



Eagle Tower Limited v Shah & 5 others; Igueta (Interested Party) (Environment & Land Case E180 of 2023) [2023] KEELC 19250 (KLR) (10 August 2023) (Ruling)

Neutral citation: [2023] KEELC 19250 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E180 OF 2023**

**JO MBOYA, J
AUGUST 10, 2023**

BETWEEN

EAGLE TOWER LIMITED PLAINTIFF

AND

ANIL BHARMAL SHAH 1ST DEFENDANT

SATO PROPERTIES LIMITED 2ND DEFENDANT

ALKA ANIL SHAH 3RD DEFENDANT

SAHEEL ANIL SHAH 4TH DEFENDANT

VISHAL ARUN SHAH 5TH DEFENDANT

INTERGRAL OFFICE SOLUTIONS LIMITED 6TH DEFENDANT

AND

MERCY KAIMURI IGUETA INTERESTED PARTY

RULING

1. The instant Ruling relates to and concerns Three (3) separate and distinct Applications, which have been filed by the various Parties and in respect of which the various Parties, inter-alia, have sought for a plethora of reliefs;
2. For good measure, the instant Ruling concerns Applications dated the 14th May 2023; Application dated 13th June 2023; and amended Notice of Motion dated the 27th June 2023, respectively. Instructively, each of the Applications which have been alluded to seeks distinct reliefs and hence it is imperative that the reliefs sought at the foot of each Application be reproduced and or enumerated albeit separately.



3. As pertains to the Application dated the 14th May 2023; the Plaintiff/Applicant has sought for the following reliefs;
 - i. Spent.
 - ii. Pending the hearing and determination of this Application, the 2nd, 3rd and 6th Defendants/ Respondents be and are hereby ordered to vacate the basement parking area of the premises on L.R No. 209/20601 (I.R No. 143093/1) which basement is registered as I.R No. 185751 in an accounts jointly held by the Plaintiffs/Applicants and Defendants/Respondents advocate or in an account to be designated by the Honorable court.[verbatim]
 - iii. Pending the hearing and determination of the Main suit, the 2nd, 3rd and 6th Defendants/ Respondents be and are hereby ordered to vacate the basement parking area of the premises on L.R No. 209/20601 (I.R No. 143093/1) which basement is registered as I.R No. 185751 in an accounts jointly held by the Plaintiffs/Applicants and Defendants/Respondents advocate or in an account to be designated by the Honorable Court.[verbatim]
 - iv. In the alternative to prayer (ii) herein above, pending the hearing and determination of this Application and the Main suit, the 2nd, 3rd and 6th Defendants/Respondents be and are hereby ordered to deposit the rents payable for the shop based at the basement parking area on the premises on basement parking area of the premises on L.R No. 209/20601 (I.R No. 143093/1) which basement is registered as I.R No. 185751 in an accounts jointly held by the Plaintiffs/ Applicants and Defendants/Respondents advocate or in an account to be designated by the Honorable Court.[verbatim]
 - v. In the alternative to prayer (ii) herein above, pending the hearing and determination of the Main suit, the 2nd, 3rd and 6th Defendants/Respondents be and are hereby ordered to Deposit the Rents payable for the shop at the basement area on Basement Parking area of the premises on L.R No. 209/20601 (I.R No. 143093/1); which basement is registered as I.R No. 185751; in an accounts jointly held by the Plaintiffs/Applicants and Defendants/Respondents advocate or in an account to be designated by the Honorable Court.
 - vi. Pending the hearing and determination of this Application and on the Main suit, the Defendants/Respondents by themselves and/or any one legally considered as their agents, be restrained by way of an Injunction from dealing with or in any way interfering of the basement area on Basement Parking area of the premises on L.R No. 209/20601 (I.R No. 143093/1); which basement is registered as I.R No. 185751.
 - vii. Costs of this Application be in the cause.
 - viii. Any such further orders and other reliefs the Honorable Court may deem just to grant in the Interests of Justice.
4. The instant Application is premised and/or anchored on the various Grounds which have been enumerated in the body thereof. Furthermore, the instant Application is supported by the affidavit of one Victoria Elizabeth Odhiambo sworn on the 14th May 2023; and to which the Deponent has annexed a total of 10 Documents.
5. Instructively, upon being served with the instant Application, the Defendants/Respondents responded thereto vide a Replying affidavit sworn by the 2nd Defendant/Responded, namely, Anil Bharmal Shah; sworn on the 19th June 2023; and in respect of which the Deponent has averred inter-alia



- that the entire suit before the Honourable Court is barred by the *Limitation of Actions Act*, Chapter 22, Laws of Kenya; and hence same ought to be dismissed in Limine.
6. Be that as it may, it is important to point out that the reliefs sought at the foot of the Application dated the 14th May 2023; are incomprehensible and in any event, difficult to grapple with, given the muddled-up manner in which the reliefs have been crafted.
 7. The Second Application is the one dated the 13th June 2023; filed by and on behalf of the Defendants/Applicants and wherein same have sought for the following reliefs;
 - i. Spent
 - ii. This Honourable Court be pleased to give directions on timely filing of a response to this application.
 - iii. This court be pleased to strike out the Notice of Motion Application and Complaint dated the 14th May 2023 for being scandalous, frivolous and or vexatious to the Defendants and/or in the alternative; for being an abuse of the court process.
 - iv. Costs of this Application and the suit be borne by the Plaintiffs.
 8. The subject Application is premised and or anchored on a plethora of Grounds which have been enumerated in the body thereof. Further and in addition, the Application herein is supported by the affidavit of Anil Bharmal Shah; sworn on the 13th June 2023; and in respect of which the Deponent has attached a total of 12 Documents. For good measure, the documents attached to the supporting affidavit are voluminous.
 9. Though served with the Application dated the 13th June 2023; the Plaintiff/Respondent herein does not appear to have filed any Response to the said Application. Further and in any event, no such Response was adverted to and/or cited by Learned counsel for the Plaintiffs/Respondents during the time when the consolidated Applications were canvassed before the Honourable court.
 10. The third Application has been filed by and on behalf of the intended/ Proposed Interested Party. For coherence, the Third Application is dated the 27th June 2023; and wherein the following reliefs have been sought;
 - i. Spent
 - ii. The Honorable Court be pleased to enjoin the Applicant as an Interested Party in this suit.
 - iii. Upon the grant of the prayers herein, the Honorable Court be pleased to grant Leave to the Applicant/Intended Interested Party to respond to all pleadings/applications filed by the Parties in this matter.
 - iv. The Honorable Court be pleased to make any other orders it deems fit and expedient in the circumstances.
 - v. The costs of the Application to abide the cause.
 11. Invariably, the instant Application is anchored on various grounds which have been enumerated in the body thereof. Furthermore, the Application is supported by the further affidavit sworn on the 23rd June 2023; and in respect of which the Deponent has attached Four (4) sets of documents, inter-alia, a copy of the Lease registered in favor of the intended Interested Party.
 12. Be that as it may, upon being served with the amended Notice of Motion dated the 27th June 2023; the Defendants/Respondents adopted and relied on the Grounds of opposition which had hitherto



been filed in response to the Application dated the 30th May 2023, namely, the original Application before same was amended.

13. For good measure, the Three Applications came up for hearing on the 29th June 2023, whereupon the advocate for the respective Parties agreed to canvass and dispose of the Applications simultaneously. Similarly, the advocates for the Parties also agreed to have the three Applications ventilated and disposed of by way of oral submissions.
14. Pursuant to and in line with the agreement by the Parties, the Honourable court proceeded to and indeed entertained the Three separate and distinct Applications simultaneously and by way of oral submissions.

Submissions By The Parties:

a. Plaintiff's/applicant's Submissions:

15. Learned counsel for the Plaintiff/Applicants adopted the grounds contained at the foot of the Application and thereafter reiterated the averments/ depositions at the foot of the supporting affidavit sworn on the 14th May 2023, as well as the Further affidavit sworn on the 28th June 2023, respectively.
16. Further and in addition, Learned counsel for the Plaintiff/Applicant thereafter raised, highlighted and canvassed Four (4) salient issues for due consideration by the Honourable court.
17. Firstly, Learned counsel for the Applicant contended that the Plaintiff/Applicant has established and demonstrated the existence of a Prima facie case with probability of success, insofar as the Plaintiff/Applicant is the Management Company which was Incorporated by the Owners of various Apartment constructed and standing on the suit Property herein.
18. It was the further submissions of Learned counsel for the Applicant that to the extent that the Plaintiff/Applicant is the Management Company, same is bestowed with the requisite mandate and or authority to ventilate the grievances by and on behalf of the owners of the apartments, where the rights of such owners have been breached, violated and/or infringed upon.
19. Additionally, Learned counsel for the Plaintiff/Applicant has submitted that the Shareholders of the Plaintiff/Applicant, who are the owners of the Apartments bought the various Apartments Off-plan and wherein it was indicated that the Basement area of the suit property was designated and reserved as a Parking area, to be used by the Shareholders/Members of the Plaintiff/Applicant herein.
20. Secondly, Learned counsel for the Applicant has submitted that the Drawings relating to the suit Property and which gave rise to the various Apartments that were ultimately sold to and in favor of the Members/ Shareholders of the Applicant herein, were indicated to form part of the Contract documents. In this regard, Learned counsel for the Applicant has contended that the Sale Agreement that was entered into and executed with the Members/Shareholders of the Applicant herein and must therefore be read together with the building Plans and Drawings, with a view to appreciating the true scope and extent of the Premises that were sold to and in favor of the Members/ Shareholders of the Applicant herein.
21. Thirdly, Learned counsel for the Applicant has similarly submitted that the Sale Agreements/ Contracts which were entered into and executed by the Members/ Shareholders of the Applicant on one hand; and the 1st Defendant/Respondent on the other hand; were superseded by the Lease which was ultimately registered in favor of the Members of the Applicant.



22. In any event, Learned counsel for the Applicant has contended that the Lease over and in respect of the various Apartments were executed by Three Parties, namely, the Management Company, the Developer and the Individual Apartment owners. Consequently and in this regard, Learned counsel has therefore contended that the Plaintiff/Applicant is seized of the requisite capacity/ Locus standi to approach the Honorable court and procure the reliefs sought at the foot of the Plaint, as well as the Application beforehand.
23. Fourthly, Learned counsel for the Applicant has submitted that despite the fact that the basement of the suit property was reserved as a Parking area for the owners of the apartments, the 1st to the 5th Defendants have since transferred the basement area to and in favor of the 6th Defendant/Respondent, who has since converted same for commercial use. Furthermore, Learned counsel for the Applicant has contended that the conversion of the Basement area into a Commercial area, has denied and/or deprived the owners of the apartments of their right to use the basement area for purposes of parking, in the manner which was envisaged vide the sale agreements and the Lease executed between the Members/ Shareholders of the Applicant and the 1st Defendant/Respondent herein.
24. In view of the foregoing, Learned counsel for the Applicant has implored the Honourable court to find and hold that the Applicant herein has established and demonstrated the requisite ingredients to warrant the orders sought at the foot of the Application, including inter-alia, Temporary Injunction to restrain the 6th Defendant/Respondent from accessing and/or using the basement area to the exclusion of the Applicant/Members of the Applicant.

b. Intended Interested Party's Submissions:

25. The Intended Interested Party herein adopted the Grounds contained at the foot of the Application dated the 27th June 2023; and also reiterated the contents at the foot of the Further affidavit attached thereto. For good measure, the further affidavit is sworn on (sic) the 23rd June 2023.
26. Furthermore, Learned counsel for the Interested Party has thereafter highlighted and canvassed two (2) pertinent issues for due consideration by the Honorable court.
27. First and foremost, Learned counsel for the Intended Interested Party has submitted that the intended Interested Party is one of the owners of the Apartment in the suit property and by virtue of being an apartment owner; same is entitled to use the Basement area for purposes of Parking.
28. Secondly, Learned counsel for the intended Interested Party has submitted that even though the intended Interested Party is a Shareholder/Member of the Plaintiff/Applicant; the intended Interested Party has peculiar interest in respect of the subject dispute and hence same deserves to be joined into the proceedings as an Interested Party; to enable her to vindicate her interests in respect of the disputed property.
29. Premised on the foregoing, Learned counsel for the intended Interested Party has therefore impressed upon the Honourable court to find and hold that the intended Interested Party is thus a necessary Party to the instant proceedings and therefore ought to be admitted and therefore joined as such.

c. Defendants'/respondents' Submissions:

30. Learned counsel for the Defendants/Respondents adopted the grounds contained at the foot of the application dated the 13th June 2023; the Supporting affidavit; the Replying affidavit sworn on the 29th June 2023; and finally the Grounds of opposition dated the 19th June 2023, respectively.



31. Further and in addition, Learned counsel for the Defendants/Respondents also intimated to the court that same had hitherto filed/lodged skeleton written submissions dated the 28th June 2023; and which Learned counsel sought to adopt and rely on. For good measure, the skeleton written submissions dated the 28th June 2023; were duly adopted.
32. Having adopted and reiterated the contents of the various documents, which have been enumerated hereinbefore, Learned counsel for the Defendant/Respondent thereafter highlighted and amplified six pertinent issues for consideration and determination by the Honourable court.
33. First and foremost, Learned counsel for the Defendants has submitted that the Plaintiff/Applicant herein is only entitled to the Reversionary interests over and in respect of the suit property; but which Reversionary Interests have neither accrued nor arisen, to warrant the Applicant herein approaching the Honorable court for any sought of reliefs, either in the manner claimed or otherwise.
34. Additionally, Learned counsel for the Defendants/Respondents has contended that in the absence of any Proprietary rights to and in respect of the suit property, the Applicant herein has failed to establish and or demonstrate the existence of a Prima facie case, with overwhelming chances of success.
35. Secondly, Learned counsel for the Defendants/Respondents has submitted that the Sale Agreement which were entered into and executed between the 1st Defendant and the members/shareholders of the Plaintiff/Applicant, did not include and/or refer to the Drawings as part and parcel of the contract. In this regard, Learned counsel has contended that the Drawings in question, which are now being alluded to by the Plaintiff/Applicant; do not form part and parcel of the Agreement/ Lease; the owners of the apartments executed.
36. Thirdly, Learned counsel for the Defendants has submitted that the basement area was the subject of an Application for change of user, which was mounted with the Nairobi City Government, same being the Planning Authority for purposes of Change of User. Further and in addition, Learned counsel has submitted that the Application for Change of User from Commercial to include workshop, was duly approved.
37. As a result of the fact that the change of user pertaining to and concerning the Basement area was duly granted, Learned counsel for the Defendant has submitted that same cannot now be canvassed before this Honorable Court, yet the approval by the Planning Authority has never been challenged, impugned and/or negated, in the manner provided for in accordance with the Provisions of the *Physical and Land Use Planning Act*, 2019.
38. Fourthly, Learned counsel for the Defendants/Respondents has submitted that following of the approval of the application for change of user by the Nairobi City County Government, the 1st Defendant/Respondent entered into a Lease Agreement dated the 1st August 2015; and thereby demised the Basement area to a Company known as Rights and Beyond Limited.
39. Additionally, Learned counsel for the Defendant/Respondent has submitted that the Company, namely, Rights and Beyond Limited, appropriated the terms of the lease and upon the determination of the said lease; the 1st Defendant/Respondent demised the basement to and in favor of the 6th Defendant/Respondent herein.
40. In the premises, Learned counsel for the Defendant/Respondents has therefore submitted that the Basement area has been used for Commercial purposes ever since the 1st August 2015; when same was demised to and in favor of Rights and Beyond Ltd.



41. In view of the foregoing, Learned counsel for the Defendants/Respondents has contended that the suit by and on behalf of the Applicant herein, which seeks to challenge the conversion of the basement area for use as a commercial/workshop; is therefore time barred.
42. Fifthly, Learned counsel for the Defendants/Respondents has also submitted that even if the Applicant herein had the requisite rights and or interests (which counsel contends otherwise) then the said rights could only be ventilated before a court of law within six years from the date when the apartments were transferred to and registered in the names of the owners, who are Shareholders/Members of the Plaintiff/Applicant.
43. On the other hand, Learned counsel has contended that the various Leases in favor of the Apartment owners were registered in the year 2014 and hence, the Plaintiff/Applicant herein was obligated to approach the Honorable court within a duration of six years and not otherwise.
44. Sixthly, Learned counsel for the Defendants has submitted that the sale agreements which were entered into and executed between the 1st Defendant and the Apartment owners, who comprise of the shareholders of the Plaintiff/Applicant, contained an arbitral clause, namely, clause Number 29 thereof, which indicated that any Dispute between the Parties and arising out of this agreement was to be referred to and determined by a Single Arbitrator to be agreed upon by the Parties; and in default, to be appointed by the Chairman of the Law Society of Kenya.
45. Further and in any event, Learned counsel for the Defendants/Respondents has further contended that the named Clause also indicated that the decision of the arbitrator was to be Final and binding on the Parties.
46. Based on the foregoing position, Learned counsel for the Defendants/Respondents has therefore submitted that the instant suit and the incidental Application are barred by the Doctrine of Exhaustion; which requires that the dispute beforehand be submitted to arbitration and not otherwise.
47. Lastly, Learned counsel for the Defendants/Respondents has submitted that the Plaintiff/Applicant herein has failed to apply her legal mind to the import and tenor of the approval which was granted to and in favor of the 1st Defendant/Respondent and wherein the use of the basement area was converted from commercial unto commercial/workshop.
48. Furthermore, Learned counsel has added that insofar as the change of user was duly sanctioned and approved by the Planning Authority; the Plaintiff/Applicant cannot approach this Honorable court with a view to challenge and or impugned same either in the manner adverted to in the suit or otherwise.
49. Premised on the foregoing, Learned counsel for the Defendants/ Respondents has therefore implored the Honorable court to find and hold that the entire suit is scandalous, frivolous and vexatious; and in any event, an abuse of the Due process of the Honourable court.
50. Consequently and in this regard, Learned counsel for the Defendants/Respondents has sought to have the entire suit struck out, with Costs to the Defendants/ Respondents.

Issues For Determination:

51. Having reviewed the Three separate and distinct Applications, which form the substratum of the instant Ruling; and upon taking into account the Responses thereto; and finally upon consideration of the oral submissions which were ventilated by and on behalf of the advocates for the Parties; the following issues do arise and are therefore worthy of determination;



- i. Whether the instant Suit/Cause of Action by the Plaintiff/Applicant is statute barred by dint of *Limitation of Actions Act*, Chapter 22, Laws of Kenya.
- ii. Whether the instant suit contravenes the Doctrine of Exhaustion and if so; whether the suit is bad in law.
- iii. Whether the Honorable court is seized of the Jurisdiction to impugn and/or impeach the Development Approval relating to the Change of user, which was granted pursuant to and in accordance with the Physical Planning Act, now repealed.
- iv. Whether the Proposed Interested Party has a stake in the suit and whether same ought to be joined as a Party, either in the manner sought or otherwise.

Analysis And Determination

Issue Number 1

Whether the instant Suit/Cause of Action by the Plaintiff/Applicant is statute barred by dint of *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

52. The Plaintiff/Applicant herein has filed the instant suit vide the Complaint dated the 14th May 2023 and in respect of which the Plaintiff/Applicant has made various averments. For good measure, the averments contained at the foot of the Complaint are instructive and imperative insofar as determining whether the cause of action is statute barred or otherwise.
53. Consequently and arising from the foregoing, it is therefore important to outline and reproduce the contents of certain paragraphs, namely, Paragraphs 10, 11, 12 and 13 of the Complaint, which constitutes the gravamen of the suit before the Honorable court.
54. For good measure, the named paragraphs are reproduced as hereunder;
 10. On or about October 2015, the Defendants changed and or caused the use of the basement to be changed from a parking area into a shop.
 11. On or about the 20th March 2017, the Defendants fraudulently and illegally caused a sub-lease (Sectional Title) to be registered and issued in favor of the 2nd and 3rd Defendants as I.R. no. 185751.
 12. The 2nd and 3rd Defendants have been leasing these shops out for a sum of Kes.208, 000/= per month to the 6th Defendant.
 13. The Plaintiff avers that the actions of the Defendants amounts to a breach of contract.
Particulars of breach of contract by the Defendants
 - i. Interfering with the Plaintiffs/Applicants tenants rights to use the basement as a parking area contrary to the agreement for sale and subleases executed for apartment in the apartment block.
 - ii. Changing the use of the parking area contrary to the agreements for sale and subleases executed for apartments in the apartment block and renting the shop out.
55. From the contents of the paragraphs, whose details have been enumerated hereinbefore, it is evident and apparent that the complaints that informs the cause of action before the court arose on or about October 2015; and that in any event, same have been within the knowledge of the Plaintiff/Applicant herein.



56. Additionally, paragraph 11 of the Plaintiff also confirms that the other limb of the complaints arose and or accrued on the 20th March 2017. Similarly, it is apparent that the Plaintiff/Applicant has been privy to and/or knowledgeable of the facts underpinning the complaint beforehand.
57. Having made the foregoing observations, it is also instructive to note that the Plaintiff's claims before the Honourable court touches on and/or concerns breach of Contract. Consequently and in this regard, there is no gainsaying that the Plaintiff/Applicant ought to have filed and mounted the suit beforehand within six years from the date of accrual/ commencement of the cause of action.
58. To start with, the conversion and change of user pertaining to and concerning the Basement area into a commercial segment occurred and/or arose, according to the Plaintiff/Applicant, on or about October 2015. In this respect, it therefore means that the Plaintiff/Applicant ought to have come to court at the very latest by October 2021 and not otherwise.
59. As pertains to what is deemed to be the fraudulent and illegal creation of a sub-lease (whose details have been enumerated at the foot of paragraph 11 of the Plaintiff); the Plaintiff/Applicant ought to have approached the Honourable court at the very latest on or before the 19th March 2023 and not otherwise.
60. Despite being privy to and or aware of the complaints, which are now being ventilated before the Honourable court; the Plaintiff/Applicant failed to move the court within the statutory timelines. In this respect, the Plaintiff's suit which is anchored and/or premised on breach of contract by and on behalf of the Defendants/Respondents is clearly statute barred by dint of Section 4(1) of The Limitation of Actions Act, Chapter 22 Laws of Kenya.
61. Consequently and to the extent that the suit by and on behalf of the Plaintiff/Applicant is statute barred, it then means that the entire suit and the incidental application anchored thereon are incompetent, misconceived, bad in law and thus Legally untenable.
62. In this respect, it is important to restate and to reiterate the legal implications and consequence of Limitation of Action Act, Chapter 22, Laws of Kenya. For good measure, the significance thereof was underscored by the Court of Appeal in the case of Gathoni versus Kenya Co-operative Creameries Ltd[1982] eKLR, where the court stated and observed as hereunder;
- “The law of limitation of actions is intended to protect defendants against unreasonable delay in the bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. Special provision is made for infants and for the mentally unsound. But, rightly or wrongly, the Act does not help persons like the applicant who, whether through dilatoriness or ignorance, do not do what the informed citizen would reasonably have done.”
63. Additionally, the significance, nay, Legal consequence of Limitation of Actions was also adverted to and espoused in the case of Pius Kimaiyo Langat versus Co-operative Bank of Kenya Limited [2017] eKLR, wherein the Honorable Court of Appeal stated and held thus;
- “It is also trite law that the period of limitation cannot be extended. If any authority is necessary, this Court in Divecon vs Samani (1995-1998) EA 48 stated as follows:-
- "....to us, the meaning of the wording of section 4 (1) is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on



contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that „„the wording of section 4 (1) of the *Limitation of Actions Act* (Chapter 22) suggests a discretion that can be invoked??.

64. Similarly, the import and tenor of Limitation of Actions and its effects on a cause of action was also elaborated upon and illuminated in the case of Deposit Protection Fund Board in Liquidation of Euro Bank Limited (In Liquidation) vs Rosaline Njeri Macharia & Another [2016] eKLR. For good measure, Court stated:

“ As to whether the suit was statute barred under the *Limitation of Actions Act*, the suit was filed on 19th July 2007. By dint of paragraphs 24, 25, 26, 28, 29 and 30 of the plaint, the cause of action was pleaded to have accrued on 27th July 1999 when the alleged breach of contract occurred. As the breach was of a contract relating to lending of money whose security instrument is contested, section 4(1)(a) of the Limitations of Actions Act, Cap 22 requires that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In this appeal, the “suit” having been instituted in 2007 when the accrual of the cause of action was in July 1999, it was clearly filed outside the six-year period and consequently was time barred, if indeed it was a suit.”

65. Arising from the foregoing, there is no gainsaying that the suit by and on behalf of the Plaintiff/Applicant herein, which is indicated to be underpinned on the basis of actions and/or omissions which arose in October 2015, is clearly statute barred and thus a nullity ab initio.

66. Notably and on the basis of the finding herein, I would have been disposed to strike out the suit and to terminate the instant Ruling; but I have enumerated two other issues which require a short mention and deliberation.

67. Arising from the foregoing and in this regard, I propose to canvass the outstanding issues for the sake of completeness.

Issue Number 2

Whether the instant suit contravenes the Doctrine of Exhaustion and if so; whether the suit is bad in law.

68. It is common ground that members/shareholders of the Plaintiff/Applicant herein entered into and /or executed assorted sale agreements with the 1st Defendant/Respondent, pertaining to and/or concerning their respective apartments.

69. Subsequently, the said members/shareholders of the Plaintiff/Applicant executed Leases with, inter-alia, the 1st Defendant/Respondent, culminating into the transfer of the various apartments to and in favor of the respective owners thereof.

70. Nevertheless, it was agreed between the Apartment owners, who were Members of the Plaintiff/Applicant that in the event of a Dispute arising out of the sale agreements or relating to the rights and



liabilities of either Party to the sale agreement in respect of the apartment; such a Dispute, if any, was to be referred to arbitration.

71. For good measure, Clause Number 29 of the sale agreement was couched in the following manner;
- “ All disputes and questions whatsoever which shall arise between the parties hereto touching on this sale agreement or relating to the rights and liabilities of either party herein shall be referred to the decision of a single arbitrator who shall be an advocate of not less than 20 years standing to be appointed by agreement of the parties failing which to be appointed by the chairman for the time being for the Law Society of Kenya in accordance with the provisions of *Arbitration Act* or any Act amending or replacing it. The decision of such arbitrator shall be final and binding on all Parties.”
72. My understanding of the provisions of Clause 29 of the sale agreement, which forms the contract between the Members/Shareholders of the Plaintiff/Applicant on one hand; and the 1st Defendant/ Respondent on the other hand; is to the effect that any dispute arising out of and/or pertaining to the rights and liabilities of the Parties was to be referred to a Single Arbitrator agreed upon by the Parties; and in default, to be appointed by the President of the Law Society of Kenya. Furthermore, it was also agreed that the decision by the arbitrator was to be Final of all the Parties.
73. Before venturing to analyze the legal implication the arbitral clause, (whose details I have alluded to in the preceding paragraph), it is important to point out that Learned counsel for the Plaintiff/Applicant did not dispute the arbitral clause in the said agreement.
74. Further and in addition, it is also important to underscore that Learned counsel for the Plaintiff/Applicant did not attack and/or contend that the arbitral clause was, say, a nullity and/or contrary to Public Policy or otherwise.
75. Having pointed out the position taken by Learned Counsel for the Plaintiff/Applicant, it is now appropriate to return home and to consider the legal implication of the arbitral clause, which epitomizes Alternative Dispute Resolution, in terms of Article 159(2) © of the *The Constitution*, 2010.
76. To start with, where Parties contracting at arms-length, agree to have any resultant dispute to be addressed and/or resolved in a particular manner, inter-alia, by way of arbitration; such Parties are bound by the terms of the arbitral clause and cannot therefore seek to circumvent and or side step the arbitral clause.
77. Furthermore, it is important to underscore that by dint of Article 159(2) of *The Constitution* 2010, courts of law are called upon and or enjoined to foster, facilitate and promote Alternative Dispute Resolution, where appropriate.
78. For coherence, the provisions of Article 159(2) of *The Constitution*, 2010 (supra), provides as hereunder;

159.

Judicial authority

- (1) Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.
- (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles—
 - (a) justice shall be done to all, irrespective of status;



- (b) justice shall not be delayed;
- (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3);

79. Other than the foregoing, the obtaining Jurisprudence is to the effect that; where there exists an alternative dispute resolution mechanism, either envisaged by the Parties or better still, contained/enunciated in statute; it behooves the Parties to first and foremost invoke and exhaust such dispute resolution mechanism before approaching the Honorable court. In instructively and for good measure, the Legal position herein adverts to the Doctrine of Exhaustion.
80. To underscore the obtaining Legal position and in particular, the aspect that fortifies the Doctrine of Exhaustion; it is appropriate to take cognizance of the dictum of the Court of Appeal in the case of Geoffrey Muthinja & another versus Samuel Muguna Henry & 1756 others [2015] eKLR, where the court held and stated as hereunder;

“We find and hold that the exhaustion doctrine applies even where, as was argued by the appellants herein, what is sought to be challenged is the very authority of the organs before whom the dispute was to be placed. We think there were sufficient safeguards in place for a valid determination of the various plaintiffs’ disputes had they filed them within the church set up. And there was always the right, acknowledged by the learned Judge, of approaching the courts after exhaustion of the church mechanisms. By failing to do so, and quite apart from the force of their apprehensions, the appellants effectively failed to exhaust their remedies and essentially short-circuited the process by filing suits pre-maturely.

81. Similarly, I beg to point out and underscore that the Plaintiff/Applicant herein, who is the management company constituted to act for and on behalf of the owners of the apartments, was obligated to comply with the arbitral clause and thereafter refer the dispute, if any, to a single arbitrator, for purposes of determination and/or resolution.
82. For good measure, it was not open to the Plaintiff/Applicant, to approach the Honorable Court as the port of first call, immediately a Dispute arose; yet the contract documents, inter-alia, the sale agreements entered into and executed by her Members and by extension the Leases; alluded to highlighted arbitration, as the first port of call, in the event of a dispute.
83. Premised on the foregoing, I come to the conclusion that even on the basis of the Second question, the Suit beforehand, is premature, misconceived and therefore legally untenable, for violating the Doctrine of Exhaustion.

Issue Number 3

Whether the Honorable court is seized of the Jurisdiction to impugn and/or impeach the Development Approval relating to the change of user, which was granted pursuant to and in accordance with the Physical Planning Act, now repealed.

84. The Defendants/Respondents have averred that same applied to the Nairobi City County Government for development permission and essentially for change of user of basement area of the suit property from commercial to commercial/workshop. In this regard, the Defendants/Respondents have availed to Honourable court a copy of the application for development permission.
85. Furthermore, the Defendants/Respondents also contended that following the application for development permission, relating to the conversion of the basement area form commercial to



- commercial/workshop; the Application for Development permission was duly advertised in the Local daily's, with a view to attracting objections, if any.
86. Finally, it was pointed out that no objections was ever mounted and or raised; and thereafter the approval for change of user was duly granted and/ or issued on the 25th November 2015.
 87. Other than the foregoing, the Plaintiff/Applicant has also admitted and acknowledged that the change of user/conversion of the basement into commercial use took place and or occurred in October 2015. In this regard, the Plaintiff/Applicant admits and/or acknowledges that there was indeed a Change of user which affected the basement area of the suit property.
 88. Nevertheless, and despite being aware of the development approval, culminating into the change of user, one of the reliefs which the Plaintiff/Applicant seeks reads as hereunder;
 - a. Declaration that the basement of the apartment block is a designated parking area and the Defendants to not have a right to convert and transfer/sell the basement.
 89. In my understanding, what the Plaintiff/Applicant is imploring the Honourable court to do is to invalidate the development approval, which was granted by the Planning authority on or about the 25th November 2015; and thereafter to Quash same.
 90. Notably, it is important to point out that any aggrieved person, namely, being aggrieved by the decision of the Planning Authority, in this case Nairobi City County Government; was obligated to mount and/or lodge the requisite appeal with the County Liaison committee within a set timeline, as stipulated vide the provisions of the Physical Planning Act, now repealed.
 91. On the other hand, it is also worthy to point out that the Environment and Land Court would thereafter be seized of the requisite Jurisdiction, albeit by entertaining an appeal arising out of a decision of the County Liaison Committee or the National liaison committee and not otherwise.
 92. Having pointed out the foregoing, it is instructive and paramount to underscore that this Honorable court would not be seized of the requisite Jurisdiction to entertain and to interrogate the issues which have been canvassed at the foot of the Plaint before the Honorable court. In any event, in the absence of Jurisdiction, a court of law is obligated to down his/her tools.
 93. For good measure, it is imperative to reiterate that where a court of law is divested of Jurisdiction, then the court cannot proceed and entertain the impugned proceedings. Further and in any event, if the court were to do so, the resultant proceedings and decision would be a nullity ab initio.
 94. Without belaboring the point, I beg to take cognizance of the dictum in the case of Phoenix of E.A. Assurance Company Limited versus S. M. Thiga t/a Newspaper Service [2019] eKLR, where the court held as hereunder;
 1. At the heart of this appeal is the issue of jurisdiction. It is a truism jurisdiction is everything and is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. What is jurisdiction?
 2. In common English parlance, 'Jurisdiction' denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae. It is for this reason that this Court has to deal with this appeal first as the result directly impacts Civil Appeal No.6 of 2018 which



is related to this one. We shall advert to this issue later. In the meantime, it is important to put this appeal in context.

95. To surmise, I come to the conclusion that the issues which have been raised at the foot of the Plaint beforehand ought to have been addressed by invoking the provisions of the *Physical and Land Use Planning Act*, 2019, which replaced the Physical Planning Act; and not by approaching the Jurisdiction of the court in the first instance.
96. In a nutshell, it is my finding and holding that this Honorable court is divested of the requisite Jurisdiction to entertain and adjudicate upon the dispute beforehand.

Issue Number 4

Whether the Proposed Interested Party has a stake in the suit and whether same ought to be joined as a party, either in the manner sought or otherwise.

97. The proposed/intended Interested Party herein has mounted the application dated the 27th June 2023; and wherein same has sought for liberty to be joined into the proceedings as an interested party.
98. Furthermore, the proposed Interested Party states and/or avers that same is an apartment owner in the suit property and further, that same is also a member/shareholder in the Plaintiff/Applicant, which is the Management Company formed by the apartment owners.
99. Nevertheless and despite being a shareholder in the Plaintiff/Applicant; the proposed Interested Party still contends that the Plaintiff/Applicant does not wholly represent her interests; and thus same seeks to be joined into the proceedings with a view to propagating her interests.
100. Despite the contention by and on behalf of the proposed Interested Party, it is common knowledge that where one is a member/shareholder of a company; it is the company that is mandated to espouse and/or ventilate the grievances which touch on and/or affect her shareholders and not otherwise.
101. Additionally, it is not lost on this Honourable court that under the *Sectional Properties Act*, 2020; the Management Company is established and or incorporated to protect and espouse the rights and interests of the property owners. Consequently and in this regard, once the Plaintiff/Applicant has filed the suit, it is deemed that the rights and interests of the proposed Interested Party are duly catered for.
102. Secondly, it is also important to point out that the proposed Interested Party is resident of the state of Illinois, in the United State of America. In any event, the affidavit in support of the Amended Notice of Motion has been notarized in the state of Illinois.
103. Notably and there is no gainsaying that the United States of America (USA), is not part of the Commonwealth and therefore any affidavit/statutory declaration sworn and/or made in the USA, the state of Illinois, not excepted must be verified and approved in accordance with the provisions of Section 88 of the *Evidence Act*, Chapter 80 Laws of Kenya.
104. Notwithstanding the foregoing, there is no gainsaying that even though the affidavit in support of the amended Application was taken and/or sworn in the State of Illinois, the Notary Public, who administered/commissioned the Oath thereto; has neither verified nor proved the execution of the impugned affidavit either by an affidavit or otherwise, by such other document bearing the signature and seal of attestation of the Notary Public.



105. For good measure, the requirement of proof and/or verification, as pertains to affidavits made and or taken outside the commonwealth, has been previously elaborated and highlighted by various courts, whose decisions underscore and illuminate the necessity of proof by affidavit or otherwise.
106. Instructively, the position of the law to this effect, was elaborated upon in the case of Peeraj Genral Trading & Contracting company Ltd & Another versus Mumias Sugar Company Ltd (2016)eKLR, where the court stated and held thus;
11. I am in total agreement with the reasoning of Ringera J. (as he then was) and I do adopt the same herein. Indeed, Section 88 of the *Evidence Act*, Cap 80 of the Laws of Kenya provides that documents which would be admissible in the English Courts of Justice are admissible in Kenyan Courts without proof of the seal or stamp or signature authenticating it or of the judicial or official character claimed by the person by whom it purports to be signed. In England by virtue of Order 41 rule 12 of the Rules of the Supreme Court, affidavits taken in commonwealth countries are admissible in evidence without proof of the stamp, seal or the official position of the person taking the affidavit. The same position obtains in Kenya. As there is no such presumption in favour of documents made outside the commonwealth, it follows that the affidavit in the instant case which was taken in Dubai, in the United Arab Emirates, would have to be proved by affidavit or otherwise to have been taken by a Notary Public in UAE and that the signature and seal of attestation affixed thereto was that of such Notary Public.
12. There is proof herein that this was done. The stamp of Ahmed Tamim is affixed on the affidavit as well as a stamp from the Dubai Court Notary Public dated 15th April, 2015. It may very well be that in Dubai such stamps are sufficient to show that such a document has been authenticated. Indeed the verifying affidavit is equally translated into Arabic, which is the official language of the High Court in UAE. In the result it is my finding the verifying affidavit of Pramit Verma is valid and admissible in evidence as the same has been notarized accordingly.
107. Consequently and in the absence of the requisite verification, whether by affidavit of the Notary Public or otherwise; it is imperative to observe that the impugned affidavit sworn on the 23rd June 2023, is fatally deficient and incompetent. In this regard, same be and is hereby struck out, for contravening the provisions of the *Evidence Act*.
108. Having struck out the supporting affidavit sworn on the 23rd June 2023, it is evident that the impugned amended Notice of Motion, is left bare and is thus rendered incompetent, on the basis of want of evidence to anchor and/or premise same.
109. Consequently and in the circumstances, the impugned Application dated the 27th June 2023; is no doubt, also a candidate of striking out.

Final Disposition

110. Having duly reviewed, evaluated and considered the issues which were enumerated in the body of the Ruling herein, it is now appropriate to proclaim the Final and Dispositive orders.
111. Be that as it may, in the course of interrogating the various issues under reference; this Honourable court has indeed arrived at various findings, whose import and tenor are crystal clear, explicit and illustrative of the position that the Court has taken.
112. In view of the foregoing, I therefore come to the following conclusions;
- i. The application dated the 14th May 2023, is misconceived, bad in law and legally untenable.



- ii. The amended Notice of Motion dated the 27th June 2023; is premature and incompetent, in this regard same be and is hereby struck out.
- iii. The Application dated the 13th June 2023; is meritorious and is hereby allowed.
- iv. The entire suit be and is hereby struck out for being incompetent and in any event statute barred.
- v. Costs of the suit and the three Application be and are hereby awarded to the Defendants/ Respondents; to be agreed upon and in default, to be taxed by the Taxing officer of the Honourable Court in the usual manner.

113. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10th DAY OF AUGUST 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Mr. Macharia for the Plaintiff/Applicant.

Mr. Simiyu for the Defendants/Respondents.

Mr. Muguku for the Proposed Interested Party.

