff would do with the same now that the purpose for which he acquired them had hit a dead end.
>
> In his testimony before the court, the Plaintiff produced a Valuation Report (Exhibit 2) of the buildings he constructed on the suit property. The Report by Next Level Valuers

and Property Consultants dated November 7, 2016 places the value of the building as at September 28, 2016 when they conducted the valuation at Kshs 220,000/-

In the absence of any other valuation report with a contrary value, this court is persuaded that the building is worth the said Kshs 220,000/- and that the Defendant ought to pay the said amount to the Plaintiff as compensation now that he no longer desires to have the Plaintiff operating the Posho Mill on his property."

111. The Plaintiff at clause 2(m) of the lease agreements was permitted to sublet the suit properties. It is from this authority that the Plaintiff leased out the properties to seven (7) sub tenants under different lease terms as per the schedule at page 5 of the Amended Plaint.

112. The Plaintiff argued that he was expected to earn a total of Kshs 221,539,183.55/- at the expiry of the seven leases and that this is a legitimate expectation from the long-term lease with the defendant and the fact that he had the right to purchase the properties on first priority if the Defendant was to sell.

113. The total expected rent from the sub leases was tabulated at Kshs 221, 539,138.55/- by CPA Peter Maina Kimani PW3.

114. The Plaintiff argued that despite acknowledging that it is aware that there are sub tenants on the suit properties, the Defendant failed to produce any report to counter the figures tabulated by PW3. While relying on Samson Nzaro (supra) the Plaintiff's Counsel urged the court to use the unchallenged figure as tabulated and produced by PW3 and award the Plaintiff the entire amount he would have received as rent income were the sub leases to run the entire terms.

115. Relying further on the case of Dormakaba Limited vs Arcitectural Supplies Kenya Limited (Civil Suit 136 of 2020) (2021) KEHC 210(KLR) (Commercial and Tax)(10 November 2021) (Judgment) Justice Mativo (as he then was) stated as follows:-

> " that to successfully claim damages, a Plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the Plaintiff suffered damage (loss) as a result of the defendant's breach. The Plaintiff is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics. A Plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. This implies that the Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff."

116. The Plaintiff submitted that from the evidence on record he had established that it is entitled to the orders sought and that the Defendant is in clear breach of the contract therefore the Plaintiff should be compensated by damages for breach of contract.

117. Relying on the case of Consolata Anyango Ouma vs South Nyanza Sugar Co. Ltd (2015) eKLR where court stated as follows:

> "the next question is whether the appellant was entitled to damages as a result of the breach. As a general principle, the purpose of damages for 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 complained of had not occurred. This is principle is encapsulated in the Latin phrase restitution in integrum (see Kenya Industrial Estates Ltd –Vs- Lee Enterprises Ltd NRB CA Civil Appeal No. 54 of 2004 (2009) eKLR, Kenya Brewaries Ltd V Natex Distributors Ltd Milimani HCCC No. 704 of 2000 (2004) eKLR). The measure of damages is in accordance with the rule established in the case of Hadley V Baxendale (1854) 9. Exch. 341 that the measure of damages is such as may be fairly and reasonably be considered arising naturally from the breach itself or such as may be reasonably contemplated by the parties at the time the contract was made and a probable result of such breach (see Standard Charted Bank Limited V Intercom Services Ltd & others NRB CA Civil Appeal No. 37 of 2003 (2204) eKLR). Such damages are not damages at large or general damages but are in the nature of special damages and they must be pleaded and proved (see coast bus service Ltd Vs Sisco Murunga Ndanyi & 2 others, NRB CA Civil Appeal No. 192 of 92(UR) and Charles C. Sande V Kenya Co-operative Creameries Ltd, NRB CA Civil Appeal No. 154 of 1992 (UR)"

118. It was further submitted that the defendant was clearly in breach of the lease agreement and hence the Plaintiff was entitled to damages.

119. In respect to costs, the Plaintiff relied on the provisions of section 27(1) of the *Civil Procedure Act* and Orix Oil (Kenya Limited) –Vs- Paul Kabeu & 2 others (2014) eKLR, J.R. No. 6 of 2014 Republic –Vs- Rosemary Wairimu Munene, Exparte Applicant –Vs- Ihururu Dairy Farmers Co-operative Society Limited and HC EP No. 6 of 2013, party of independent candidate of Kenya –Vs- Mutula Kilonzo & 2 others and urged the court to award the Plaintiff the costs of the suit.

The Defendant's submissions

120. The Defendant filed written submissions dated February 2, 2023. The Defendant submitted on the following issues:

i. Which lease agreements presented by the Plaintiff and the Defendant are the correct and genuine leases.

ii. Who was to register the lease.

iii. Whether there was breach of the lease agreements by the parties.

iv. Whether the Plaintiff is entitled to the prayers sought.

121. It was submitted that on the forged lease agreements, it was the Plaintiff's case that the two copies of lease agreements that he presented to this Court were the original leases as agreed between the two parties. However, it was the Defendant's contention that these agreements were gravely defective and had been altered and forged in what appears to only meet the selfish needs of the defendant. The alterations are found on several inserted clauses namely;

a. In clause one, the Defendant deleted the term of twenty (20) years and included thirty (30) years thus terminating the tenancy period on December 1, 2038 as opposed to December 1, 2029.

b. Completely deleting clause 2(e) which forbade him to carry out any other business save for selling motor vehicles.

c. In clause 2(k) where he included the term and condition that the lessor will negotiate w9ith lessee the compensation of the developments of the plot.

d. In clause 2(m) where the Defendant introduced the option of sub-letting the premises to person whom he may desire.

e. Deleting terms under clause 3 (c) the Defendant inserted a period of 9 months being notice of intention to sale and inserting the terms and conditions that he is to be given the first option of purchase.

It is the defendant's contention that these are indeed alterations to the original lease agreements.

122. The Defendant argued that on execution and attestation of the lease agreements it was submitted that the original lease agreement had been signed and attested in all the pages of the lease agreements as it was the best practice and which would avoid such alterations and forgery as seen in this case. On the contrary, the lease agreements presented by the Plaintiff had only been signed and attested only at the last page of the lease agreement indicating that he only plucked out the last page of the initial agreements and inserted in his altered lease agreements. In fact, and without prejudice it is evident from the alleged sub-lease agreements entered between the Plaintiff and his alleged tenants that he also used the same practice where all the sub-lease agreements were signed on each and every page of the sub-lease documents. The Counsel for the Defendant posed the question that why would the Plaintiff be less diligent and thorough on the most important lease agreement and which protects even the alleged sub-leases but more cautious on the execution of the sub-lease agreements? That again by the conduct of the Plaintiff indicates a significant loophole on the alleged original documents presented by the Plaintiff.

123. On forensic evidence, the Plaintiff relied on the forensic document examination report prepared by the Directorate of Criminal Investigation in regard to the lease agreements for the suit properties. However, the report examiner on page 20 of the Plaintiffs list of documents noted that the documents that were presented were photocopies which are prone to mechanical manipulation and it was therefore difficult to conclude whether there were made by the same author or not. Further on page 35 of the Plaintiff's list of documents, the Plaintiff also gave another different agreement bearing the same recitals, same names, same subject matter and same date but which all the pages of the document are signed by the vendors and the advocates. The terms and conditions of this document also flatly contradict the terms that are reflected on the alleged original two lease documents relied on by the Plaintiff. Needless to say that this document was in custody of the Plaintiff and he is the one who presented it to the DCI for forensic examination, this document which we submit to be the correct and original ease agreement clearly shows that save for the Plaintiff's signature, each and every page of the lease agreement was signed as earlier indicated in our submissions. The exclusion of the Plaintiffs signature on each page as well explained in court and also earlier in these submission that after the vendors had appended their signature and left the office of the advocate, the Plaintiff was to later sign the documents and commence with the process of registration. Similarly, it highlights the contested clauses exactly as the Defendants had stated to be the correct clauses to this Court.

124. The Defendant further submitted that, it has been demonstrated that the lease agreements had been forged and altered to the detriment of the Defendant and for that reason could not be registered. The

law clearly states that an unregistered lease agreement cannot be relied on in court as a lease agreement but merely as a contract between the parties. In order for a lease to confer an interest in land, Section 43 of the Lands Registration Act provides that:

a. Every instrument effecting a disposition of land under this Act shall be in the form prescribed in relation to that disposition under this Act or any other written law.

b) No instrument effecting any disposition of an interest in land under this Act shall operate to sell or assign land or create, transfer or otherwise effect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of instruments affecting the land in respect of which the disposition has been made.

It is not in contention that the lease agreements in question suffer this grave defect.

125. The court was urged to find guidance on the maxim "Exturpi Causa Non Orituacito" which as defined in Sifa International Limited & Another Vs- Koinange Investment Development & 3 others (2009) eKLR means that:

> " 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 (party) proves the illegality the court ought not to assist him."

126. On issue on registration of the lease documents, the Defendant contended that upon executing the agreements, they instructed the advocate to forward the same to the Defendant for execution and later for registration. When registering a lease agreement, it is the common practice that the party wishing to register the same should first present the documents for assessment of stamp duty, which they after payment of the requisite charges are then forwarded to the relevant authorities for franking. This is also enshrined under Section 46 of the *Land Registration Act* which provides that:

> " An instrument required by law to be stamped shall not be accepted for registration unless it is stamped in accordance with the *stamp duty act*, cap 480."

Here as provided under section 2 of the *stamp duty act*, a stamp denotes

> " a mark embossed or impressed by electronic means or by means of a dye, franking machine or adhesive stamp recognized by the Government."

127. Proof of franking is indicated using a red stamp from the lands registry which is stamped on the first page of the document. (An example is indicated on the Plaintiffs alleged true copies of the original lease agreements.) Once the documents have been franked, the applicant fills some form known as booking forms which are then, together with any other relevant documents including the original title deeds are presented to lands office for registration.

128. Given the sensitive nature and high value of the parcel of lands, it was the agreement that the Defendant would first hold on to the original titles and would only surrender the same during the booking of the registration of the lease after the documents had been franked as proof of payment of stamp duty. This would shield the Defendant from unforeseen risks emerging from surrendering high valuable title documents. Indeed, the Plaintiff went ahead and started the process of registration which was first to have them assessed for stamp duty payable and have them franked. However, while this process only

takes several days or at most two weeks, the Defendant retained the documents for close to one year before having the documents franked at the land's office. Infact, while the agreement was prepared and executed on November 17, 2008, the date of franking as clearly indicated on the franked stamp indicates the stamp duty was paid and the documents franked on September 17, 2009 ten months later. In fact, this delay in payment of stamp duty defies section 5(1) of the *Stamp duty Act* which provides that:

> " subject to the provisions of this Act or of any other written law, every instrument, unless it is written on duly stamped material, shall be duly stamped with the proper duty before the expiration of thirty days after it is first executed....."

129. Nonetheless, the Defendant had received information that the Plaintiff had been sick and was willing to accommodate the Plaintiff. Perhaps it was at this point that the Plaintiff curved a well calculated plan to create a scenario where he would benefit when the tenancy period lapsed or when the Defendant wished to sell its parcel of land. Nevertheless, following this delay, it was at this point that he would later come back with altered lease agreements and this made the Defendant shy wary from surrendering to him original titles for registration.

130. The Defendant also stated that following this chronology of events, it is also questionable why the Defendant would later misguide this Court that it was the term of agreement that it was defendant who would have the lease agreements registered. If indeed it was agreed that the Defendant would have the title deeds registered, why did he present franked documents to this Court which was an indication that he had already begun the process of registration?

131. The Defendant argued that in this case, the doctrine of estoppel should be invoked as it is a principle of law which precludes a person from asserting something contrary implied by a previous action or statement contrary to what is implied by a previous action or statement of that person. In this case, the defendant relied on the case of Serah Njeri Mwobi –vs- John Kimani Njoroge (2013) eKLR.

132. On the breach of agreements, it was submitted that no evidence was adduced before this Court to indicate that the Defendant breached the agreement. Before the Plaintiff instituted this case, neither himself nor his alleged sub-tenants had been issued with any notice to vacate the property. During cross-examination, the Plaintiff was emphatic that the reason why he moved the court was to avert any intended sale of the suit properties by the Defendant. His action was based on unfounded fear otherwise based on mere presumption. Save for the word of mouth and the purported and/or altered lease document, the Plaintiff has not demonstrated or indicated how the Defendant breached the said lease agreements.

133. On inclusion of the 9 months' notice and first option of sale, it was stated that company decisions are ordinarily made through resolutions passed by their respective directors. Based on the meeting held by the Defendant in regard to the suit properties, it is clear that the lease agreements were an extension of the previous lease agreements previously entered in 1999. This fact was not disputed even by the Plaintiff himself. In fact, the letters dated May 13, 2006 and November 20, 2008 written by the Plaintiff and addressed to the Defendant strictly indicated a request an extension of the tenancy period and a revision of the rent payable.

134. In addition to this, the minutes presented by the Defendant for the Board meetings held on May 31, 2006 and again on June 30, 2006 deliberating the request by the Plaintiff does not mention anything else other than these two terms and conditions. As such, the amendments which were to be done to the lease agreements as instructed to the advocate would only include 20 more years and the rent payable. It is impractical for the lease agreements to reflect anything other than discussions which were held in

an official board meeting for a company registered under the law. The inclusion of any other terms and conditions was not in the form of a resolution of the board of directors. This position was reinforced by quoting paragraph 715 of Halsbury's Laws of England/Fourth Edition at page 4229 where it is stipulated that:

> " A company, not being a physical person, can only act either by resolution of its members in general meeting, or by its agents....."

135. This position was also upheld in Affordable Homes Africa Ltd vs Henderson & 2 others (2004) eKLr where Justice Njagi stated that inter alia: -

> " As an artificial person, however, a company can only take decisions through the agency of its organs, which are primarily the board of directors or the general meeting of its shareholders....."

136. It was the Defendant's submission that the resolution passed ruing the meetings was with regards to the suit properties were only on the extension of the lease period and a revision of the rent payable.

137. It is further undisputed that the board held a meeting to deliberate the sale of the two parcels of land which in any event was not at all secretive as the Plaintiff wishes the court to believe. In fact, he was still a member of the Defendant being a shareholder and this information was well available to him. Nonetheless, the Plaintiff moved to court seeking orders inter alia; maintenance of the status quo and that he be given 9 months' notice and to be given the first option of sale. This was despite the fact that even though such a meeting had been held and the issue deliberated, he was not served with an eviction notice and neither did his alleged tenants. This provision was well provided for in the lease agreements under clause 5 of the lease agreements where a party wishing to terminate the lease agreement would do so in writing. This notwithstanding that his allegations for breach are founded not only on an unregistered lease agreement but also on altered and forged documents.

138. Nevertheless, the Defendant was willing to accommodate his application which by consent resulted to him being given the 9 months' notice and the first option of sale. Several offers were given to him which were even favourable offers considering the high value of the parcels. He was however unwilling or unable to commit himself to the offers given. Seeing this failure on his end, the Plaintiff through his submissions would later claim that the Defendant had already breached the sale agreement as he had given the notice and the first option of sale after the institution of this suit.

139. It was submitted that both parties entered into the consent willingly and in the presence of their two able Learned Senior advocates and if the Plaintiff was indeed genuine of the prayers sought, he would have avoided such prayers in that application and accordingly relented into entering into such as consent as that juncture. Upon entering into a consent, it is trite law that they are bound to the consent order. We find the sentiments of Justice R. Nyakundi in SNI vs AOF (2020) eKLR to restate this position where the honourable judge stated that;

> " Prudence, indeed will dictate that parties legal effect deprived from the consent orders should be deliberately be bound unless there is evidence that every material fact in their possession was invariably mistaken or misrepresented to warrant a variation or complete setting aside the order."

140. Reliance was also made to the case of Flora N. Wasike vs Destinno Wamboko (1988) eKLR where it was held that:

> " It is now settled law that a consent Judgment or order has a contractual effect and can only be set aside on grounds which would justify a contract aside, or if certain conditions remain to be fulfilled, which are not carried out. (See the decision in J.M Mwakio V Kenya Commercial Bank Ltd CA No. 28 of 1982)."

141. If the Plaintiff had not seen the 9 months' notice that was given by consent of the parties while the cause of these proceeding, it defeats logic why he would go ahead and make his proposal of the purchase price. Under the doctrine of Estoppel, he must cease from claiming under this head. He waived his right when he entered into consent and proceeded to make an offer on the purchase price.

142. The court was urged to find guidance in definition given in 748 Air Services Limited vs Theuri Munyi (2017) eKLR where the honourable Judges noted that,

> " waiver is an intentional relinquishment or abandonment of a known right or privilege"

The Honourable Judges further adopted the analysis in the case Serah Njeri Mwobi case (supra) in respect of waiver and estoppel by conduct, that: -

> " the doctrine of waiver operates to deny a party his right on the basis that he had accepted to forego the same rights having known of their existence. The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person..."

143. On compensation for developments, the Defendant submitted that it was the Plaintiff's argument that the agreement provided for compensation of erected structures and developments to the Plaintiff upon the termination of the lease agreement. He heavily relied on his altered lease agreements to prove this provision. However, clause 2 (k) and clause 6 of the original lease agreements provided that the lessor would not be liable to pay the lessee any compensation in regard to any such structures put up by the lessee on termination of the agreement. This was the same agreement provided for in the previous lease agreements entered into on September 27, 1999 and which the Plaintiff himself admits through the letters dated May 31, 2006 and again on June 30, 2006 when he was requesting for an extension of the tenancy period and the revision of the rent payable. Infact, some of these developments had been made prior to the agreement entered on November 17, 2008 and which would fall under the previous agreement dated September 27, 1999. This is evident even from the pictorial evidence adduced by the Plaintiff. This would mean that the Plaintiff was not bound to expect any compensation from developments erected ruing the course of that agreement and which he again admits in his letters dated May 31, 2006 and again on June 30, 2006.

144. It was submitted that the lease agreements dated November 17, 2008 were an extension of the lease agreements dated September 27, 1999 save only for the provision of rent payable and tenancy period which were deliberated as provided for in the minutes. This would agree that if the Defendant indeed wished to compensate the Plaintiff, this would have been expressly stated during the meeting especially given that compensation sought by the Plaintiff amounts to millions of shillings. The instructions given to the advocate who had conduct of this matter was that only these two provisions would be amended.

145. On existence of tenants and future loss of income it was submitted that the original lease agreements dated November 17, 2008 under clause 2 (m) provided that the Lessee would not assign, sublet or part

with possession of the demised land. While this clause was also altered by the Plaintiff so as to meet his own selfish gains, this same provision has also been well articulated in the former lease agreement dated November 27, 1999. Infact, section 54 (1) of the *Land Registration Act* provides that:

> " Upon the registration of a lease containing an agreement, express or implied, by the lesee that the lessee shall not transfer, sub-let, charge or part with possession of any of the leased land without the written consent of the lessor, the agreement shall be note din the register of the lease, and no dealing with the lease shall be registered until the consent of the lessor, verified in accordance with this act has been produced to the Registrar."

146. The Plaintiff neither issued a written notice of his intention to sublet the property nor did he receive any consent from the Defendant. The Plaintiff further adduced exaggerated amounts as compensation sought amounting to Kshs 43,649,425 for developments and expected loss on income amounting to Kshs 221, 539, 183.55/-. The Plaintiff relied on the Quantity Surveyor's report and the evidence of PW3 who is an accountant.

147. The Defendant argued that, It is trite law that loss of income or future earnings must be pleaded and must be proved as they are in the nature of special damages. Justice L. Kamaru in Swalleh C. Kariuki & another vs Violet Owiso Okuyu (2021) eKLR quoted the Court of Appeal in Douglas Kalafa Ombeva vs David Ngama (2013) eKLR, where it was held that;

> " loss of earnings is a special damage claim, and it is trite law that special damages must be pleaded and proved. Where there is no evidence regarding special damages, the court will not act in a vaccum or whimsically"

148. It was submitted that the Plaintiff did not present any receipts to substantiate his claim for loss of income. His only evidence was the report from the accountant and the quantity surveyor. The court was urged to consider that these expert witnesses were hired by the Plaintiff to support his claim for the amounts sought. Thus, they were paid agents acting under the instructions of the Plaintiff whose wish was to seek exaggerated amounts to the detriment of the Defendant.

149. Reference was made to the sentiments in the case of David Njuguna Ngotho Versus Family Bank Limited & another (2018) eKLR where the Hon. Justice R. Nyakundi cited sir George Jessel Mr. in the case Abringer V Ashton where he termed expert witnesses as "PAID AGENTS". Further, the Hon. Judge quoted Lord Woolf in his Access to Civil Justice Report that:

> " Expert witnesses used to be genuinely independent experts. Men of outstanding eminence in their field. Today they are in practice hired guns. There is a new breed of litigation hangers-on, whose main expertise is to craft reports which will conceal anything that might be to the disadvantage of their clients."

150. The Honourable judge proceeded to agree with the decision in Taylor on Evidence (12th Ed.) Vol. 1....para. 58 at p. 59 where it was stated that:

> " Perhaps the testimony which least deserves credit with a jury is that of skilled witnesses. These witnesses are usually required to speak, not to facts, but to opinions, and when this is the case, it is often quite surprising to see with what facility, and to what an extent, their views can be made to correspond with the wishes or interests of the parties who call them. They do not, indeed willfully misrepresent what they think, but their judgments become so warped by regarding the subject in one point of view, that, even when conscientiously disposed, they are incapable of forming an independent opinion. Being zealous partisans,

their belief becomes synonymous with Faith as defined by the apostle for it too often is but "the substance of things hoped for, the evidence of things not seen." To adopt the language of Lord Campbell, skilled witnesses come with such a bias on their minds to support the cause in which they are embarked that hardly any weight should be given to their evidence."

151. The Defendant argued that the evidence produced by an accountant cannot be relied on as they did not show any receipts or even how they arrived to such lump sum amounts. The accountant failed to present any receipts or evidence showing how the alleged tenants had been paying rent at least as an indication of the projected income claimed. It was his duty to present sufficient documentary evidence as highlighted in David Njuguna Ngotho vs Family Bank Limited & another (supra) where the court quoted the case of Choge & Others vs Republic (1985) eKLR that the duty of an expert witness is

> " to furnish the judge or jury with the necessary scientific criteria for testing the accuracy of their conclusion, so as to enable the judge or jury to form their own independent judgment by the application of these criteria to the facts proved in evidence...."

152. The Defendant also submitted that importance of receipts or any other factual evidence was highlighted by the Hon. Justice R. Nyakundi where he quoted Justice Mativo in Stephen Kinini Wang'ondu vs The Ark Limited (2016) that:

> " Expert evidence should be tested against known facts, as it is the primary factual evidence which is of the greatest importance. It is therefore necessary to ensure that expert evidence is not elevated into a fixed frame work or formula, against which actions are then to be rigidly judged with a mathematical precision."

153. The Defendant therefore urged that the report adduced by the Quantity Surveyor and the accountant were mere projections insufficiently corroborated and thus should not be considered.

154. It was also submitted that the Plaintiff had failed to demonstrate any breach of contract on the part of the defendant that would benefit him any award of general damages.

155. The Defendant urged the court to dismiss the suit with costs.

Issues for Determination.

156. I have considered the pleadings filed by the parties, the documents adduced in evidence and the oral testimony tendered by the witnesses. I have also read the well written and detailed submissions, filed by the parties. The facts of the case are already summarized herein above and there is no need to repeat.

157. The Parties did not agree on any issues. In the court's considered opinion, the issues for determination in this matter are:

i. Whether the lease agreements are valid and binding as between the parties.

ii. Whether there was any breach of the lease agreements between the parties.

iii. Whether the Plaintiff is entitled to the prayers sought.

iv. Who should bear the costs of the suit.

Analysis and Determination.

158. I shall now proceed to analyze the issues sequentially.

159. It is not disputed that the Plaintiff and the Defendant herein entered into two leases agreements both dated November 17, 2008. However, the Defendant contended that the lease agreements produced by the Plaintiff in evidence which was contained at page 1 to 14 of the Plaintiff's Supplementary bundle of documents dated July 9, 2020 are not the correct agreements. The Defendant produced its own agreement similar found at pages 9 to 20 of the Defendant's list of documents.

160. It is trite law that he who alleges must prove. This is set out under Section 107(1)(2) of the *Evidence Act*, which provides as follows:

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

161. During trial, the Plaintiff maintained that he was not aware of the agreements produced by the Defendant and that the agreements produced by the Defendant were not signed by the Plaintiff. In furtherance of his case, during trial, the Plaintiff produced a forensic examination report undertaken by CI Alex Mwongera dated April 25, 2014 which agreed with the Plaintiff's position that indeed the lease agreements produced by the Plaintiff are genuine leases over the suit properties as the signatures therein matched the specimen provided by the Defendant's directors and the Plaintiff. On this aspect, the Plaintiff submitted that the Court had only had the chance to be referred to a single forensic document examiner's report as supplied by the Plaintiff. The Plaintiff also cited the case of Ali Mohammed Sunkar vs Diamond Trust Bank Ltd (2011) eKLR quoted in the case of John G Kamuyu & Another Vs Safari 'M' Park Motors Nairobi ELC No. 1013 of 1999 where the court stated that an expert report can only be challenged through a counter expert report. The Plaintiff also cited the case of Care Mission Kenya & 4 others V Benta Akinyi Otieno & 2 others (2021) eKLR this court in agreeing with a forensic examination report admitted as evidence by consent without calling the examiner held:

> " This court takes note that what is contested by the defendant as particularized in their counter-claim is the manner in which the Plaintiffs acquired the titles into their names. The plaintiffs did not present the contested documents for expert examination hence the findings of the examiner on the contested signatures on the documents of application for consent of Land Control Board to transfer and the transfer form transferring the suit title from the names of Deity E.C.D./Primary to the 2nd Plaintiff have not been contradicted. The burden placed on the defendant' to discharge on proof of the fraud has been discharged."

162. Having considered and evaluated both the documentary and oral testimony tendered herein and in the absence of any evidence adduced by Defendant to the contrary, it is the finding of this court that the lease agreements both dated November 17, 2008 in respect to L.R. No. 13330/368 and L.R. No. 13330/369 are valid and binding to the parties herein.

163. In respect to the breach of the agreement, It was the Plaintiff's case that he had been in occupation of the suit properties from 1988 and never had any issues with the Defendant until when the Defendant wanted to sale the suit properties.

164. It was also the Plaintiff's case that Clause 3(c) of the lease agreements dated November 17, 2008 that should the defendant wish to sell the properties then they will issue a nine months' notice of its intention to sell and first priority to purchase to the Plaintiff before seeking third party purchases.

165. The Defendant pleaded and submitted that there was no evidence to indicate any breach of the said agreements.

166. During trial, the Plaintiff stated on cross-examination that he is still in the suit property but had filed this suit to avert any intended sale that would be prejudicial to him and in breach of the agreements between the parties.

167. The Black's Law Dictionary,{{^}} 9th Edition Page 213 which defines a breach of Contract as;

> "a violation of a contractual obligation by failing to perform one's own promise, by repudiating it, or by interfering with another party's performance. A breach may be one by non-performance or by repudiation or by both. Every breach gives rise to a claim for damages and may give rise to other remedies. Even if the injured party sustains no pecuniary loss, or is unable to show such loss, with sufficient certainty, he has at least a claim for nominal damages."

168. Its trite that a contract is the source of primary legal obligations upon each party to it procures that whatever he has promised will be done is done. Leaving aside the comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to "substituted or secondary obligations" on the part of the party in default. Those secondary obligations of the contract breaker arise by implication of law. From the testimony that was tendered, it was clear that the Plaintiff was given a first priority to purchase however according to the Defendant he gave an offer of Kshs 30,000,000/- which was way too low.

169. On this particular issue, it was evident that the Plaintiff was given the 9 months' notice and first option for sale but gave a very low offer. It was also evident that the Defendant gave him several offers to match up the value of the property but the Plaintiff was unable to commit to the same.

170. Article 40 (1) of *the Constitution* states that

> "subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property."

171. In the instant case, while it is true that clause 3 (c) of the Lease agreement dated November 17, 2008 provided as follows;

> "In case the Lesser may ever decide to sell the land priority shall be given to the Lessee by giving a notice of at lease nine (9) months of intent to sell."
>
> Having evaluated the evidence that was tendered herein there was no breach by either party at all in respect to the same.

172. In view of the foregoing, it is the finding of this court that there was no breach by the Defendant nor any party of the terms of the lease agreements dated November 17, 2008.

173. The Plaintiff sought for several reliefs in his amended plaint dated July 9, 2020. The said reliefs are also listed at page 1 of this judgment.

174. The Plaintiff submitted that having demonstrated that the lease agreements produced by him in court are genuine agreements, he is entitled to the prayers sought. It was also submitted that the Plaintiff is merely seeking the enforcement of the lease agreements entered by the parties. To successfully claim damages, a Plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the

defendant; and (c) the Plaintiff suffered damage (loss) as a result of the defendant's breach. The Plaintiff is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs. A Plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. This implies that the Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff.

175. It was also submitted that the as an alternative prayer to the Plaintiff exercising his right of first offer to purchase, the Defendant should compensate him for Kshs 43,649,425/= being as per the valuation report dated 19th July 2019 in respect to the developments undertaken therein. The Plaintiff also sought for loss of rental income from sub leases of Kshs 221,539,138.55/= should the leases be terminated.

176. From the evidence that was tendered the court indeed found no breach by either party in respect to the terms of the lease agreement. In view of the foregoing the only appropriate remedies that this court can issue should be in respect to the enforcement of the terms of the lease agreement as agreed by the parties.

177. In respect to costs, the same is at the discretion of the court and having considered the circumstances of this case, and the fact that the Plaintiff has only partially succeeded in respect to the reliefs sought in his case, I will direct each party to bear own costs of the suit.

Final orders

178. Before I conclude, I must sincerely thank all the Advocates for their well written submissions the authorities that were cited which were extremely useful to this Court.

179. The upshot of this Court's findings is that the Plaintiff's suit partially succeeds and judgment is hereby entered in the following terms:

    a. The Defendant to give the Plaintiff, a nine months' notice of its intention to sell the suit properties and the first option to purchase the two parcels of land, namely L.R. No. 13330/368 and L.R. No. 13330/369 at a fair open market value, to be determined by a valuer appointed by the Registrar of Valuers Registration Board, the cost of which shall be done by the Plaintiff.

    b. An order of mandatory injunction is hereby issued compelling the Defendant to register the two lease agreement both dated November 17, 2008, against the titles of the respective parcels of land and the Plaintiff to be provided with the evidence of the registration of the two lease agreements within 30 days of the decree being served upon the Defendant.

    c. In the alternative to prayer (a) and (b) above, the Defendant be ordered to pay the Plaintiff special damages in the suit of Kshs 43, 649, 425.00 being the value of developments on Plots L.R. No. 13330/368 and L.R. No. 13330/369 Nairobi County.

    d. Any other relief not expressly granted is denied.

    e. Each party to bear own costs of the suit.

Dated, Signed and delivered at Nairobi this 13th day of July 2023.

E.K. WABWOTO

JUDGE

In the presence of:-

Mr. Mwathe and Mr. Kibe Munga for Plaintiff.

Mr. Gatere for Defendant.

Court Assisitant – Caroline Nafuna.

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