Ngera v Sunbird Lodge Ltd (Environment & Land Case 75 of 2017) [2022] KEELC 2347 (KLR) (30 May 2022) (Judgment)

Neutral citation: [2022] KEELC 2347 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT & LAND CASE 75 OF 2017

FM NJOROGE, J

MAY 30, 2022

BETWEEN

JOSEPH BORO NGERA ..... PLAINTIFF

AND

SUNBIRD LODGE LTD ..... DEFENDANT

JUDGMENT

1. The Plaintiff commenced this suit vide a plaint dated 12/2/2014 which was filed on 17/2/2014. He filed an amended plaint on 15/7/2015. That amended plaint sought the following prayers:

    a. A declaration that the lease agreement was a nullity for lack of consent of land control board and for non-registration;

    b. An order of eviction do issue against the defendant from the parcel of land LR No. 9361/6 situated North-west of Gilgil township of Nakuru District

    c. An order that the Plaintiff is entitled to a forfeiture by the Defendant of Land parcel No. 9361/6 for breach of the agreement.

    Or in the alternative:

    a) A declaration that all that business known as Sunbird Lodge situate in LR No. 9361/6 is a joint venture between the Plaintiff and the Defendant.

    b) A declaration that the Plaintiff is entitled to 40% of the net income from the lodge business on land parcel No. 9361/6 North West of Gilgil from the year 2010.

    c) That pending hearing and determination of this suit the court be pleased to issue a mandatory injunction directing the Defendant to allow the Plaintiff by the himself or

his agent to participate in the running, operating and management of Sunbird Lodge or in the alternative the court be pleased to appoint receivers to manage Sunbird Lodge

d) The court to be pleased to issue a mandatory injunction directing the Defendant to allow the Plaintiff by himself or his agent to participate in the running, operation and management of Sunbird Lodge or in the alternative the court be pleased to appoint receivers to manage Sunbird Lodge

e) Any other relief the court may deem fit to grant.

f) Costs of the suit.

2. The Defendant filed an amended statement of the defence dated 14/7/2015 on 16/7/2015 and the Plaintiff filed a reply to defence on 28/7/2015 denying the contents of the amended defence.

The Plaintiff's Case

3. It is the Plaintiff's case that he remains the registered owner of LR No. 9361/6 (herein referred to as the suit premises). In the year 2005 the Defendant approached the Plaintiff with a request to be leased 20.713Ha to develop a hotel and/or lodge. The parties then entered into an agreement in the year 2007 whereby the Plaintiff leased 20.713Ha comprised in the suit land to the Defendant. The parties mutually agreed that the construction of the lodge was a mutual investment between the parties; that the Plaintiff was to contribute land, deemed to be 40% of the total capital contribution, and that the Defendant would contribute costs of construction deemed to be equivalent to 60% of the capital contribution. Further the parties agreed as follows: that for purposes of investment and mutuality of interest of the lessor and the lessee on the land an amount ofUS $ 5 per bed per night shall be paid by the guests, visitors, customers or clients until the total cost of the investment had been recovered and which period of recovery is estimated to be 5 years or, depending on circumstances prevailing, longer or shorter; that upon recovery of the investment cost in the land the lessor would be entitled to 40% levy on the net profits of the investment and the lessee would be entitled to the remainder thereof; that should there be need to expand the investment, the expansion shall be funded from the net profits kitty; that the lessor shall be involved in the procurement process in the intended investments on the land by the lessee and most notably in the lodge business; that the lessee shall supply a monthly sales report to the lessor commencing on the 15th day of occupation by the lessee of the premises and thereafter on every 15th day of subsequent months; and that the lessor shall apply for and provide to the lessee with every assistance to obtain a change or extension of user or planning or such other consent and approval then or in the future affecting the title to the premises and to otherwise take all necessary steps to otherwise facilitate inter alia the proper registration of the lease.

4. The Plaintiff further avers that to enable the Defendant recoup the capital investment it was agreed that for a period of 5 years the Defendant was to take all the profits but it was to pay to the Plaintiff a token of US$5 per bed per night and that the Plaintiff was to be involved in the procurement process of the intended investment in the lodge business. It was as a result of the above agreement that the business known as Sunbird Lodge was born. However, in flagrant breach of the agreement the Defendant deliberately and intentionally ran the lodge business without involving the Plaintiff at all. The Plaintiff averred that the 5-year initial period provided for in the agreement has already expired and now he should be involved in the procurements and in the running of the business. He avers that he ought to have been involved from the beginning to enable him know all the income and expenditure arising therefrom.

5. The Plaintiff also avers that the lease giving rise to the Defendant was a nullity as there was no Land Control Board consent for transfer; that the Defendant did not register the lease as required hence it is

void; that there was no interest transferred to the Defendant and therefore the Defendant's occupation of the suit premises is illegal and a trespass.

6. The Plaintiff further states that in a bid to conceal income from the business the Defendant refused to cooperate with him such that the Plaintiff could not apply for the Land Control Board consent nor apply for change or extension of user from agricultural to commercial.

The Defendant's Amended Statement of Defence

7. In response to the Plaintiff's claim the Defendant stated as follows: that he admits that land is registered in the name of the Plaintiff; that the Defendant holds a lease agreement dated 25/8/2007 over the suit premises; that the Plaintiff's claim does not sufficiently disclose proper particulars and/or reasonable cause of action and is an abuse of the court process; that the business named Sunbird Lodge had never been a joint venture between the Plaintiff and the Defendant.

8. The Defendant denied that the consent of the Land Control Board was necessary for their transaction and/or the relationship of the parties herein; and in the alternative, if it was, it was the Plaintiff's duty to obtain it the omission of which cannot be construed to the disadvantage of the Defendant and which can not negate the existing relationship between the parties. The defendant claims that the Plaintiff is estopped from challenging the lessor-lessee relationship between the parties, having suffered the Defendant to fundamentally and substantially invest on the suit premises and further that whether or not the lease was registered is irrelevant and does not vitiate the contract between the parties.

9. In particular, the Defendant denies that the Plaintiff was to be paid 5$ per bed per night and avers that the amount paid was rent in terms of the agreed modes of calculations of the consideration under the terms of the lease. It is further denied that the Plaintiff was involved in the procurement process as alleged. The Defendant emphasizes that Sunbird Lodge is not a joint venture between the parties in this suit and that the Plaintiff being not a shareholder in the Defendant he was not entitled to participate in management and running of the Defendant's investment. To the defendant, the Plaintiff was not a co-investor or a shareholder, he remained a landlord who has since been receiving rents/consideration in the manner provided for in the lease agreement and his acquiescence estops him from claiming that the business was a joint venture, or denying the legality of the landlord-tenant arrangement or relationship between the parties. Demand and notice of intention to sue were also denied and the Defendant prayed for the Plaintiff's case be dismissed or struck out with costs.

The Plaintiff's Reply to Defence

10. In this pleading, the Plaintiff denied the contents of the amended defence and stated that it is the responsibility of the person acquiring the interest to obtain the consent. He further maintained that the business was a joint venture and that he had a right to involvement in its management.

Hearing

11. Midway through the proceedings in this case the original Plaintiff died and was substituted with his son, the legal representative to his estate, vide an application dated 23/8/2021. Hearing commenced on November 14, 2018when the original Plaintiff testified as PW1. PW2 testified on the October 29, 2019, whereupon the Plaintiff's case was closed and DW1 commenced his testimony. DW3 testified on the 23/2/2021 and DW4 on 31/1/2022 on which day the defence case was closed.

12. PW1 the plaintiff, adopted his witness statement dated 19/8/2015 and filed on 20/8/2015. His evidence is that he owns the suit land, that a certain Mr. Gunter approached him and requested to develop a tourist lodge on the suit premises that later Mr. Gunter was joined by his partner Mr. Othmer

in the request. The Plaintiff did not want to lease the land instead he wanted a business partnership with the two gentlemen. Consequently, Sheth and Wathigo, the advocates for the partners drew up an agreement between the two parties in this suit. He stated that he does not want 40% shares in Sunbird Lodge but he wanted 40% of net profits. He averred that a tourist lodge was developed on the suit land as agreed between the parties and that he was to get 40% after the Defendant recovered construction expenses. As per clause 8 of the agreement, he was to get 5 dollars per bed per night for the estimated 5-year period after the business started, and 2.5 dollars per child per night. After 5 years or less depending on the period within which the construction expenses would be recovered by the Defendant he would be entitled to 40% of the net profit. Pursuant to clause 8(d) of the agreement he was to be involved in the procurement processes and this was necessary in order to enable him to know what income and what expenses the business was getting or incurring respectively. The Defendant has been paying the Plaintiff 5$ per bed per night. After 5 years the Defendant refused to pay the Plaintiff 40% of the net profit and denied him access to their office; also as soon as the business started the Defendant denied the Plaintiff access to the procurement process. The Plaintiff therefore does not know how much the Defendant has made since the business started. He engaged an auditor who got only part of the information. According to the auditor, who was also denied some of the information that he needed, the Defendant had recouped the investment by the year 2016. According to the Plaintiff there was no agreement that the Defendant would take a loan to start the business; the Plaintiff would simply provide the land and the defendant would bring in the capital; there was therefore no agreement that the Defendant was to recover interest from any loan first. According to the Plaintiff the consideration that the Defendant was to give comprised of the developments on the land and to that end the Defendant built cottages, a hotel, a restaurant and a bar. Under clause 6(a) the Defendant was to give the Plaintiff the monthly sales report so as to enable the Plaintiff know the transactions undertaken each month and the revenue generated but the Defendant failed to comply therewith; Clause 6(c) provided that the Plaintiff was to obtain the Land Control Board consent but the Plaintiff avers that he did not do so since the Defendant denied him access to the business; Clause 7(c) also required the Plaintiff to obtain consents but the Plaintiff did not obtain them due to the Defendant's refusal to observe the terms of the agreement.

13. The Plaintiff avers that he received money from the Defendant in protest in order to recover his expenses and that the Defendant is still in occupation of the premises; the Plaintiff still accepts the bed per night payments and on a without prejudice basis.

14. The Plaintiff testified that Clause 8 provided that if there was need to expand the business it would be done from the net profit and he observed that that clause would be necessary if he was simply a landlord in the arrangement.

15. Clause 9 provided for arbitration. The Plaintiff declared a dispute before suing but the Defendant refused to have a common arbitrator appointed. The Plaintiff avers that he wrote a letter (PExh.2) to the Defendant on 9/8/2012 through the firm of Mirugi Kariuki seeking to have the arbitrator appointed. However, before that letter was written the Defendant and the Plaintiff had had many meetings. The Defendant responded to the letter through a letter dated 13/8/2012 (PExh.3) written by Sheth & Wathigo Advocates. On December 15, 2011Sheth & Wathigo wrote a letter (PExh.4) which admitted the Plaintiff's entitlement to 40% net profit when it becomes due; however, the Plaintiff maintained that without involvement in the running of the business he would not be able to know when the 40% became due. The Plaintiff's lawyers then wrote a letter dated 18/4/2012 (PExh.5.)

16. The Plaintiff further testified that he appointed an auditor while this suit was pending and connected him with the Defendant; he went to Sunbird Lodge and did an audit; however, he, as he informed the Plaintiff, was not able to meet the Defendant's auditor but he was given some incomplete information; according to the Plaintiff's evidence the Defendant has attempted to sell the business on many

occasions. The land the business is situate on was valued by the Githaiga & Co. Valuers on October 23, 2013 at Kshs.196,000,000/=. The Defendants have so far not disclosed to the Plaintiff what they have earned from the business; all they pay him is 5$ per bed per night; the computations they give the Plaintiff are prepared by themselves and the Plaintiff cannot verify what is in it. He has computations for 2011 to 2014 (PExh.9). (This suit was filed in 2014).

17. Though the Plaintiff avers that the agreement between the parties is one sided and vague and regrets not employing an advocate in its preparation he admits having signed it and is ready to abide by it. To him the Defendant is in breach of the agreement.

18. Upon cross-examination by Mr. Situma the Plaintiff stated that he is still the sole proprietor of the land. He also admitted that Mr. Gunter was operating another business at Delamere and that Mr. Julius Matasyio was part of the initial negotiations with the Defendant. He admitted that he is not a Director of the Defendant and that he voluntarily executed the agreement which states that he is a lessor while the Defendant is a lessee as per that agreement. He admitted that that agreement guides his relationship with the Defendant. He stated that according to him and his auditor, the Defendant had recouped his expenditure although the auditor did not obtain all the information needed for that conclusion; he admitted to having omitted to produce some letters pertinent to the dispute. He maintained that his contribution to what he called the joint venture was land worth Ksh. 196,000,000/= which land has not been transferred to the Defendant. He is not aware whether any change of user was done by Mr. Matasyo. When shown letters dated 6/7/2007 and 6/8/2007 from the Ministry of Lands he stated he was unaware of them. He maintained that he declared a dispute regarding the agreement and when the Defendant failed to appoint an arbitrator he did not refer the dispute to the arbitrator himself.

19. Upon re-examination by Ms. Mwangi, he confirmed that he was not aware of the letters proposing change of user and that his names do not appear on those letters as an applicant. He maintained that if any change of user emanated therefrom it would be illegal. However, he admitted that Mr. Matasio was an architect involved in the design of the Sunbird Lodge; that the agreement between him and the Defendant was never registered and that no consent was obtained to have it registered; he maintained that if the Defendant had been transparent he would have known the date on which the 40% accrued to him.

20. PW2, Sammy Ngugi Ngera testified on October 29, 2019 and adopted his witness statement. He stated that he is a specialist in Accounts and Finance; a chartered accountant and an associate of the Institute of Chartered Accountants in England and Wales with an experience of 8 years in prominent accounting firms; he has a finance consulting firm based in New York. His father the Plaintiff asked him to carry out a financial review of Sunbird Lodge and he spent time at the lodge but the lodge provided him with only some of the documents that he needed; others were not available; he was informed that Butt and Company, Auditors had those documents. The auditors for Sunbird had those documents; so he failed to get the asset listing and the loan information; all that Butt and Company auditors gave him was a list of loans. His desire to meet with Butt & company, auditors did not yield fruit; however he perused the agreement forming the basis of this case which he described as sketch and ambiguous in that: 1) the investors were to get back the cash they have invested for 5 years or more or less without a clearly defined period, 2) it was difficult to determine the amount of each investment by each investor, 3) There was no means to determine how much each would invest, 4) there was no independent verification of the amount of investment, or the revenue in the agreement which could have determined the period within which the land owner would get back his investment and also in determining the net profit. The agreement also provided that after the investors recouped their investment the landlord would get 40% of the net profit.

21. According to the witness and from an expert accounting perspective, net profit is an ambiguous term which would require to be properly defined by stating what was revenue and what was expenses. For example, were salaries payable to the other investors to be termed as expenses. There was no mention of loans in the agreement. He found that the other investors had, instead of putting in their own money as capital, given the business a loan yet they were meant to give an equity investment and not a loan; they were to contribute capital as an equity while the land owner contributed the land. That was not all; they were charging 12% interest on the loan on the amount they had brought in which had an effect of showing that they were not recovering the investment with the result that the land owner would have to wait for much longer to recover his investment. It was irrelevant where the two got their money from. According to the financial statement, the two other investors had invested a total of Kshs. 68,900,000 in the business as at December 21, 2016. In his computations, PW2 treated the 12% which they were charging as interest as a withdrawal. According to those computations they had recovered a total of Kshs. 64,900,000/= in the form of interest alone. Considering that the profit as per their record was Ksh 12,270,000/= they would have recovered their investment in full by then. However, he was cautious not to validate the above figures fully because they were provided by the Defendants. PW2 stated that in such an investment the recovery period is normally 8-12 years and therefore the assertion by the defendant that it had recovered only 21% of the investment must be untrue since the defendant's own financial statements show the opposite.

22. Upon cross-examination by Mr. Situma PW2 agreed that the defendant's shareholders are two in number: That is Mr. Gunter and Mr. Othmer. He admitted there were maximum cooperation from staff at the lodge but the two shareholders did not cooperate. He did not have any evidence that he had written to Butt and Co. Auditors seeking their cooperation; that Mr. Ngera contributed land which he still owns and which he has never transferred to Sunbird Lodge; he admitted to failing to file the audited statements which Sunbird lodge gave him and which he admitted he had relied on. He also admitted that his calculations did not rely on asset listing and loan details which were with the auditors.

23. DW1 Piercher Othmer gave his sworn evidence on 12/2/2020 and adopted his witness statement dated 3/5/2014 filed on 7/5/2014 as his evidence-in-chief. His evidence is as follows: He is a director and shareholder of Sunbird Lodge Ltd which has only two directors and two shareholders; the Plaintiff is landlord to the Defendant by virtue of a long term lease executed by both parties on the suit premises on which Sunbird Lodge runs its business; that Sunbird Lodge was built after the lease was executed; Sunbird Lodge Ltd fully funded the construction; the lease was for a term of 99 years from date of execution; rent was to be paid monthly at 5 US$ per bed night as long as Sunbird Lodge recovers its investments; investment by Sunbird was approximately 70,000,000/=; the Plaintiff is a landlord to Sunbird Lodge Ltd as the land is registered in his name and he never contributed any capital sum; the lease provides that upon recovery of the cost of investment, the lessor would be entitled 40% of the net profit; this arrangement would include profit or loss and would be transmitted, just like the bed night charges, to the Plaintiff; Sunbird paid rent as per clause 8 of the lease and has receipts (DExh.3); Sunbird has not yet recouped its investment; PW2 never approached Sunbird or wrote any letter requesting accounting information; he never wrote to Sunbird's auditors; change of user was applied for in respect of the suit land; and the Ministry of Lands raised no objection; several meetings were held on 1/4/2011, 25/3/2011, 6/10/2011 as per minutes recorded (DExh.7) with regard to Plaintiff's claim that he is a director of Sunbird Lodge Ltd and minutes were taken; the Plaintiff's request to be a director or shareholder was declined; that the letter dated 13/8/2013 from Super Duka Nakuru which is the Plaintiff's company was received just as were letters dated November 21, 2011 and November 25, 2012 (DExh.8) in response to which Sunbird sent a letter dated 3/8/2013 (DExh.9) to the Plaintiff; so far Sunbird Lodge Ltd has paid Kshs. 18 – 20 million as rent to the Plaintiff and it is yet to recoup its investment. Upon cross-examination by Ms. Mwangi he stated that Sunbird Lodge approached the

Plaintiff to sell the land to it but he refused and offered it a long term lease; the company and the business bear the same name "Sunbird Lodge"; Ksh 70,000,000/= was used to build the lodge; the Plaintiff introduced DW1 to Julius Matasyo as an architect and he became their architect and he was involved in the construction, choosing materials and contractors such as plumbers; however he was not involved in furnishing the interior and suppling the hotel materials; he does not recall Mr. Matasyo giving a final figure on the construction cost; that Matasio was to ensure that the Lodge was to be constructed in the manner that the Plaintiff wanted; Sunbird Lodge transparently supplied sales report to the Plaintiff as per clause 6 of the lease; the lease was not registered; he does not have evidence that Land Control Board Consent was obtained; recovery of the investment was to be within 5 years or more because on uncertainties in the tourism sector; he admitted that under clause 8b the Plaintiff was to get 40% net profit after Sunbird Lodge had recouped its investment and that Sunbird supplied him with all financial records to enable him know whether it had recouped its investment; he also admitted that under clause 8(d) the Plaintiff was to be involved in the procurement process in the intended investment and that he was free to be involved and to be supplied with all the necessary information; the agreement did not state that Sunbird lodge would get a loan for construction or that interest would be charged thereon; DW1 was not aware of how much Sunbird Lodge has taken from the business as interest but he admits that the interest was paid from the lodge business; as the Defendant's landlord the Plaintiff would not share in the loss of the business; guests come from all over the world and the Plaintiff is usually given a list; the accountant is employed by the Defendant; guests pay only while in Kenya; currently the business is being run by a management company known as Secluded African Properties who commenced on 1/2/2019; that the court order stopping the transfer of shares did not stop the running of the business; however Sunbird Lodge Ltd never informed the Plaintiff of the hiring of Secluded African Properties. Upon re-examination by Mr. Situma he stated as follows: Clients usually pay in Kenya Shillings converted from US dollars.

24. DW2, Victor Kiprono Kirui testified on 23/2/2021. His evidence is that he is a land Surveyor working with the Ministry of Lands and Physical Planning, summoned to court to testify in this matter. He confirmed that the Ministry issued a no objection letter dated 6/8/2004 in respect of the proposed change of user for the suit property from Agricultural to Tourist Resort vide a letter dated 6/8/2007 (DExh.5).

25. Upon cross-examination he stated he does not have the change of user application made and neither did he know who had applied for change; he was also not aware whether a Land Control Board Consent was obtained for the transaction.

26. DW3, Julius Matasio testified on 31/1/2022 and adopted his witness statement dated 20/2/2016. His evidence is as follows: He is a registered licensed architect; the Plaintiff introduced him to the Defendant to offer his services to develop a residential lodge and he was part of the meetings the Plaintiffs and the Defendant held; that they applied for change of user; that the response to such a change of user application is normally sent to the applicant and the development proceeded after change of user was secured vide DExh.5.

27. Upon cross-examination by Ms. Mwangi, he stated that he never read through the agreement between the parties though he was involved in the negotiations regarding the leasing of the land. He was not present at the drawing of the lease agreement; according to him development means the physical structures; he was not aware why the Plaintiff was to be involved in the procurement of the food of the lodge; the Defendant was paying him for architectural services; he brought in everybody involved in the construction; at the opening of the tender the Plaintiff was represented and DW3 got the tender and was paid by Sunbird Lodge; he would collect payment cheques from the site and the Plaintiff was given a copy of his agreement with the Defendant and so he was made aware of what DW3 was paid; he

cannot remember how much he used to construct the lodge as it was long ago; he also does not know if besides the 5 dollars per bed space the Plaintiff was to be paid anything else; he has never been involved in getting guests to the lodge as he is only a technical person and was not involved in the business; he admitted that the Planlist, a company, applied for change of user and concluded that the Plaintiff must have signed it; he is not aware whether the directors of Sunbird Lodge got the consent of the Land Control Board.

28. The defence case was then marked closed and a time frame was given for the filing of submissions. The plaintiff filed submissions on 25/2/2022 and the defendant filed its submissions on 9/3/2022.

Determination.

29. I have considered the pleadings the evidence and the submissions in this suit. The issues that arise for determination in the instant suit are as follows:

    a. Was the business known as Sunbird Lodge Ltd a joint venture between the plaintiff and the defendant?

    b. Was the consent of the land control board was necessary and if so is the transaction between the parties is void for want of consent?

    c. Is the defendant in breach if the agreement between it and the plaintiff?

    d. What prayers should issue?

30. Regarding the first issue there is no doubt that the relationship between the parties must be defined by their agreement produced as P. Exh 1 (which is also DExh 2). As per the amended plaint, the plaintiff appears to think that though P.Exh 1 is termed as a lease in its heading, the terms in the body of the agreement show that Sunbird Lodge was a joint venture in which the plaintiff was to contribute the land valued at 40% and the directors of the defendant the costs of construction or development valued at 60% and that by the agreement entered into mechanisms for the payment of the plaintiff of some income based on bed nights were included; the agreement also entitled the plaintiff to involvement in procurement for the lodge business. In the same pleading the plaintiff concedes that there was a lease agreement between him and the defendant which he seeks to be nullified on the basis of want of a land board consent.

31. On the other hand, the defendant categorically pleads that Sunbird Lodge was not a joint venture between it and the plaintiff or that the plaintiff, being not a shareholder in the defendant, was entitled to take part in the management and running of the defendant's business.

32. It is common ground that the plaintiff owns the land on which Sunbird Lodge is built and operated on, and that the relationship between the parties commenced with the agreement produced as P Exh 1 which they voluntarily signed. Save that it was entered into in the year 2007, the plaintiff's copy of the agreement is otherwise undated. DExh 2, the defendant's copy, which in in all other respects similar to the plaintiff's, is dated 25/8/2007 and I will take that to be the date of the agreement since in any event it is the one pleaded by the defendant without demur on the plaintiff's part.

33. The agreement is termed as a lease agreement between the plaintiff and the defendant, and not between the plaintiff and the defendant's directors. The following emerge from the agreement: the portion leased to the defendant by the plaintiff for 99 years (renewable term) is part of LR No 9361/6-Gilgil and it is 20.713 ha in size; the plaintiff's interest in the development to be undertaken by the defendant on the leased premises and the covenants by the lessee formed the consideration in the agreement; the outstanding covenants imposed upon the defendant were as follows: to supply a monthly sales report

to the lessor commencing on the 15th day of occupation; pay for electricity supplied through the lessor's connection or otherwise provide electricity for the leased premises and pay for water connected to the premises; apply the land for the permitted use only; build the lodge; observe all duties and obligations imposed on the lessor by public authorities and compliance with the laws and regulations in place with regard to the land as well as avoidance of nuisances to the lessor.

34. Under the agreement the notable covenants on the part of the lessor were to pay rates, land rents and other outgoings; grant the lessee's quiet enjoyment of the land; apply for and obtain change or extension of user or other consents and approvals affecting title to the land and to take measures to facilitate the registration of the lease; permit installations as would be necessary for the lessee's business; not interfere with the lessee's use of the premises and provide the enterprise with a right of way and, save in situations of emergency, access the premises for inspection only with prior notification to the lessee.

35. Mutually, it was agreed as follows: an amount of US$ 5 per every occupied bed per night shall be paid to the lessor by the lessee from the amount paid for such bed by clients until costs of the investment have been recovered which period may be equal to, in excess of or lesser than 5 years; thereafter, upon recovering the costs of investment on the land the lessor shall be entitled to 40% of the net profits of the investment with the lessee benefitting from the remainder thereof. Expansion would be funded from the net profits kitty; the lessor shall be involved in the procurement processes in the intended investments on the land and particularly in the lodge business; the lessor shall allow the services of a company going by the name GO Ballooning Kenya Ltd but the costs of those services shall not be costs of the investment. It is therefore not correct for the defendant to assert there was no condition for payment by way of dollars per bednight.

36. From the foregoing it is clear that a very great proportion of the clauses of the agreement dated 25th August 2007 is devoted to the terms and covenants of a lease agreement between the parties. Only a small proportion of the clauses contained in clause 8 relate to the actual business to be carried on in the premises.

37. The apparent intent of the parties in allowing the inclusion of the terms in Clause 8 was first, to provide consideration for the lessor and hence render the agreement legally valid and second, to cushion the lessee from the high cost of investment on the suit land by way of tapping reimbursement from the income derived from the business. I have considered clause 4, which provides as follows:

> " The lessor leases the premises to the lessee on consideration of his interest comprised on the development on the premises leased which development is to be undertaken by the lessee on terms and conditions herein after appearing and of the covenants by the lessee."

38. In this court's view, clause 4 was the precursor to clause 6 and clause 8 in that it defined in general terms what valuable consideration for the lease would be and clause 8 gave the fine details of that consideration. Clause 6 on the other hand set out the covenants by the lessee which do not amount to valuable consideration.

39. The very existence of clause 8(d) stating that the lessor shall be involved in the procurement processes in the business or the clause requiring surrender of a monthly sales report to the plaintiff add no value to the argument that the agreement is a joint business venture; these were just a strategy devised to enable the defendants pay rent by way of income from the premises; there was no express mention of a partnership in the agreement between the parties or shareholding on the part of the plaintiff in the defendant company. If the provisions of clause 8 were severed from the agreement, it would cease being valid for want of valuable consideration to the plaintiff. The plaintiff would still have been otherwise entitled by way of express citation of liquidated pecuniary rental sums in an ordinary lease agreement;

I think that if it was the intention of the parties to enter into a joint venture, the plaintiff erred, or was somehow misled into believing that the inclusion of terms giving him valuable consideration would have the effect of converting the lease agreement into a joint venture.

40. In this court's conclusion, it is evident that the apparent intent of the inclusion of those few terms regarding valuable consideration to the plaintiff should not, even by the greatest stretch of imagination, be viewed as a basis for concluding that there was a joint business venture between the parties; what the parties entered into vide the agreement dated 25/5/2005 was a lease agreement with the plaintiff as a landlord and the defendant as a tenant and not a joint venture agreement.

41. The above analysis brings this court to the second issue as to whether the consent of the land control board was necessary for the transaction and if so whether the transaction between the parties is void for want of consent.

42. Nothing would have been easier for the defendant than to exhibit a copy of the consent if it was obtained. Pleadings show that from its inception, the defendant has been aware that no consent was obtained for the transaction but shifts blame on the plaintiff for the default. Paragraph 5A of the defendant's amended defence stated as follows:

> " The defendant .... avers that the consent alleged therein is irrelevant, in application to the transaction and or relationship between the parties herein."

43. In paragraph 5B of the said amended defence the defendant stated as follows:

> " The defendant .... will content that if the alleged consent was applicable, it was the prerogative and or responsibility of the plaintiff to obtain the said consent and failure thereof can not be construed to the disadvantage of the defendant or negative the existing relationship especially after the parties have acted as they have done."

44. It is therefore safe to state here that it is common ground that no consent of the land control board was obtained for the transaction.

45. The question that arises then is this: was that consent necessary for the lease transaction between the parties?

46. The land in question is indubitably agricultural land. Though there was an intention to change the user of the land into the commercial use that the defendant intended to put it into the same appears not to have been realized. The only evidence of pursuit of the change or extension of user on the record is a letter from the Ministry of Lands which states that the Ministry has no objection to the proposed land use change. DW2, surprisingly, did not know who had applied for change of user; he also failed to produce any change of user application. All that can be certain is that the plaintiff never applied for the change. Lack of an objection by the Ministry of Lands is totally different from an approval letter. There was no document for example stating that other stakeholders such as the municipal authorities had been involved in the process of the proposed change or extension of use. Consequently, even after the development of the Sunbird Lodge, the use of land remained agricultural up to the date of the institution of this suit.

47. The need for a consent of the land control board is provided for in the provisions of Section 6 of the *Land Control Act* which state as follows:

> " 6. Transactions affecting agricultural land
>
> (1) Each of the following transactions that is to say—

(a) the sale, transfer, lease, mortgage, exchange, partition or other disposal of or dealing with any agricultural land which is situated within a land control area;

(b) the division of any such agricultural land into two or more parcels to be held under separate titles, other than the division of an area of less than twenty acres into plots in an area to which the Development and Use of Land (Planning) Regulations, 1961 (L.N. 516/1961) for the time being apply;

(c) the issue, sale, transfer, mortgage or any other disposal of or dealing with any share in a private company or co-operative society which for the time being owns agricultural land situated within a land control area, is void for all purposes unless the land control board for the land control area or division in which the land is situated has given its consent in respect of that transaction in accordance with this Act.

(2) For the avoidance of doubt it is declared that the declaration of a trust of agricultural land situated within a land control area is a dealing in that land for the purposes of subsection (1).

(3) This section does not apply to—

(a) the transmission of land by virtue of the will or intestacy of a deceased person, unless that transmission would result in the division of the land into two or more parcels to be held under separate titles; or

(b) a transaction to which the Government or the Settlement Fund Trustees or (in respect of Trust land) a county council is a party." (emphasis mine)

48. Section 7 of the same Act states as follows:

" 7. Recovery of consideration

If any money or other valuable consideration has been paid in the course of a controlled transaction that becomes void under this Act, that money or consideration shall be recoverable as a debt by the person who paid it from the person to whom it was paid, but without prejudice to section 22."

49. Section 22 of the Act further provides that:

" 22. Acts in furtherance of void transaction

> Where a controlled transaction, or an agreement to be a party to a controlled transaction, is avoided by section 6 of this Act, and any person—
>
> (a) pays or receives any money; or
>
> (b) enters into or remains in possession of any land,in such circumstances as to give rise to a reasonable presumption that the person pays or receives the money or enters into or remains in possession in furtherance of the avoided transaction or agreement or of the intentions of the parties to the avoided transaction or agreement, that person shall be guilty of an offence and liable to a fine not exceeding three thousand shillings or to imprisonment for a term not exceeding three months, or to both such fine and imprisonment.

50. The plaintiff correctly submits that the terms of clause 6(c) of the lease agreement stated that the lessee shall apply the demised premises to the permitted use only. The correct position is that neither the land control board consent nor change of user was obtained for the suit land by either the plaintiff or the defendant.

51. Also, it is correct for the plaintiff to submit that it is not sufficient for the defendant to submit that the plaintiff is the one who was duty bound to obtain the land control board consent. The plaintiff relied on the cases of *Elizabeth Cheboo vs Mary Cheboo Gimnyigei* Civil Appeal No. 40 of 1978, *David Sironga Ole Tukai vs Francis Arap Muge* and Others Civil Appeal No 76 of 2014 and *United Millers Ltd vs Nairobi Java House* CC No 41 of 2018 for the proposition that the consent of the land control board is mandatory in any transaction involving agricultural land and that the court can not ignore the express provisions of a statute under the guise of equity.

52. The defendant submitted that in conveyancing transactions the lessor bears the duty of obtaining the requisite consents, citing the cases of *Republic vs Ministry of Roads & Another Ex Parte Vipingo Ridge Ltd & Another* 2016 eKLR (which cited a decision that cited *Holman vs Johnson* 1775 -1802 ALL ER 98 and *Scott vs Denning & McNab Company Ltd* 3 [1892] 2 QB 724, and, calling into aid the ancient maxim of ex turpi causa non oritur actio, it has also stated that the plaintiff is estopped from relying on the lack of consent for the reason he authored the misfortune of non-obtainance of consent by his default. Passages from the English cases are cited by the defendant.

53. The defendant relying on *Ex Parte Vipingo Ridge* (*supra*) quoted the following passage adopted therein from the Holman case (*supra*):

> " The principle of public policy is this: *Ex dolo malo no oritur actio*. No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of this country, there the court says that he has no right to be assisted. It is on that ground the Court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff."

and the following passage adopted therein from the Scott case (*supra*):

> " Ex turpi causa non oritur actio. This old and wellknown legal maxim is founded in good sense, and expresses a clear and well-recognized legal principle, which is not confined to indicable offences. No court ought to enforce illegal contract or allow itself to be made the

instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal, if illegality is duly brought to the notice of the court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him."

54. The plaintiff further submitted, and the defendant joined him in that submission, that the land control board consent was necessary in order to enable the registration of the 99-year lease as was required by the provisions of Sections 47 and 48 of the Registered *Land Act*.

55. Section 8 of the *Land Control Act* states as follows:

> " 8. Application for consent
>
> (1) An application for consent in respect of a controlled transaction shall be made in the prescribed form to the appropriate land control board within six months of the making of the agreement for the controlled transaction by any party thereto..."

56. The LCB consent must therefore be applied for within 6 months of the making of the transaction. Leases, such as that in the present suit, are included. It is plain to see that Section 8 of the *Land Control Act* (LCA) does not stipulate that only one party has the duty to apply for the consent of the land control board.

57. Having regard to the provisions of Section 8 of the*LCA* then, I am inclined to agree with the plaintiff when he states that any party to the agreement is under a duty to apply for the consent and to uphold the express provisions of the statute in preference to the adopted practice, whatever its origins. In this court's view the defendant could also have applied for the land control board consent and there is no good reason advanced for why it did not do so.

58. This court would have been inclined to apply greater leniency and delved a bit deeper into the merits of the defendant's submission of ex turpi causa non oritur actio perchance the provisions of the *Land Control Act* been categorical that only the lessor has the duty in any transaction to seek and obtain the consent of the land control board. However, every person, the defendant included, too is deemed to know the law and indeed the old adage is that ignorance of the law is no defence.

59. Decades ago, in *Ngobit Estate Ltd vViolet Mabel Carnegie* [1982] eKLR (CA), the appellant, who had raised the defence in the trial court below appealed stating that the agreement to procure and execute a lease constituted, to the extent of the alleged lease, a controlled transaction within the meaning of the *Land Control Act* (Cap 302) and consequently became void for all purposes for failure to apply for consent of the Land Control Board within the prescribed period or in the alternative that consent of the Land Control Board not being applied for within three months of April 30, 1978, it ceased to be bound to perform any obligation the performance of which constituted entering by any person into a controlled transaction. Madan J.A. in Ngobit (*supra*) in a judgment concurred with by the rest of the Court of Appeal bench observed as follows:

> " It was common ground, said the learned judge, and rightly so, that the lease in the instant case being of agricultural land was a controlled transaction which was void for all purposes unless the board gave consent in respect of the transaction in accordance with Section 6(2) of the Act."

60. Potter, J.A. agonized over the issue of voidness or nullity of contract in Ngobit (*supra*), delivering himself as here under:

> " The case of the respondent plaintiffs unhappily founders on the merciless rock of the *Land Control Act*. In the appeals which come before this court in which the Land Control Act is involved, it is invariably the case that the Act is not being relied upon by a party in order to fulfill the intended purposes of the Act but by a vendor of an interest in land in order to deprive the purchaser of the benefit of his contract.
>
> However, the function of the judiciary is to interpret the statute law, not to make it. Where the meaning of a statute is plain and unambiguous, no question of interpretation or construction arises. It is the duty of the judges to apply such a law as it stands. To do otherwise would be to usurp the legislative functions of Parliament.
>
> The harshness of the Act has been ameliorated by amendments which came into effect on December 24, 1980 (Act No 13 of 1980). In this case, however, there is no escaping the application and effect of the Act as it was before the amendments took effect."

61. Miller JA on his part observed as follows in the Ngobit case:

> " The *Land Control Act* (Cap 302) No 34 of 1967 was specifically enacted to "Control Dealings in Agricultural Land;" and applies to the facts and circumstances of this case. The provisions of the Act may well be seen to be somewhat restrictive, but the effect of the words used does not, as a question of law, create ambiguity. (See Croxford v Universal Insurance Co [1936] 2 KB 253 at page 280) viz: "where the words of an Act of Parliament are clear, there is no room for applying any of those principles of construction, which are merely presumptions in case of ambiguity."

62. The Court of Appeal (Miller JA) further stated as follows in Ngobit:

> " The Act applicable to the case was the *Land Control Act* No 34 of 1967. I think that the closing remarks of the judgment of Lindley, LJ in Young v Corporation of Leamington (1882) 8 QBD at page 579 are somewhat appropriate to this case ie
>
> "It may be said that this is a hard and narrow view of the law; but my answer is that Parliament (has) thought it expedient to require this view to be taken, and it is not for this or any other Court to decline to give effect to a clearly expressed statute, because it may lead to apparent hardship."

63. It therefore offers the defendant no succour to claim mala fides against the plaintiff in the circumstances of this case. In the case of *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR the Court of Appeal stated as follows:

> " Speaking for the Court in Kariuki v Kariuki[1983] KLR 225, at p. 227, Law, JA affirmed that when a transaction is stated by the express terms of an Act of Parliament to be void for all purposes for want of necessary consent, a party to that transaction cannot be guilty of fraud if he relies on the statute to argue that the transaction is void. His Lordship also added that no general damages are recoverable in respect of a transaction which is void for all purposes for want of consent and that the only remedy open to a party to a transaction

which has become void under the Act is recovery of any money or consideration paid in the course of the transaction under section 7 of the Act." (emphasis mine.)

64. The dreaded effect of the want of consent that now haunts the defendant and which it laments as having emanated from the plaintiff's inaction could have as well arisen out of a denial of a consent by the board for reasons. As stated in the case of Sironga (Supra) the Board has many things it is mandated to consider while assessing an application for consent. In that case the court stated as follows:

> " What is beyond doubt, the paternalistic nuances of its colonial origins notwithstanding, is the fact that the enactment of the *Land Control Act* in 1967 was informed by noble and deliberate public policy considerations. The Act seeks to regulate transactions in agricultural land, to among other things avoid sub-division of land holdings into uneconomical units, thus undermining agricultural production; to mitigate the danger of landlessness inherent in unchecked sale and alienation of land; to control land holding by non-Kenyans, etc. It is for these reasons that in considering whether to grant or refuse consent regarding dealings in agricultural land, the land control board is obliged under the Act to consider, among others, such factors as the economic development of the land in question, the possibility of maintenance or improvement of standards of good husbandry; the agricultural land already owned by the proposed transferee; the fairness or unfairness of the proposed consideration or purchase price; and whether subdivision of the land in question would reduce the productivity of the land.
>
> It is not surprising therefore that in Wamukota v Donati[1987] KLR 280 at page 291 Apaloo, JA (as he then was) found the public policy considerations behind the *Land Control Act* unquestionable in the following terms:
>
> "I believe that sound reasons of public policy motivated the Parliament of Kenya to seek to prevent the alienation of agricultural land to non-Kenyans or to Kenyans without the interposition of the judgment of an independent board. Section 6 of the Act lays down the sanction for violation of the Act in absolute terms. An alienation made in transgression of the Act is ordained to be void for all purposes. Strong words indeed!"

65. This court now has no difficulty in holding, and indeed does hold, that the lease between the parties herein became void for all purposes at the expiry of 6 months from the date of its execution for the reason that no land control board consent had been obtained.

66. The upshot of the foregoing is that the determination of the above two issues is sufficient to finally and effectively dispose of this litigation and there is therefore no need to delve into the merits or demerits of any other issue listed for determination herein above.

67. Consequently, I enter judgment for the plaintiff and I issue the following orders:

    a. It is hereby declared that the lease agreement dated 25/8/2007 between Joseph Boro Ngera and Sunbird Lodge Limited over land parcel no LR No. 9361/6 is a nullity for lack of consent of land control board and it is hereby cancelled;

    b. The defendant shall vacate the parcel of land referred to and known as LR No. 9361/6 situated North-west of Gilgil Township of Nakuru District at the expiry of 3 (three) months from the date of this judgment in default of which it shall be evicted from the suit land;

    c. The defendant shall bear the costs of this suit with interest at court rates until paid in full.

    It is so ordered.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 30TH DAY OF MAY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU