Kamwati & another v Elite Paka Service Limited (Environment & Land Case 1377 of 2013) [2023] KEELC 20292 (KLR) (28 September 2023) (Judgment)

Neutral citation: [2023] KEELC 20292 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 1377 OF 2013

OA ANGOTE, J

SEPTEMBER 28, 2023

BETWEEN

SUSAN MUKAMI KAMWATI ..... 1ST PLAINTIFF

LYDIA WANJIRU KARIUKI ..... 2ND PLAINTIFF

AND

ELITE PAKA SERVICE LIMITED ..... DEFENDANT

JUDGMENT

Background

1. The Plaintiffs instituted this suit vide the Plaint dated 12th, November, 2013, seeking the following reliefs as against the Defendant;

    i. A permanent injunction restraining the Defendant from further destroying and/or demolishing the suit properties and/or parking space allocated to the Plaintiffs.

    ii. A permanent injunction restraining the Defendant from further trespassing on the suit property.

    iii. A mandatory injunction commanding the Defendant to restore the Plaintiffs' suit properties in the condition they were before the breach.

    iv. Mesne profits at the rate of Kshs 160,000/= per month with effect from the date of filing this suit until the hearing and determination hereof or until further orders of the Court.

    v. Quiet and peaceful possession of the suit property.

    vi. Damages for breach of contract.

    vii. Damages for trespass and causing nuisance.

viii. A declaration that the Plaintiffs are shareholders of the Andes Management Company.

ix. Exemplary and/or punitive damages.

x. Costs of this suit and interest thereof.

2. It is the Plaintiffs' case that at all material times, the Defendant was the registered proprietor of all that parcel of land known as L.R 209/10521/1, IR No 260021/1 situated in Nairobi and measuring 0.4047 of a hectare and that vide a Lease dated 18th November, 2011, the Defendant caused the lease described hereinabove to be renewed for a further term and a new grant being Grant No IR 134939 was issued.

3. It was averred in the Plaint that the suit property is developed and comprises of six (6) blocks of 2 and 3 bedroomed residential apartments totaling 21 in number and includes other facilities such as a gate house, servants quarter block, driveways and parking and that pursuant to agreements in writing dated 13th December, 2011 and 19th April, 2012, the Defendant agreed to sell and the Plaintiffs agreed to purchase the apartments described as Apartment No 23, Block F and Apartment No 12 Block C at a cost of Kshs 8,500,000/= and Kshs 10,500,000/= respectively.

4. According to the Plaintiffs, vide a Deed of Variation signed between the 1st Plaintiff and the Defendant, the 1st Plaintiff purchased Apartment No 18 in Block C instead of Apartment No 23 Block F; that the Plaintiffs also paid the Vendor and/or Vendor's Advocate the total sum of Kshs 7,000,000/= broken down into Kshs 4, 500,000/= for the 1st Plaintiff and Kshs 2,500,000/= for the 2nd Plaintiff.

5. According to the Plaintiffs, the apartments were vested in them vide Leases dated 12th November, 2012 and registered at the lands office on the 12th April, 2012 [27th December, 2012]; that they mortgaged the properties to Barclays Bank and Kenya Commercial Banks respectively and that they are still servicing their respective loans with the banks.

6. It was averred in the Plaint that on or about February, 2013, they took possession of the suit properties and rented the same out to tenants who have been residing therein and paying rent of Kshs 80,000/= per month and that sometime in October, 2012, the Defendant proceeded to maliciously and without any justification demolish the common walls in the staircase adjoining the Plaintiffs respective apartments completely destroying the staircase and endangering the occupants of the suit premises.

7. According to the Plaintiffs, the Defendant has also embarked on excavating the common areas and obstructed the designated parking rendering the premises un-inhabitable and dangerous and that in furtherance to the above, the Defendant has contrary to the terms of the Sale Agreement which indicated that upon purchasing the suit apartments, the Plaintiffs would become holders of one (1) ordinary share in the management company described as the Andes Management Limited, the Defendant has failed to register them as shareholders of the management company.

8. The Plaintiffs contend that the Defendant's actions constitute breach of the sale and Lease Agreements, the particulars of which include; demolishing the staircase leading to their apartments thereby obstructing access; excavating the land thereby interfering with the property; failing to ensure that the Plaintiffs are enjoying peaceful and quiet possession of the properties; failing to register the Plaintiffs as shareholders of the management company and destroying the suit premises despite having received the full purchase price.

9. The Defendant filed its statement of Defence in which it denied all the assertions in the Plaint save for some facts to wit; that it has at all material times been the registered owner of the suit property although the same is described as I.R 26002/10 and not 26002/1 as indicated in the Plaint and that it entered into a contractual relationship with the 1st Plaintiff through a Sale Agreement dated the 13th

December, 2011 where she (1st Plaintiff) purchased Apartment Block 23 in Block F and with the 2nd Plaintiff dated the 19th April, 2012 where she purchased Apartment No 12 in Block C.

10. According to the Defendant, the Sale Agreements were binding on the parties and were subject to several terms; that on 18th July, 2012, the 1st Plaintiff executed a Deed of Variation so as to vacate from her initial Apartment 23 in Block F to Apartment 18 in Block C to allow the Defendant to demolish and reconstruct/rebuild Block F and that this was an acknowledgement that the Defendant would commence construction works.

11. It is the Defendant's case that the Deed of Variation and the subsequent Leases were subject to the terms and conditions of the Sale Agreement as captured in clause 9.1 of the Leases which provided that the Leases together with the agreements for sale contain the entire agreement and understanding between the parties.

12. In response to the allegations of malicious destruction of property and rendering the premises uninhabitable, the Defendant stated that pursuant to the aforesaid terms and conditions, it commenced the process of erecting additional residential units November, 2013; that the Plaintiffs were well aware at the time of executing the agreements that the Defendant would eventually commence construction works and that this term was not varied or challenged formally or otherwise.

13. It was averred in the Defence that despite their awareness of the intended constructions, the Plaintiffs negligently or otherwise failed to inform their tenants of the same; that subsequently, the Plaintiffs cannot claim to have suffered loss yet they failed to disclose to the tenant this material information and that the demarcation of the parking was for safety purposes and at the request of the other users.

14. It was stated by the Defendant that the Plaintiffs have been allocated alternative parking; that in any event, the Defendant is a third party to the Tenancy Agreements between the Plaintiffs and their tenants and that the Defendant cannot be liable for any loss out of a contract that it is a stranger to.

15. It was averred by the Defendant that the Defendant has not trespassed onto the Plaintiffs' property and has only carried out developments on the relevant blocks on the suit property; that block D, E & F are distinct and independent from each other thus the construction of one block does not affect access or tenability of the other and that the Defendant has taken a facility to finance the development of additional apartments and any order for stay of the construction will occasion the Defendant tremendous and irreparable loss as the facility is subject to the construction of additional residential apartments.

Hearing and Evidence

16. The matter proceeded for hearing on 1st March, 2022. The 2nd Plaintiff, PW1, adopted her witness statement dated the 12th November, 2013 as her evidence in chief and produced the documents of an even date as [PEXHB1].

17. Briefly, it was her evidence that she entered into an agreement with the Defendant for the purchase of Apartment No 12 Block C, erected on the Defendant's Land Reference No 209/1052/1 at a cost of Kshs. 10,500,000 on 19th April, 2012 and that pursuant thereto, a Lease was registered as required by law.

18. PW1 informed the court that as per the terms of the agreement for sale, upon purchase of the apartment, she became a shareholder of the management company to which she paid and continues to pay service charge. It was the evidence of PW1 that she subsequently took possession of the apartment and leased it out to a tenant at the rate of Kshs. 80,000 per month.

19. It was PW1's testimony that on or about 1st October, 2013, she received information that the Defendant had mobilized a group of workers and tractors and they had started demolishing the apartments on Block D and E which shares the staircase with Apartment Block C; that she rushed there and affirmed the same; that the Defendants actions are in breach of the contract as per the Sale Agreement of 19th April, 2012 and that she has suffered and continues to suffer loss as the apartment is charged to Kenya Commercial Bank and the tenant occupying the premises has given notice of his intent to vacate.

20. In cross-examination, PW1 admitted that as per the agreement, the Defendant was erecting a gym and additional residential apartments; that the Lease indicated that it supersedes all other prior discussions and that the Court visited the premises.

21. PW1 stated that contrary to the Defendant's assertions, it has trespassed on her property as it has no interest in Block C where her apartment is located; that the Defendant has not done any developments in Block C apart from excavation, creating of open spaces on common areas and that when she purchased the property, it had six blocks being blocks A-F and Block C was interlinked to D & E and shared a staircase which was separated.

22. According to PW1, when she purchased the house, she also purchased a share in the management company; that they share the common areas which they are all entitled to and that she was entitled to the open spaces and paid for a share in the management company.

23. Pw2 was Susan Mukami, the 1st Plaintiff. She adopted her witness statement dated 12th November, 2013 as her evidence in chief and relied on the bundle of documents adduced as [PEXB1] and a further bundle of documents as [PEXHB2].

24. PW2 stated that she purchased Apartment 23 Block F vide a Sale Agreement dated 13th December, 2011; that vide a Deed of Variation dated the 18th July, 2012, the apartment she was purchasing was changed to Apartment 18 Block C; that on the property stands six blocks of residential apartments with 21 flats consisting of among others a servant quarter, gatehouse and parking; that upon entering into the sale agreement, a Lease was duly drawn up registering and transferring the apartment to her and that she subsequently charged the apartment to her bank and secured a loan of Kshs 7,990,040.

25. PW2 stated that it was a term of the agreement that upon purchasing the apartment, she would become a shareholder in the Andes Management Limited, a management company incorporated to manage the affairs of the company.

26. According to PW1, in January 2013, she took possession of the aforesaid apartment and rented it out to a tenant at the rate of Kshs 80,000 per month; that she has been duly paying service charge; that her tenant has been enjoying peaceful possession of the property until 27th September, 2013 when the Defendant began demolishing the adjacent buildings that share a staircase and that the Defendant in breach of the contract began excavating the common areas and further blocked access to the parking and excavated the same.

27. It was the evidence of PW1 that as a result of the foregoing, the tenant is unable to access the house and is exposed to the risk of falling objects; that there is equally noise pollution; that as a result of the foregoing, her tenant has served her with a notice of intent to vacate and that she stands to suffer loss of income.

28. PW2 informed the court that her apartment has been damaged and she has lost the use of common areas despite the fact that she has a legal right over them; that the Defendant's actions are not only

illegal but actuated by malice and that she was aware of the terms of the agreement which provides that the vendor was in the process of constructing additional units.

29. PW2 informed the court that when she bought the property, there were 24 apartments; that she was initially in Block F but through a Deed of Variation, she moved to Block C; that Clause 5(5.1) shows additional apartments whereas Clause 5.2 indicates that the vendor shall not be liable for damages, loss and defects and that in this instance, the breach is not about defects as the Defendant's actions affected the structural components of Block C and that Block C was adjoining Block D with a staircase.

30. In re-examination, PW2 clarified that they objected to the Defendant charging the mother title to HCFK Bank; that nevertheless, the Defendant went ahead and charged the title; that the sale agreement indicated that that the owners of each of the apartments was entitled to one share and the management company would be given reversionary interest once all the apartments were sold and that the Defendant has not passed the reversionary interest to them as agreed.

31. DW1 was Patrick Mwangi, the Defendant's Director. He adopted his witness statement dated 30th April, 2021 and produced the bundle of documents of an even date as [DEXHB1]. DW1 informed the court that at all material times, the Defendant was the registered proprietor of the suit property containing 6 blocks of apartments with each block containing 24 apartments.

32. According to DW1, the Defendant entered into a Sale Agreement with the 1st Plaintiff dated 13th December, 2011 where she purchased Apartment No 23 in Block F and another agreement with the 2nd Plaintiff dated 19th April, 2012 where she purchased Apartment no 12 in Block C and that among the terms of the agreements was that the vendor has erected 24 residential apartments and was to erect and complete additional apartments and a gym.

33. According to DW1, it was a term of the agreement that the vendor shall not be liable for any damages, loss, costs or expenses however incurred by the purchaser by reason of any defects or faults which shall appear or occur in the property after 6 months from taking possession, and that the agreement embodies the entire understanding of the parties.

34. According to DW1, on 18th July, 2012, the 1st Plaintiff executed a Deed of Variation whose effect was to change the apartment she was purchasing from Apartment 23 in Block F to Apartment 18 in Block C to allow the Defendant demolish and reconstruct Block F; that the Deed of Variation and subsequent Leases were subject to the terms and conditions of the Sale Agreement and that the Defendant is not a party to the Tenancy Agreements between the Plaintiffs and their tenants.

35. It was the evidence of DW1 that at the time of execution of the sale sgreements, the Plaintiffs were well aware of the intended construction; that the demarcation of the parking slots was for security purposes and alternative parking slots were provided; that no breach, malice and bad faith can be imputed on the Defendant; that the Plaintiffs have not substantiated any loss they will suffer and that the constructions were in any event foreseeable.

36. In cross-examination, DW1 stated that Apartments 8 in Block D and 3 and 4 in Block A have not been sold and as such the reversionary interest cannot pass; that other apartments have not been developed; that they have the CR12 of Andes Management Company which reflects the shareholding of the company and that the purchasers acquired shares with each apartment having an equivalent of one share.

37. According to DW1, he acquired 94 shares at the time of registering the company; that he does not have the 94 shares; that the shares were issued on the basis of the projected apartments; that they carried out excavation on the land in 2013; that he was to construct 94 apartments on the lower side of the land

and an additional 110 apartments on the remaining part and that the site layout plan shows that no apartment owners were to be denied any access.

38. It was the evidence of DW1 that all the apartment owners can access the portion that is not under construction; that none of the tenants left the premises; that they sealed off the part they were constructing; that they removed the staircase but sealed the lower part of the demolished area; that as a norm, the owners of the existing block cannot access the entire site and that the owners are free to access the common areas.

39. DW1 informed the court that the property is charged to HCFK and was charged at the time of purchase by the Plaintiffs; that the Defendant borrowed 364,000,000 but the money is yet to be disbursed to due this matter and that the purchasers were aware of the intended construction at the time they purchased the property.

40. DW1 stated that the demolition only affected three blocks which were distinct, save for the wall next to the staircase at Block C; that the Court visited the site and confirmed there was no structural damage; that there was an expansion joint where they separated the staircase and put steel walls with glass to avoid dust and that there was no obstruction during the demolition.

Submissions

41. The Plaintiffs' advocate filed submissions on 4th July, 2022. Counsel rehashed the Plaintiffs' case and the evidence as adduced at trial. It was submitted that having admitted the existence of the sale and Lease Agreements, the Defendant is estopped from denying that it acted in breach thereof and that in *South Nyanza Sugar Co Ltd vs Leonard O. Arera*[2020]eKLR, the Court emphasized that parties are bound by their contracts and it is not the business of Court to re-write such contracts.

42. Counsel submitted that the Plaintiffs are shareholders in the management company by virtue of having purchased apartments on the suit property and are therefore entitled to ownership of the common areas.

43. Reliance in this regard was placed on the case of *Shainaz Jamal & 8 Others vs Abdul Rasul Manji & Another* [2017] eKLR where the Court held that where the housing units in a gated community are developed by a single developer on a title held on leasehold basis, often the practice has been that the reversionary interest in the mother title is transferred to the management company upon sale of all the units, and the management company ultimately becomes the Lessor.

44. Counsel submitted that Section 6(1) of the *Sectional Properties Act*, 2020 mandates the Registrar, on opening a register for a unit to include in the register the share in the common property apportioned to the owner of that unit; that the Defendant is guilty of illegally changing the shareholding of the management company since the reversionary interest was to vest in the company upon the sale of the last unit and that the Defendant was obligated to transfer the reversionary interest to the Plaintiff as all the units had been sold.

45. The Defendant's counsel submitted that during the hearing, the Plaintiffs raised new issues which did not arise from the pleadings, including whether the Defendant fraudulently and illegally charged the mother title and whether the Defendant has defaulted in failing to transfer the reversionary interest after all the units in the block were sold.

46. It was submitted that the Defendant has not defaulted in failing to transfer the reversionary interest as they are still in the process of constructing additional apartments and that it is only upon the sale of all the additional apartments that the reversionary interest would revert to the management company.

47. It was submitted that the Defendant was not in breach of the Leases and Agreements for sale in respect of the suit properties because it made it clear that it was going to erect and complete additional residential apartments; that Block C was not interfered with during construction as the blocks are separate and that the Plaintiffs are bound by the agreements which they have admittedly executed and cannot seek to have the Court vary the same.

48. Counsel submitted that although the Plaintiffs are seeking for damages, they have not specified whether they are seeking general or special damages and that in the case of *Transmara Sugar Co Ltd vs Ben Kangwaya Ayiemba & Another* [2020]eKLR where the Respondent also failed to specify whether they sought general or special damages, the Court held that they could not be granted either.

49. Counsel submitted that as held in *Kenya Tourist Development Co-orporation vs Sundowner Lodge Limited* [2018] eKLR, general damages are not available for breach of contract and that the Court of Appeal in *Robert Okeri Ombeka vs Central Bank of Kenya*[2015]eKLR cited the decision in *Douglas Odhiambo Apel and Emmanuel Omolo Khasin vs Telkom Kenya Limited*, CA No 115 of 2006(UR) in which the Court stated that the law on special damages is that they must be specifically pleaded and proven.

50. It was submitted by the Defendant's Counsel that there is no basis for the claim for trespass as the Defendant was carrying on construction on its property and not the Plaintiffs' apartments. As regards the principles on trespass, Counsel cited the case of *Joseph Kipngetich Bet vs Antony Langat & Another* [2013] eKLR and *Eliud Waweru Karokwa vs Irene Wanjiku Githendui*[2022]eKLR.

51. Similarly, it was submitted, there was no wrongful possession of the property by the Defendant to warrant a claim for mesne profits. Reliance in this regard was placed on the cases of *Attorney General vs Halal Meat Products Limited* [2016] eKLR and Joan Wairimu Mbuthia & Another vs Peninah Wanjiku Mugo[2013]eKLR.

52. The Defendant's counsel submitted that there has been no interference with the Plaintiffs' apartments and the prayer for nuisance does not lie; that the prayer for mandatory injunction is unenforceable having been overtaken by events as Block D, E and F have already been demolished to pave way for the new blocks; and that in any event, the demolition did not affect the Plaintiffs' block C.

53. The Plaintiffs' advocate filed further submissions in which he submitted that the suit property was registered under the provisions of the Registration of Titles Act and that upon disposing the apartments, the vendor created subleases for each apartment respectively and upon acquiring the apartments, the Plaintiffs were entitled to hold a share each in Andes Management Company.

54. It was submitted that pursuant to the provisions of Section 17 as read with Section 20 of the *Sectional Properties Act*, 2020, once a management company is incorporated, the common areas are vested in the said management company; that the MEMOARTS further provided that the control, management and ownership of the common areas are vested in the management company and that once the Defendant disposed off its interests in the property, it legally ceased being entitled to the common areas.

55. According to Counsel, the Defendant had admitted to blockading the common areas through the use of glass and iron burglar proofed wall and excavating the land and that these actions were illegal and in breach of the Agreement for sale, leases and MEMOARTS and that the increase in the shareholding of the management company admitted to by the Defendant was illegal and fraudulent in that there was no evidence sanctioning the increment notwithstanding that some of the 24 units have been disposed and all the apartments in Blocks D, E and F demolished.

Analysis and Determination

56. Having considered the pleadings and testimonies by the parties, the following arise as the issues for determination;

    i. Whether the Defendant breached the terms of the Sale and Lease Agreements between itself and the Plaintiffs?

    ii. Whether Defendant trespassed on the Plaintiffs' property?

    iii. Whether the Plaintiffs are entitled to the reliefs sought?

57. Vide the present suit, the Plaintiffs are seeking, inter-alia, for permanent injunctive orders restraining the Defendant from demolishing the suit premises or any part thereof and trespassing thereon; mandatory injunctive orders compelling the Defendant to restore the suit premises to the condition it was in before the breach; a declaration that they are shareholders of the management company; damages for breach of contract, trespass and causing nuisance and mesne profits and exemplary/ punitive damages.

58. It is the Plaintiffs' case that the Defendant is in breach of the terms of the Lease and Sale Agreements having demolished the suit premises making them un-inhabitable and leading to the Plaintiffs loosing tenants and subsequently rental profits; that having mortgaged their properties, the loss of income was having adverse effects on their ability to repay the loan; and that in furtherance to the above, the Defendant has contrary to the terms of the Sale Agreement failed to register them as shareholders of the management company.

59. The Plaintiffs adduced into evidence copies of the titles, search certificates, Sale Agreements dated 13th December, 2011 and 19th April, 2012, Deed of Variation dated 18th July, 2012, Lease documents dated 12th November, 2012 in respect of Apartments 12 and 18 Block C, Valuation reports by Pinnacle Valuers and Premier Valuers Limited dated 5th April, 2011 and 26th January, 2012 respectively, amongst others.

60. In response, the Defendant maintained that the Plaintiffs have all along been aware of its intention to carry out constructions of the property the same having been indicated in the Agreements; that it was the duty of the Plaintiffs to inform their tenants of the same; that nonetheless, the works did not in any way interfere with the Plaintiffs' properties and that no claim can lie as against it.

61. Considering the above narration, it is apparent that the dispute between the parties herein turns on the terms of the Sale and Lease Agreements. The first port of call for the Court therefore is to interpret the terms of the agreements between the Plaintiffs and the Defendant in order to make a determination of whether or not there has been breach.

62. It is trite that the Court cannot re-write a contract or agreement for parties. All that the court is called upon to do is to interpret and enforce the terms of the agreement as dictated by the rights, duties and obligations of each specific part. This was the position of the Court of Appeal in *Housing Company of East Africa Limited vs Board of Trustees National Social Security Fund & 2 others* [2018] eKLR where it was held as follows:

> "It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and

unambiguous, a court's role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed with the agreement of both parties and not unilaterally..."

63. The Sale Agreements and Leases (hereafter the Agreements) are clear and unambiguous. They clearly stipulate the duties, obligations and rights of both the Plaintiffs on one hand and the Defendant on the other.

64. The Court will begin with the contention on shareholding of the management company. Clause 6.2 of the Sale Agreements provides as follows:

> " The Purchaser shall be entitled to One (1) share in the Management Company upon the registration of the Lease in favour of the Purchaser."

65. Article 9 of the Memorandum and Articles of Association of the Management Company provides in part as follows:

> " Every member shall be entitled, without payment to receive within two months after allotment or lodgement of transfer (unless the conditions of issue provide for a longer interval) one certificate under seal of the Company for the share registered in his name, specifying the number and the amount paid thereon..."

66. Once the Lease is registered in the name of a purchaser, he is entitled to be registered as a shareholder in the Management Company. The Plaintiffs herein had their Leases registered on 27th December 2012 as evidenced in the Title documents. This position is in tandem with the provisions of the of the *Sectional Properties Act*, 2020.

67. The 1st Plaintiff did indeed issue a demand letter dated 17th October 2013 requiring the Defendant to provide the 1st Plaintiff with a share certificate.

68. The Plaintiffs have provided a CR12 search on the Management Company showing that they have duly been recognized as shareholders, with each having one share. What then is the contention? From the Plaint, the Plaintiffs have alleged the breach to be "failure to register the Plaintiffs as shareholders of the Management Company."

69. In view of the evidence adduced by the Plaintiffs themselves, this allegation of breach is not supported as it is clear from the CR12 produced by themselves that they have been registered as shareholders of the management company. The prayer for the inclusion as shareholders in the management company therefore fails.

70. The second disputation is on breach due to further developments on the suit property. The Plaintiffs contend that the further developments violate their right to quiet and peaceful possession of the suit properties. The Plaintiffs also contend that the constructions have resulted into destruction of the suit premises and demolition of common staircase leading to their apartments thereby obstructing access thereto.

71. The Defendant has not disputed the ongoing constructions. It argues that the Plaintiffs by signing the Agreements were aware of and agreed to the constructions. In not so many words, the Defendant is in essence arguing that the Plaintiffs acquiesced to the breach of their right to peaceful and quiet possession.

72. It is then crucial to first consider the clauses under contest. The Plaintiffs have availed evidence of the Sale Agreements and Leases entered into with the Defendant with respect to Apartments 12 and 18 in

Block C on the suit property to argue that the terms therein have been breached, and that their rights have thereby been infringed.

73. The Defendant also relies on the said Sale Agreements and Leases to argue that the Plaintiffs had agreed to the construction on the suit properties. The relevant clause in this regard of the Sale Agreements are paragraph B in the Recitals and clause 5.1 that deal with development on the suit property. Paragraph B of the Recitals states as follows:

> " There exists on the Land Twenty-Four (24) residential apartments and the Vendor is in the process of erecting and completing a gym and additional residential apartments on the Land. The residential apartments together with pathways, driveways and other usual amenities hereinafter referred to as "the Estate" in accordance with the approved Building Plans which are available for inspection at the Vendor's offices."

74. The Agreements for Sale provide at clause 5.1 that:

> " The Vendor has erected Twenty-Four (24) residential apartments and shall erect and complete additional residential apartments and a gym pursuant to the Agreement for Sale as more particularly detailed in the plans available at the site office at the Estate available for inspection by the Purchaser and the Purchaser shall be deemed to have approved and accepted the same prior to the execution of this Agreement. The Vendor hereby covenants and undertakes to complete the works and finishes on the said Property in accordance with good workmanship"

75. As already stated, parties are bound by their contracts. What the parties bound themselves to is constructions of "additional residential apartments and a gym". The Defendant informed the court that the construction of the "additional apartments" was to be done on Blocks D, E and F which were to be brought down to pave way for the new apartments. The Plaintiffs have not disputed this. They however contended that the demolition was of the common walls and the staircase adjoining their respective apartments thereby destroying the staircase and endangering the lives of the occupants in Block C.

76. The other contention by the Plaintiffs was that the excavation was done in respect of the common areas thus rendering the premises inhabitable and obstructing the parking lot by erecting a temporary iron sheet wall around the designated parking leaving the Plaintiffs with no parking.

77. Having pleaded as such, it behooved the Plaintiffs to lead evidence to demonstrate their plea. It is trite that he who alleges must prove. This is codified in the *Evidence Act* under section 107. The courts have reiterated this principle in a plethora of decisions. The court will only mention one for purposes of demonstration. In the case of *Anne Wambui Nderitu vs Joseph Kiprono Ropkoi & Another* [2005] 1 EA 334 the court stated as follows:

> " As a general proposition under section 107(1) of the *Evidence Act*, Cap 80, the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue. There is however the evidential burden that is cast upon any party the burden of proving any particular fact which he desires the Court to believe in its existence which is captured in sections 109 and 112 of the Act."

78. To prove the allegations of destruction, demolitions and obstruction caused by the constructions, the Plaintiffs have adduced photographic evidence. These photographs appear to have been extracted from a record as it is clear their pagination starts running from around page 12 of the record they have been

extracted from. No explanation has been given as to why the entire record from which the photographs were derived was not provided to court.

79. Additionally, it is not clear the purpose for which the photographs were taken as it is evident they were captured by Premier Valuers Limited, who were not called to testify.

80. Further, the photographs appear to be inconsistent with the initial photos which were extracted from what appears to be a valuation report, while the other photos appear to be unrelated to the valuation photos. To compound all the foregoing, there is no certificate required under section 106B of the *Evidence Act* concerning such evidence.

81. In *Elizabeth Ongoro Amollo vs Francis Kajwang Tom Joseph & 2 Others* [2017] eKLR, the learned Judge citing Zachariah B. Parry in an article '*Digital Manipulation and Photographic Evidence:* Defrauding The Courts One Thousand Words at a Time' published in the Journal of Law, Technology & Policy [Vol. 2009] 175 drew a distinction between traditional photography and digital photography as follows:

> " Traditional photography is an analog science. Light enters through a camera's lens and the image the camera views is faithfully recorded onto a negative. This negative is then printed into a recognizable image....Digital photography is the new norm for image capture. Digital cameras, in contrast to their analog complements, do not store information in a continuous medium. Instead, information is recorded in discrete bits of information called binary code, which is a string of ones and zeroes that makes up the storage language of hard drives, compact discs, computers, and all other digital devices. By using a series of numbers, instead of the continuous crests and troughs characteristic of analog information, digital image manipulation is much easier, cheaper, and infinitely more difficult to detect than an analog alteration...Accordingly, whilst photographic evidence is admissible pursuant to Section 78 of the *Evidence Act*, there is a compelling basis to demand that, unlike traditional photographs, digital photographs must be carefully verified as electronic evidence under Section 78A of the *Evidence Act* given the distinction expressed by Zechariah, above."

82. And in *Samwel Kazungu Kambi vs Nelly Ilongo & 2 Others* [2017] eKLR, the court while dealing with photocopies of photographs observed that:

> " The source of the photocopies of the photographs annexed to the affidavit sworn by the Petitioner in support of the Petition was not disclosed. The device used to capture the images was unknown. The person who took the photographs was not named. The person who processed the images was not named. The Petitioner was not an eyewitness to the incident and he could not therefore tell the court that the photographs were a true reflection of the incident he witnessed."

83. However, as the Defendant never challenged the admissibility of the photographs, the court will say no more and will look at the photographs for their probative value. The Court of Appeal in *Kenneth Nyaga Mwige vs Austin Kiguta & 2 Others* [2015] eKLR held as follows with regard to presentation of documents for evidence:

> " The mere marking of a document for identification does not dispense with the formal proof thereof. How does a document become part of the evidence for the case? Any document filed and/or marked for identification by either party, passes through three stages before it is held proved or disproved. First, when the document is filed, the document though on file does not become part of the judicial record. Second, when the documents are tendered or

produced in evidence as an exhibit by either party and the court admits the documents in evidence, it becomes part of the judicial record of the case and constitutes evidence; mere admission of a document in evidence does not amount to its proof; admission of a document in evidence as an exhibit should not be confused with proof of the document. Third, the document becomes proved, not proved or disproved when the court applies its judicial mind to determine the relevance and veracity of the contents – this is at the final hearing of the case. When the court is called upon to examine the admissibility of a document, it concentrates only on the document. When called upon to form a judicial opinion whether a document has been proved or disproved or not proved, the Court would look not at the document alone but it would take into consideration all facts and evidence on record."

84. The question then is whether the photographs meet the preponderance of probabilities test in a civil claim. Other than pleading acquiescence by the Plaintiffs to construction of additional apartments and a gym, the Defendant denied the destruction or demolition of common areas and the stairways shared between Blocks C and Blocks D and E. The Plaintiffs were thus required to prove their allegations on a balance of probabilities.

85. An examination of the photographs does not support the Plaintiffs' allegations. There is no correlation between the allegation of destruction or demolition of the stairways adjoining Blocks C, D and E and common areas with the photographs as evidence of the allegations.

86. At page 193, all that is seen is a photograph of a building. Which building this is, or Block, has not been explained. At page 194, the photographs show the inner and outer parts of the apartments. As already alluded to above, Pages 193 and 194 appear to have been lifted from the valuation report and do not relate to or prove the allegations of destruction or demolition of common areas and the stairways.

87. Page 195 of the bundle of documents shows photographs of some destroyed apartments. It is not outrightly apparent where or when the photographs were taken. Additionally, they do not support the contention that the stairways shared between Block C and Blocks D and E have been destroyed, or that the demolition of the stairways of Block D affected the stairways of Block C, and if so, in which manner.

88. Page 196 is a photograph of parked vehicles and of an iron sheet erected on parking spaces. This was presumably to prove obstruction of parking and not excavation, demolition or destruction. The Defendant confirmed in its testimony that it had erected the iron sheets and added that the Plaintiffs had been allocated alternative parking.

89. This was not contested and it was not demonstrated that the alternative parking was inadequate or otherwise. As per the Agreements, the Plaintiffs were each entitled to a parking space, without a description of where the parking space was situated. By providing an alternative parking space, the Defendant cannot be said to have breached the Agreements in failing to provide parking space for the Plaintiffs.

90. Page 197 is a photo of what appears to be stairways. Again, it is not clear whether the stairways are within Block C and how or whether they have been destroyed as alleged. Lastly, page 198 is a photo of a part of a demolished building. Again, there is no correlation with Block C and the allegations made with regard to the demolition and destruction of common areas and the stairways adjoining Blocks C, D and E in the suit properties.

91. Faced with an instance of photos produced but where no correlation had been made, the court in *Lalichandra Durgashanker Pandya & Another vs E.K Baya & Others* [2021] eKLR stated as follows:

> " I am aware that some photographs were annexed but they do not provide any evidence of the time of entry. Neither are those photographs connected directly to any of the defendants i.e it is not said that photograph No. 1 shows a house belonging to claimant No. 1 and so on."

92. Similarly, the photographs herein have only but been presented without connection to the allegations of breaches. The evidence adduced to prove the allegations of breaches through demolition of common areas and destruction of stairways have not met the standard required. Lastly, on the allegation of excavation, not a single shred of evidence has been provided by the Plaintiffs.

93. The best evidence in this matter should have come from an expert in construction. The Plaintiffs should have called an expert to controvert the Defendant's assertion that the stairway of Block C was separate and distinct from the stairway of Block D which was demolished, and the effect of the said demolition, not only to the safety of the occupants of Block C, but to a peaceful occupation of the Block.

94. The upshot of all the foregoing is that the Plaintiffs failed to demonstrate to the required standard the allegations of breach of contract as pleaded.

95. It is a well settled principle of law that parties are bound by their pleadings and that unless amended, the evidence adduced shall not deviate from the pleadings. The Court of Appeal in the case of *Magnate Ventures Limited vs Alliance Media (K) Limited & Others* [2015] eKLR had this to say on the same issue:

> " In Gandy vs Caspar Air Charters Ltd [1956] 23 EACA", 139 the former Court of Appeal for Eastern Africa expressed itself as follows on the purpose of pleadings:
>
> "...the object of pleadings is, of course, to secure that both parties shall know what are the points in issue between them; so that each may have full information of the case he has to meet and prepare his evidence to support his own case or to meet that of his opponent. As a rule relief not founded on the pleadings will not be given."
>
> And in Galaxy Paints Co. Ltd. vs Falcon Guards Ltd. [2000] 2 EA 385, this Court stated that the issues for determination in a suit flowed from the pleadings and that a trial court could only pronounce judgment on the issues arising from the pleadings and that unless pleadings were amended, parties were confined to their pleadings. (See also IEBC & Another vs Stephen Mutinda Mule & Others, CA No. 219 of 2013).
>
> The exception to the general rule that parties are bound by their pleadings, expounded in such cases as Odd Jobs vs Mubia [1970] EA 476 and Vyas Industries Ltd. vs Diocess of Meru [1982] KLR 114) arises where the parties raise and address unpleaded issues and leave them to the Court to decide."

96. Having considered the pleadings, it is noted that the Plaintiffs have raised questions as to the Defendant's failure to revert the reversionary interest in the property to the management company and whether the charging of the mother title to HFCK Bank was illegal and fraudulent. These issues do not form part of their pleadings and cannot be considered by the court.

97. Nonetheless, even if the Court were to consider them within the exceptions laid out in Magnate ventures(supra) case, the same will fail. It is a principle of law that fraud must be specifically pleaded and proved. That having not been done, the allegation of the fraudulent charging of the mother title fails.

98. On the allegation of the Defendant's failure to revert the reversionary interest, clause 7 of the Sale Agreement provides as follows;

> " 7. 1The parties agree that the Vendor will sell and transfer the reversion expectant upon and to the Land to the management company for the sum of Kshs Two Hundred and Fourty Thousand within 90 days of the last of the Leases being registered to their respective purchaser of apartments in the estate."

99. The Defendant has indicated that not all the apartments have been sold and leases registered in respect thereof, this has not been contested. It follows therefore that it is premature for a claim for reversionary interest to the management company to arise at this stage.

100. What then of the allegation of trespass? Clerk and Lindsell on Torts 18th Edition paragraph 18-01 defines the term "Trespass" thus:

> " An unjustifiable entry by one person upon the land in possession of another"

101. Section 3 (1) of the *Trespass Act*, Cap 294 provides that:

> " Any person who without reasonable excuse enters, is or remains upon or erects any structure on, or cultivates or tills or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence."

102. The Court of Appeal in *Stephen Mutuku Mulinge & Another vs Dickson M. Mutuku & Another* [2019] eKLR held as follows:

> " The appellants' case as noted in the preceding paragraphs of this judgment was based on the tort of trespass. Trespass under the Black's Law Dictionary is defined as:
>
> "An unlawful act committed against the person or property of another esp., wrongful entry on another's real property."
>
> This Court also described trespass in the case of Charles Ogejo Ochieng vs. Geoffrey Okumu [1995] eKLR in the following manner:
>
> "Trespass is an injury to a possessory right, and therefore the proper plaintiff in an action of trespass to land is the person who has title to it, or a person who is deemed to have been in possession at the time of the trespass. See Halsbury's Laws of England 3rd edition Volume 38 at pg 744."
>
> Therefore, by virtue of Section 107 & 108 of the *Evidence Act*, the onus was on the appellants to establish first, proprietorship of the suit parcel and more particularly, the sections alleged to have been encroached by the respondents. Secondly, that the respondents had intruded on the same. Did the appellants establish the foregoing?"

103. In the case of *William Kamunge Gakui vs Eustace Gitonga Gakui* [2016] eKLR, the Court of Appeal held as follows:

> " In the instant case the appellant has dangled his certificate of title to prove that he is not only the owner of the suit property but he is entitled to exclusive possession thereof. Trespass to land is a tort against possession and there must be an entry on the suit property by the tortfeasor. The evidence on record does not show that the respondent had entered the suit property. The record does not show that the respondent is cultivating or tilling the land. We find that the action of entry, cultivation or tilling was not proved by the appellant on a balance of probability. The evidence shows that the respondent lives in Garden Estate and he is not in physical occupation or possession of the suit property."

104. It is not in dispute that the Plaintiffs are the registered owners of the specific apartments No 12 and 18 in Block C. They neither own the entire suit property nor have they brought the suit for and on behalf of the entire suit property and other individual owners.

105. Having said so, there is no evidence that was led by the Plaintiffs to prove that the Defendant accessed the Plaintiffs' specific apartments or stairways to their apartments. Further, it is trite that the common areas do not belong to the Plaintiffs exclusively. They belong to all the tenants and managed by the Management Company.

106. The common areas are owned by all lease holders jointly as tenants in common. The allegations of trespass as pleaded with regard to the common areas was that the Defendant trespassed on Block C. The Plaintiffs ought to have adduced evidence showing the physical trespass by the Defendant to the common areas of Block C, which they failed to do.

107. The failure to prove the breaches by the Defendant and commission of the tort of trespass disentitle the Plaintiffs to any of the prayers sought.

108. For those reasons, the Plaintiffs' suit is dismissed with costs.

Dated, signed and delivered in Nairobi virtually this 28th day of September, 2023.

O. A. Angote

Judge

In the presence of;

Mr. Opole holding brief Mr. Musyoka for Defendant

Mr. Wambugu for Plaintiffs

Court Assistant - Tracy

[redacted]

15