Kaoyeni Enterprise Limited v Unifresh Exotics (K) Limited (Environment & Land Case 428 of 2017) [2022] KEELC 3222 (KLR) (24 May 2022) (Judgment)

Neutral citation: [2022] KEELC 3222 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 428 OF 2017

LL NAIKUNI, J

MAY 24, 2022

BETWEEN

KAOYENI ENTERPRISE LIMITED ..... PLAINTIFF

AND

UNIFRESH EXOTICS (K) LIMITED ..... DEFENDANT

JUDGMENT

I. Preliminaries

1. The suit was instituted by way of Plaint by the Plaintiff on 22nd November, 2017 in Court together with several documents. It was against the Defendant herein. The Plaintiff obtained and served summons to enter appearance upon the Defendant Thereafter, on 18th December, 2017, the Defendant filed a Memorandum of Appearance and much later on the 30th April, 2019 they filed a Defence dated 24th April, 2014. Upon the closure of pleadings, on 16th January, 2020 the suit was fixed for full trial whereby the Plaintiff summoned three (3) witnesses while the Defendant relied on the evidence of one (1) witness. Towards the end of the hearing on 2nd November, 2021 both the Advocates for the Plaintiff and the Defendant filed their written submissions and subsequently on 1st March, 2022 both of them were accorded some ample time to highlight the said submissions. Pursuant to that, a Judgement date was reserved by this Honourable Court hereof.

II. The plaintiff's case

2. From the filed pleadings, the Plaintiff seeks for the following orders. These are:-

    a) A declaration that the contract between the Plaintiff and the Defendant stands rescinded and that the Defendant is in the wrongful possession of the suit land known as land Reference Numbers TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectares (approximately 161.7356 acres).

b) An order be and is hereby issued granting the Plaintiff the right to take immediate possession of the land described as TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectares (approximately 161.7356 acres) and registered in the names of the Plaintiff, together with the improvement thereon.

c) Mesne Profits actually receivable or which with ordinary diligence have been received from the Defendant on the account of wrongful possession of all that parcel of described as TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectares (approximately 161.7356 acres) from the 15th August, 2014 upto the time the Plaintiff regains possession of the said parcel of land.

d) An order be and is hereby issued that all the monies paid pursuant to the sale of the land described as TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectares (approximately 161.7356 acres) stands forfeited.

e) Damages for the breach of the contract of sale of the land described as TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectares (approximately 161.7356 acres).

f) Costs of the suit and interest at the Court's rate.

g) Any other relief that this Honourable court may deem fit to grant.

3. The Plaintiff witness adduced evidence as follows.

Examination in Chief by M/s Katasi of PW – 1 - CECILIAH RIMBER - TESITIFIED, SWORN, STATED IN ENGLISH:-

She provided her national identity card bearing numbers 1885976. She testified knowing the company for the Plaintiff. She indicated that the directors of the company were her late husband, Denis Matano Rimber and herself. When the case was filed in the year 2017, all the witness statements were recorded including that of her late husband. He passed away on 26th February, 2019. She now stepped in as a Co - director to testify on behalf of the company. The Plaintiff's company owned land in Kwale County known as Land Reference numbers KWALE/MNANASINI/763 measuring 65.48 hectares. The company entered into a sale agreement with the company for the Defendant on 14th May, 2015. Later on, a supplementary agreement was executed on 30th April, 2016 by the same parties. She stated that on 22nd November, 2017 a Plaint was filed in Court together with several documents which she relied on and produced as Plaintiff Exhibits no. 1 - 8 respectively. Her testimony was that her husband and co-director died. She filed some more documents being the supplementary list of documents on 1ST October, 2020. She produced them as Plaintiff Exhibit number 9 and 10 respectively. Her testimony was that she remembered that on 5th October, 2020 she filed a supplementary list of witnesses, dated 9th September, 2020 and which she wished to on them as part of her evidence.

4. The Defendant company took possession of the land in August, 2014. This was before the signing of the sale agreement. They were still in possession todate. The first agreement was signed by both her late husband and herself as the directors of the Company for Plaintiff. Mr. Rajeshi Papari and Mr. Kaushik Papari signed on behalf of the company for the Defendant company. The purchase price for the land was a sum of Kenya Shillings Twenty Four Million Two Sixty Thousand Three Fourty Six Hundred (Kshs. 24,260,346/=). According to her, the Defendant made payment as -a deposit of a sum of Kenya Shillings One Million (Kshs. 1, 000, 000.00) while the outstanding balance was to be paid by seven (7) installments. The last installment was to be paid by 30th November, 2015. She informed Court that the Defendant only paid two installments. The supplementary sale agreement was signed

on 30th April, 2016. Her late husband and herself on behalf of the Plaintiff's company, and the same people signed on behalf of the Defendant's company. She posited that they entered into the second agreement because the Defendant wanted the monthly installments to be reduced so that they would pay in ten (10) months instead of seven (7). This was covered under Clause 3(1) of the supplementary agreement. The 10th and final installment was supposed to be paid by 31st December, 2016. By the time we entered into the second agreement they had paid a sum of Kenya Six Million, Two Fifty Thousand (Kshs. 6,250,000/=) only. After the period for payment of installment was extended, they still never paid as agreed, though they were still on the land carrying out cultivation. According to the agreement in case of default the Defendant was to forfeit the deposit and were not entitled to any crop on the land. The other consequence was that they were to vacate the land which they had not todate. She stated that they instructed their advocate to issue them with a demand letter which was done. They never paid any single cent and were harvesting sugarcane on the land every year. She held having seen the defence filed by the Defendants on 30th April, 2019. Under the contents of Paragraph 7, they denied the contents of paragraph 8 of the Plaint. She informed court that they had agreed that they were to clear payment before the Plaintiff would apply for the Letter of Consent from the Land Control Board and even attend the meeting. They were to release the documents after payment of the full purchase price.

5. Under the provision of Clause 4.1 was about completion arrangements. The Clause 4.1(e) related to the consents required to effect the transfer. On being referred to them, She indicated that she could see the emails and correspondences relied on by the Defendant filed on 25th September, 2019. The emails were from the month of August 2014 upto 25th February, 2015. These were negotiations emails before they signed the sale agreement. The last email is dated 25th February, 2015. According to her testimony, they entered into the first sale agreement on 14th May, 2015. The emails were exchanged before the sale agreement. She urged the court to use the sale agreement signed by the parties to determine the intention of the parties. She also stated having seen the Defendant's witness statements filed on 25th September, 2019. She stated that there was also a list of witnesses filed on 25th September, 2019 whereby one Mr. Gibson Kabui was listed as a witness. She stated that she never remembered meeting Gibson Kabui. He never signed any of the sale agreement. It was the Defendant's directors who signed. In the long run, she urged the Honourable Court to grant the Plaintiff the reliefs sought in the Plaint. She informed Court that she remembered they hired an expert who prepared a report.

6. Cross Examination of the PW – 1 by Mr. Njuru Advocate She was a director of the company Plaintiff. She had not filed a list of directors of the company. She had not filed authorization by the company to file the suit. When they sold the land, it was developed with a borehole, tractor, three bedroomed manager's permanent and a temporary one bedroomed house.

7. They also had irrigations pipes in about four (4) acres. They used to plant maize in about seventy two (72) acres and two (2) acres of sweet bananas. The rest was fallow. There was no sugarcane growing on the land. On being referred to the agreement dated 14th May, 2015. Clause 1.1.(a) it stated that the completion date was 30th November, 2015.

   She stated Under Clause 2 (a) of the supplementary agreement, there was no completion date. Clause 3.2 required that the Vendor be issued with postdated cheques which were issued.

   She confirmed that the list of documents never contained any dishonored cheques. She agreed that if a cheque was dishonored, it be refunded. She was referred to Clause 8 of the principal Agreement. Clause 8.2 stated that the purchaser had taken possession of the property and would retain possession until the payment of the full purchase price were made. It was also correct that the provision of Clause 14 stated that notice would be deemed to be duly served by being sent by email. She confirmed seeing the demand letter dated 16th August, 2017.

8. PW – 1 held that there was neither email nor certificate of posting.

There was no acknowledgement. The person who received (Simon) was not described. The letter reached the office of the Defendant. She agreed that it was a rescission notice. She confirmed the contents of Clause 7.1 and 7.2 of the Principal Agreement. She confirmed that Clause 7.0 of the Principal Agreement was never amended. She also confirmed seeing Clause 4 of the supplemental Agreement and which was never amended meaning it remained in full force. The provision of Clause 7.1 of the Principal Agreement required that 14 days notice be given. It stated that the Vendor would only retain the deposit, and return the balance of any monies paid by the purchaser. They never returned any monies. She stated having seen the letters dated 30th June, 2017, 30th July, 2017 and receipt. She held that it was correct having been received by the Government printer on 29th September, 2017. She confirmed it being correct that original Certificate of Title Deed got lost. She did not know when it got lost. She affirmed that when the rescission notice was issued in August, 2017 the title had been lost. On being shown the provision of Clause 4.1, it indicated that completion involved giving original title deed for the property. There was an expert hired by the Plaintiff. She testified that they paid him a lot of money for the work he did. She did not know how much he was paid. She never had the letter of instructions in court. She testified that from page 13 of the report, on the 3rd bullet, it stated that the sugarcane covered the farms estimated at 200 acres. She confirmed that the acreage of the suit land was about 165 acres. She stated that the 200 acres covered two parcels. She confessed not knowing what was mesne profits. She informed court that her husband knew more than what she knew. She held that the Plaintiff never stated that a sum of Kenya Shillings Six Million (Kshs. 6, 000, 000.00) had been paid. She informed Court that from the witness statement of her late husband, it was never indicated how much had been paid neither how much was the balance. PW – 1 stated that the demand letter also never stated how much was paid and what the balance was. From the certificate of official search dated 4th October, 2017, it was true that there was a restriction which was place by the Plaintiff. She last visited the land in the year 2019 but she had a manager/worker who visited and knew what went on around every day. He was a neighbor, a Caretaker and her employee. She could not reveal his name out of security reasons. He was not a witness in this case. He was the one who informed her there was harvesting going on every year and she had photographs to that effect. She even had some contacts inside the factory who informed her how much was harvested. She had obtained the Letter of Consent from the Land Control board. It was not among the documents she produced. She stated that they were very much willing to complete the agreement. She stated that, the Defendant being a company, it could have people to represent it in court. The director ought to be the one to come to court not the legal person. The cane on the farm was now about 4 to 5 months old and was to be harvested in the month of November. She stated that the cane had been there since the year 2015. The last harvest was done the previous year in the month of December. She was aware the factory in Kwale was closed, but it was given to someone else. She stated not knowing where they take the cane.

8. Re - Examination of PW – 1 by Ms. Katasi, Advocate for the Plaintiff:-

Nil.

Examination – in – Chief of PW - 2: FENTUS C. MNG'ONG'O by M/s. Katasi.

PW – 2 was sworn and testified in the English language. He stated being an Agricultural Economist who specialized in Agriculture. He was engaged by the Plaintiff's Company as a consultant in this case. He knew the deceased director of Plaintiff for over 20 years. His terms of reference were to carry out an assessment of the cane on the farm to give him the value of the cane, and also profit receivable. The land was in Kwale. They told him they had an issue with the Defendant. He visited the farm twice, the first visit being in the year 2017 October, while the second one on 18th February, 2019. When he

visited the farm, he was in the company of the late Dennis and Sammy Kilele, his colleague. When he saw the crop, it was a ratoon harvest, whatever that grew was a ratoon. Together with the late Dennis, went to the farm on the second visit on 18th February, 2019. He had wanted to confirm if the farm had any cane grown there and whether the Defendant was still using the farm and the condition of the cane. They confirmed the sugarcane was still on the farm and it was as good as before. He had been told the acreage was about 65 hectares. The farm had roads, a seasonal river, paths. About 60 hectares was under cane. Subsequently, he prepared a report which he submitted to the director of the Plaintiff's Company. I would like the court to rely on the report as part of his evidence. According to him, in order to determine the value of the land, the factors to be considered included the land "preparation" (Plse Confirm). In that area the cost of land per acre was approximately a sum of Kenya Shillings Twenty Six Thousand (Kshs.26,000/=). The second factor to be considered was the seed cane grown on it which took about a sum of Kenya Shillings Fourty Thousand (Kshs. 40,000/=) per hectare. The seed was supplied by KISCOL. The third factor was the fertilizer utilized which was a sum of Kenya Shillings Thirteen Thousand Five Hundred (Kshs. 13,500/=) per acre. The Labour from land preparation until the harvest was about a sum of Kenya Shillings Fourty Seven Thousand (Kshs. 47,000/=). PW - 2 also added that there was also the weeding, harvesting, transport and levies. When all these factors were taken into considerations, the total cost was at a sum of Kenya Shillings Two Hundred and Four, One Hundred and Seventy Six Thousand (Kshs. 204,176/=), hence the net revenue was Kenya Shillings One Eighty Seven Thousand Eighty Twenty Four Hundred (Kshs. 187,824/=) per acre. PW – 2 stated that he would get the size of the land, the field per acre which was 93 tons in that region, the size of the land, yield, and the price of cane. The price of cane was Kenya Shillings Four Thousand Two Hundred (Kshs. 4,200/=) per ton. 60 hectares X 93 X 4,200 = the value. That was the first crop. When he was instructed, he was dealing with two parcels totaling 200 acres. At page 12 of the report, the profit and the value of the land were shown. For the first crop and the ratoon (Second crop), he arrived at a sum of Kenya Shillings Twenty One Thousand Three Eighty Two Two Hundred (Kshs. 21,382,200/=) as the net revenue/profit he could have earned in two years. The first crop was in the year 2015 and the ratoon started in the year 2016.

9. The profit garnered of a sum of Kenya Shillings twenty One Million (Kshs. 21, 000, 000.00) was only for the first two years.

Upto date, it was seven years and taking away one year, and multiply by Kenya Shillings twenty One Million (Kshs. 21, 000, 000.00), totaling Kenya Shillings Sixty Four Million, Four Fouty Six Thousand Six Hundred (Kshs. 64,446,600/=) from the year 2014. PW – 2 held that for land preparation, there was a cost for the ratoon. However, he stated that there was no land preparation nor seed required. He testified that so long as the Defendant were still on the land and harvesting, there was always a profit. PW – 2 stated that he gathered and derived all this information from the Ministry of Agriculture, AFFA, Kenya Sugar Directorate and KALRO. He also consulted Kenya Research Institute. He stated that the last time for him to be in that farm in February, 2019.

Cross Examination of PW – 2 by Mr. Kulecho Advocate:-

He confirmed being an Agricultural Economist by training. He stated having his certificates and the Curriculum Vitae. At page 13, he stated that because of heavy rainfall on that day, it was difficult to go round the farm. He said they went round the farm, but with difficulties. The measurements was from the document. His task was to assess at Mnasasini where the property is situated. He was the one who took the photographs in the report. He was that growers entered into contracts with Millers/AFFA but never went into those details. He was not aware whether there had been any agreement entered between the Defendant and a cane miller. He stated that selling and contracts were difference issues. He was told that all the sugarcane in Kwale were sold to the factory in Sanisi. He worked in the Ministry.

They were the police while he was an expert. At page 8 was the information contained in the books of Kenya Sugar Directorate.

10. He was preparing the report for one to understand the details of the whole transaction. He stated that the evidence was in the report. PW – 2 stated that some people used 2.47 acres or 2.5 acres for an acre. He stated that the farm measured approximately 140 acres. There were some areas measuring approximately 30 acres with no cane.

    There were access roads, a river, homesteads within the farm. Apart from visiting that land on 4th November, he visited some other time on a difference assignment. Prior to his visit to the land, he presumed the status of the land was cane. He first found there was cane there. He could not comment on the initial preparation as he had only gone there to assess the value of the cane. He was using what was severally used in Kwale. The seedlings were used to plant the cane. If he had broken down a sum of Kenya Shillings Fourty Thousand (Kshs. 40,000/=) for seed cane, the report would be very bulky. He was only interested in the global value. For instance of the fertilizer which was of a sum of Kenya Shillings Thirteen Thousand Five Hundred (Kshs. 13,500.00). he could forward the documents he received from AFFA, but if he was to attach them, the report would be very bulky. The figures shown were the second resource from Sugar Directorate. There were no attached documents from them.

11. He was aware of the existence of chemical herbicides. Whether that was used or not he did not know. He was aware of gap filling. It was part of the seedling. It was replanting what did not grow. The cane was grown up. He worked with the Ministry of Agriculture. The Zoning method were recent emerging issues. The distance from the farm to Ramisi was about 30 Kms. There were no other factory in the Coast Province. His client was not Unifresh, the Defendant. Technical services such as extension services were not part of his assignment. The sugarcane pricing committee set the prices. He was given the information by the Sugar Directorate to the effect that they stopped the factory due to under payment. He was aware that the factory was briefly closed and they were reopening. He did not know where the cane was taken but he knew the cane was harvested. The sugarcane variety on the farm was the one supplied. He stated that nowadays there were hybrids grown. What he took was what was there. It was ready for harvesting. It took only twelve months for the crop to grow. The majority of cane in coast are 12 months. In Tana River, it was even less than 12 months.

12. Re - Examination by Ms. Katasi Advocate:-

    He provided a brief of his educational background as having attended Tsunguni Primary School, Ribe Secondary School Kenyatta High School, Mwatate. He then proceeded to the University of Nairobi in the year 1979. He studied economics and graduated in the year 1982/83. He went for further studies at the University of London for a Masters degree in Agricultural Economics. He would not know if the Defendant entered into any contract. They had not talked about his technical report. They had not talked about the closure of the factory and the fire that was there.

III. The defendant's case

Examinationin chief ofMr. Gibson Kabui Mathenge– DW – 1 byMr. Njuruadvocate

13. He was sworn and testified in English. He was a Legal Officer for the Defendant. He indicated that in the course of his duties, he handled land maters. The custodian of the documents was legal department. He had handled documents pertaining to this case. He recalled preparing and signing a witness statement on 24th September, 2019. He wished to have it adopted as evidence in this proceedings. He also recalled giving out some seven (7) documents to be used as documentary evidence in this case. They were the ones forming the list of documents dated 24th September, 2019. They were marked as Defendant's Exhibit no. 1 to 7. He stated that the supplementary agreement dated 30th April, 2016

was with regard to all that parcel of land known as land reference No. KWALE/MNANASINI/763. It had not provided for a Clause on completion date. There was a principal Sale agreement dated 14th May, 2014. He referred to the provision of Clause 8.2 of the said sale agreement which stated that the Purchaser acknowledged having taken possession of the land and agrees to hold the land in trust for the Vendor until the purchase price was made in full. He confirmed that the purchaser took possession of the land until the payment was done in full. He also made reference to Clause 3.2 of the agreement which provided several methods upon which the purchase price was to be paid. These included through cash, banker's cheque payment, electronic funds transfer, real time gross settlement (RTGS) and direct debit.

14. According to the DW – 1, the Purchaser issued several post dated cheques to the Vendor. Out of these, non had been dishonored. He had never seen any of the dishonored cheques. He was well acquainted to the filed Plaint. He stated that from the Plaint, there was neither any disclosure of how much was paid nor the outstanding balance. He referred to Clause 7.1 and 7.2 of the agreement on the issue of delay or failure to pay the purchase price. He stated that the clause provided that if the Purchaser failed to comply with any of the conditions of the sale transaction of the land, the Vendor was to issue a fourteen (14) days notice to the Purchaser. The notice would be stating the Vendor's readiness to complete the transaction and specifying the default by the Purchaser and requiring him/her to remedy the situation within a certain specified period. Failure to which the Vendor would only retain the deposit and return all the monies received. According to DW – 1, the Vendor had never received any 14 days' notice issued by the Vendor. Further, he testified that there had been no refund of the purchase price. He stated that he had not been aware whether any clauses of the agreement was deleted. The Notices were to be given by being delivered to the offices of the Advocates for the Purchaser. He made reference to item No.8 of the Plaintiff's bundle of documents. He stated that there was no email which allegedly forwarded the notice attached to the said notice. DW – 1 stated that at their offices, all documents received had to be stamped with the official stamp. Such a demand letter would have to go to the legal department. This notice was never received at their offices and it does not bear any official stamp. He was aware that there was no provisions of Mesne profits provided for in the sale agreement. He testified being aware the Plaintiff was making a claim of the Mesne profit. He denied the Defendant had a sugar mill company. He stated that he had never seen an agreement entered between the Kwale International Sugar Company and the Defendant regarding the sale of sugar cane. He refuted the allegation made by the Plaintiff to the effect that the Defendant had been harvesting sugarcane on the suit land. He categorically disowned knowing the Plaintiff Exhibit No. 7 being several black and white photographs and where they were taken from. He stated that the expert who prepared the land valuation report never came to seek the opinion of the Defendants. He noted that there was neither a land reference number nor a copy of the Certificate of title deed to the suit land attached to the report.

15. He made an observation that on page 12 of the report, it approximated the land to be measuring 105 Ha yet from the official search, it provided the land to be measuring 65.5 HA. According to him, the report had several major discrepancies.

Cross Examination of DW – 1 by Ms. Katasi Advocate:-

He started working for the Defendant from the month of August 2015 engaged as a Legal Officer and not as its director. The Company for the Defendant has its Directors. These were MR. RAJESH KOBHAI and MR. KANSHIK KOBHAI. He confirmed being aware that the two (2) sale agreements were both executed by these two Directors of the Defendant's company in the years 2015 and 2016 respectively. He affirmed that there was no Company secretary. He did not sign these documents. Indeed, he never participated at all. He was aware of the two sale agreements. From them, the purchase price for the suit land was a sum of Kenya Shillings Twenty Four Million Two Sixty Thousand

Three Fourty hundred (Kshs. 24,260,340.00/=). According to DW – 1 out of this amount, a sum of Kenya Shillings Six Million Two Fifty Thousand (Kshs. 6,250,000/=) was paid. He confessed that the Defendant had no more money. He stated that the Defendants were allowed to take possession of the suit land in the year 2014. He stated having visited the suit land severally. According to him, there was no activity taking place on the on suit land. He testified that the Defendants had already purchased the land and that was the reason they visited it. He informed court that there were several correspondences in form of Emails exchanged between the Plaintiff's Advocates and the Defendant. He was never involved in this communication. From his view point, Completion was the last payment of the purchase price made. He admitted that the Defendant had not paid the outstanding balance. He acknowledged that the demand letter issued uniform.

16. He confirmed being referred to the technical report by Kabue. He confirmed that neither in the filed Defence nor his written statement had the Defendant nor himself referred to the report. He confessed never engaging an expert to counter or controvert this report. He admitted not being an expert on sugar plantation. He informed the Honourable Court that although the two directors were still alive and kicking but they have never recorded any witness statements to date.

Re-Examination by Mr. Njuru:-

DW – 1 stated the email address was not correct. That was all.

IV. The submissions

17. On 2nd November, 2012 upon the closure of both the Plaintiff's and Defendant's case, court directed the parties to file their written submissions on 1st March, 2022 each of the parties were granted some time to highlight their written submissions accordingly.

A. The plaintiff's written and oral submissions.

18. On 8th March, 2022. The Learned Counsel for the Plaintiff the Law firm of Messers. Matemu Katasi and Associates filed their written submissions dated 3rd December, 2021 and a list of authorities. On 1st March, 2022, M/s. Katasi Advocate orally submitted that it was not in dispute that after the Defendant failed to pay seven (7) Monthly installments by 30th November, 2015 in compliance with clause 3.1 of the sale agreement executed on 14th May, 2015, a supplementary agreement was executed on 30th April, 2015 varying the payment schedule by allowing the Defendant to make payment in ten (10) installments. As a consequence, the completion date was revised from 30th November, 2015 to 31st December, 2016. The Defendant once against defaulted in performing its contractual obligations.

19. The Counsel contention was that the Defendant's only witness, Mr. Kabue admitted that out of the purchase price of a sum of Kenya Shillings Twenty Four Million Two Sixty Thousand Three Fourty Six Hundred (Kshs. 24,260,346/=), the Defendant only paid up a sum of Kenya Shillings Six Million, Two Fifty Thousand (Kshs. 6,250,000/=).

She argued that the attempt to shift the blame to the Plaintiff for their failure to complete the transaction was a red herring aimed at evading the consequences of utilizing the Plaintiff's land without paying for it. She relied on the provisions of Clause 4.1 of the sale agreement, which provided the items the Plaintiff was meant to have provided as a precedent for the sale transaction to take place. These included original title deed, transfer forms, certified true copy of the vendors certificate of incorporation, certified copy of the vendor's tax personal identification number (PIN) Certificate the relevant consent required to effect the transfer and the rate clearance certificate.

20. She refuted that the Land Control Board Letter of Consent was such a requirement. Besides according to the Provisions of Clause 1.1. (a) these documents were to be exchanged on completion date being

the day on which the purchaser would completer the payment of the purchase price and the vendor could hand over the completion documents to the purchaser or purchaser's Advocates. She argued that there was no proof of how the Plaintiff frustrated the Defendant in making demand for high payment not the registration of the caution.

She held that the Defendant was in breach of contract contrary to the Provisions of Section 40 of the *Land Act*.

Having established the breach of contract she averred that the consequences followed whereby according to Clause 7 of the agreement of either party failed to comply with any condition, the Plaintiff was to retain only the deposit being the agreed liquidated damages and return the balance of any monies paid by the purchaser. Thus, consequent to the Defendant's failure to pay the Seven (7) Monthly installments as agreed in sale agreement two new Clauses were added. Under the provisions of Clauses 3.4 and 3.5 of the Supplementary Agreement whereby the consequences for being in default of the terms of the agreement were as summarized herein.

(a) Immediate termination of the agreement

(b) Forfeiture of installments or amounts paid towards purchase price.

(c) Purchaser to relinquish the possession.

(d) Possession to forthwith revert to vendor

(e) Purchaser not entitled to any crop standing or otherwise to be found within the property.

21. In other words, she argued that the contract for sale was rescinded by reasons of the breach of contract by the Defendant and the Plaintiff was entitled to an order for possession.

To support her case, she relied on the decision of "*Ann Mumbi – Versus - William Mwangi Gathuma & Another* (2017) eKLR" where the Court held:-

> " Rescission arises where one party in a contract is in default. The party which is not in default given notice to the party in default to perform the contract on the failure to so perform the contract. On the failure to so perform the contract is thus rescinded"

She held that the Plaintiff produced the Notice dated 16th August, 2017 served by their lawyers upon the Defendant on 17th August, 2017 through email and a hard copy to their offices. In compliance with the provisions of Section 41 of *Land Act* and the Plaintiff's right to regain possession as anchored in Section 39 of the *Land Act*.

22. Additionally, the Learned Counsel submitted that the Plaintiff was entitled to Mesne Profits which the Defendants had acquired while in wrongful possession of a property or for being in trespass on the Plaintiff's land and hence deprived the plaintiff of any income by the use of the land. Since 15th August, 2014 close to eight (8) years todate when the Plaintiff acting in good faith allowed the Defendant to take possession of the land and use it for planting of commercial sugarcane. All this period they failed to pay the purchase price by 30th November, 2015 being the completion date. To buttress on this she relied on the decision of "*Kenya Hotels Properties Limited – Versus - Willesden Investments Limited* Civil Appeal No. 149 of 2007" where the court observed:-

> " Although the Respondent purchased the property in 1985, the Appellants continued occupation only became unlawful when the Respondents issued to him a Notice to vacate

in 1998 by a letter dated 6th May, 1998. The Appellant was therefore in wrongful occupation of the property for six (6) years"

23. She opined that the Court of Appeal held that in a Claim for Mesne profits, the first task is to determine the days the occupation was wrongful and correct rate (rent) for the period in question. She held that the Plaintiff adduced evidence that the Defendant had been in occupation since 2014 and according to the evidence of PW - 2 Mr. Fentus Mng'ongo an Agricultural Economist the profits were derived from the original crop in 2014 and subsequent crop referred to as ratoons, harvested annually from the year 2014 todate. He stated that sugarcane was a unique crop which once planted it could be harvested annually for over 15 years and all this period they would be making pecuniary profits. According to this witness the Defendant had made a profits of a sum of Kenya Shillings Eighty Million, Nine Hundred and Six Thousand Eight Hundred Forty Four (Kshs. 80,906,844/=) upto December, 2011.

24. It was her argument that the Defendant never produced any evidence to counter the expert evidence provided the PW - 2. The Only witness by the Defendant admitted he was not an expert on sugarcane plantation or growing.

    Finally, the Learned Counsel submitted that the Plaintiff was entitled to the reliefs sought from this filed plaint. In saying so she averred that it was based in the willful, oppressive, malicious, contemptuous, cynical, arrogant, fraudulent, malevolent, unlawful and illegal conduct of the Defendant from the time they took possession of the suit land on 15th August 2014 and failure to honour the notice served on them to vacate the suit property. They had a choice to either clear the balance or to vacate the suit land.

25. In conclusion he contention was that the Plaintiff had proved its case on balance of probabilities that the Defendant was in breach of the contract for sale of the suit land, defied a notice issued to vacate the land. Therefore the Plaintiff was entitled to all the prayers sought in the Plaint.

B. The Defendant's Oral and Written Submissions

26. On 4th February, 2022 the Learned Counsel for the Defendant the Law firm of Messrs. Lloyd & Partners Advocates filed their written submissions dated 27th January, 2022. On 1st March, 2022, Mr. Njuru Advocate orally submitted that the Plaintiff's suit was unmerited and right to be dismissed with costs for the following reasons.

    Firstly, the sale agreement had not been rescinded. He referred to the Provision of Clause 7.0 of the sale agreement whereby where the purchaser failed to comply with the terms of the agreement the vendor was to issue a fourteen (14) days written notice on the willingness to complete the transaction and requiring the purchaser to remedy the breach and if the purchaser failed to comply then the vendor would be entitled to rescind the agreement and resell the property.

    According to the Defendant no such notice was ever issued. The alleged notice dated 16th August, 2017 produced by the Plaintiff was never sent as no email or certificate of positing was exhibited to prove service upon the Defendant such as an affidavit of service.

    Secondly, the Plaintiff one who was in breach and not ready to complete the transaction when she issued the purported rescission notice and held that it was only a party who was not in default who was entitled to issue a notice to rescind a contract. He argued that through the Plaintiff purported to have issued a rescission notice she was not ready to complete the sale transaction as she had not been in possession the completion documents including a letter from the Land Control Board nor the original title deed which they claimed to have been lost ready for delivery to the purchaser in accordance with the provision of Clause 4 of the sale agreement.

Finally, they submitted at length on the claim for Mesne Profits. The Learned Counsel submitted that Mesne profit must be pleaded and proved and argued that the Mesne profit of a sum of Kenya Shillings Eighty Million, Nine Hundred and Six Thousand Eight Hundred Forty Four (Kshs. 80,906,844/=) was not pleaded in the Plaint as was required of all special damages. On this profit the Learned Counsels cited the Court of Appeal decision of "Peter Mwangi Mbuthia & Another –Versus- Samow Edin Osman (2014) eKLR" whereby Court held on the need to place material before court demonstrating how the amount that was claimed for Mesne profits was arrived at. That is there be need to have the Mesne profits be well established and substantiated by the one making the claim.

27. He extensively castigated the expert report presented in Court by the PW – 2, the Agricultural Economists on numerous grounds. These were summarized as:-

(a) The title of the report and its contents failing to relate to the suit property it as it did not mention the land reference number for the suit land.

(b) Failure by him to show his academic and professional credentials of certificates.

(c) Failure by him to demonstrate he was an agronomist with experience in sugar industry.

(d) Failure to provide costing based on known parameters for sugar farming. He failed to factor other costs activities involved in cane development of uprooting, clearing pushing if logs, ripping, ploughing, harming, furrowing planting sets covering, road formation, road maintenance, back filing, fire breakers, leveling and the machinery, equipment and labour requirement for these activities per hectares, seedcase, requirement per hectare seed cane, transport machinery, transport and labour related costs, details of harvesting and attendant costing cane cutters or mechanical by chopper harvesting and fuel costing, the rainfall patterns, fertilizer requirements, crop maintenance like gap filling, trash lining, trash blanketing and weed management.

(e) Failure to provide any soil test analysis for the soils on the suit property for him to conclude that it was good for sugar cane growing.

In other words, the Learned Counsel's contention was that the expert was just a mere "paid agent" by the Plaintiff. He argued that no government report from sugar directorate or AFFA were attached to the report to show the source of PW - 2 data on the costs benefit analysis section of the report – Table 5 of Section 5.0 based on 105.1 Hectares yet the suit land was 65.48 Hectares.

On the claim for general damages for breach of contract, he argued were not awardable by Court. Besides, he opined that the damages for breach of contract ought to be specifically pleaded and proved. To buttress on this point they relied on the decision of "*Consolata Anyango Ouma –Versus- South Nyanza Company Limited* MGR HCCA No. 53 of 2015 (2015) eKLR"

In view of all, this he urged court to dismiss the entire suit with costs.

V. Analysis and Determination

28. I have keenly considered all the filed pleadings by both the Plaintiff and the Defendant, the evidence adduced in court by all the summoned witnesses representing each of the parties herein, the articulate written submissions, the cited authorities, relevant provisions of *the Constitution* of Kenya, 2010 and law.

In order to arrive at an informed, just and fair Judgement in this case, the Honorable has framed the following three (3) salient issues for determination. These are:-

a) Whether there was a breach of the Sale Agreement duly executed and dated on 14th May, 2015 and the Supplementary Sale agreement duly executed on 30th April, 2016 between the Plaintiff and the Defendant herein for the sale of all that parcel of land known as Reference Numbers TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectres (approximately 161.7356 acres) pursuant to the provisions of the Laws of Contract, Cap. 23 of the Laws of Kenya.

b) Whether the parties herein are entitled to the reliefs sought from the filed suit.

c) Who will bear the costs of the filed Suit.

ISSUE No. a). Whether there was a breach of the Sale Agreement duly executed and dated on 14th May, 2015 and the Supplementary Sale agreement duly executed on 30th April, 2016 between the Plaintiff and the Defendant herein for the sale of all that parcel of land known as Reference Numbers TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectres (approximately 161.7356 acres) pursuant to the provisions of the Laws of Contract, Cap. 23 of the Laws of Kenya.

Brief Facts:-

29. Prior to indulging into the analysis of the framed issues herein, it's significant that the Honorable Court expounded on the brief facts of the case. From the filed pleadings the Plaintiff approached this court through a Plaint dated 21st November, 2017 seeking for the afore stated reliefs.

It is held that on 14th May, 2015, the Plaintiff entered into a sale agreement with the Defendant for the sale of the suit property. The agreed price was a sum of Kenya Shillings Twenty Four Million, Two Sixty Thousand Three Hundred and Forty (Kshs. 24,260,340/=). The Defendant was required to pay a deposit of Kenya Shillings One Million (Kshs. 1,000,000/=) and thereafter the balance be settled in Seven (7) installments ending 30th November, 2015 being the agreed completion date.

Before the execution of the agreement, the Defendant had on 15th August, 2014 taken possession of the suit land and started planting sugarcane on it. Despite the said agreement, the Defendant failed to comply which necessitated on there being a Supplementary sale agreement to be duly executed on 30th April, 2016. It varied the terms of payment from seven (7) to ten (10) installments the last one being 31st December, 2016 and the consequences for the default in payment. Out of the total purchase price the only sum the Defendant managed to pay was (Kshs. 6,250,000/=) only.

Pursuant to the provisions of Clauses 7.0 read with 3.4 and 3.5 of the Agreement, the Defendant was issued with a 30 days' notice dated 16th August, 2017 send via email and a hard copy delivered to their offices in Nairobi. All said and done the Defendant failed to honor the terms of the agreed and which led the Plaintiff to file this case in court.

30. On the other hand the Defendant filed a Defence on 30th April, 2019 almost one and half years after being served with summons to enter appearance. The Defendant averred that it was the Plaintiff who frustrated the completion of the transaction by refusing to obtain consent from the Land Control Board which according to the Director was a condition precedent for payment of the purchase price. The Defendant further averred that the Plaintiff made fresh demands by increasing the purchase price, registered a caution over the suit land and refused to collect chewiest from the Defendant's offices. According to the Defendant it was the Plaintiff who was seeking to unlawfully enrich itself by illegally retaining and forfeiting the deposit of the purchase price that the Plaintiff was in breach of the sale agreement and having invested a colossal amount, the Defendant deserved the court's protection against the Plaintiff scheme of unjust enrichment.

31. The principles of the Law of Contract – nature, meaning and scope of Contracts.

Now turning to the main issues under this sub – heading, this Court intends to have a keen assessment on the principles of the Laws of Contract and the breach of it thereof. Contracts are governed by the provisions of the "The Laws of Contract, Cap. 23", the *Land Act*, No. 6 of 2012 among other Laws of Kenya. Contract is an agreement entered between one or more than one person with another or others creating an obligation for a consideration and its enforceable or recognizable in law. There are other definition of Contract as being a promise or a set of promise, for breach of which the law gives a remedy or the performance of which the law in some way recognized as a duty. It is trite law that Courts cannot re – write contracts for parties, neither can they imply terms that were not part of the Contract. In the case of "*Rufale – Versus – Umon Manufacturing Company (Ramsboltom)* (1918) LR 1KB 592, Scrutton L.J held as follows:

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

Indeed, Courts do not make contracts to parties. Courts do not even try to improve the contracts which the parties have made themselves. If the express terms are perfectly clear and ambiguity, there is no choice to be made between different meanings. The clear terms must be applied even if the court thinks some other terms could have been more suitable.

32. The validity of Contract in sale of land are provided for under both the provisions of Sections 38 and 39 of the *Land Act*, No. 6 of 2012 which states:-

> Section 38 (1):- "Other than as provided by this Act or by any other written law no suit shall be brought upon a Contract for the disposition of an interest in land:-
>
> a) The Contract upon which the suit is founded:
>
> i. Is in writing;
>
> ii. Is signed by all the parties thereto; and
>
> iii. the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.
>
> Section 39:- "If, under a contract for the sale of land, the Purchaser has entered into possession of the land, the Vendor may exercise his or her contractual right to rescind the contract by reason of a breach of the contract by the Purchaser by:-
>
> a) Resuming possession of the land peaceably; or
>
> b) Obtaining an order for possessions of the land from the court in accordance with the provisions of Section 41.
>
> The provision of Section 40 of the *Land Act*, No. 6 of 2012 provides for the damages from the breach of Contract. It provides:-
>
> > 40 (1) "Nothing in Section 39 of the Act prevents a vendor from claiming damages and Mesne Profits from the Purchaser for the breach of a Contract of sale or for breach of any other duty to the Vendor which the Purchaser may

be under independently of Contract or effects the amount of damages that the Vendor may claim.."

(2) Any term express or implied in a contract or other instrument that conflicts with this section shall be inoperative.

33. Based on the above cited legal principles, it is not disputed that on 14th May, 2015 and 30th April, 2016 the Plaintiff and the Defendant herein did execute a sale agreement and a supplementary agreement for the sale of the suit land terms and conditions stipulated thereof.

In particular, the provisions of Clauses 3.0, 4.0 and 7.0 of the said agreements come into play. Essentially, the purchase price was a sum of Kenya Shillings Twenty Four Million Two Sixty Thousand Three Forty Hundred (Kshs. 24, 260, 340/=) and upon payment of the Kenya Shillings One Million (Kshs. 1, 000, 000.00) the Purchaser took possession of the suit land and commenced using it.

It is stated, though vehemently denied by the Defendant, the Purchaser started cultivating the plantation of the sugar canes crop. So far a sum of Kenya Shillings Six Million (Kshs. 6, 000, 000.00) has been paid up by the Defendant as the Purchaser. It is a fact that the outstanding balance has not been cleared todate which is over seven years from the completion date which from the agreements was 14th May, 2015 and the supplementary agreement dated 30th April, 2016. Luckily, the suit land is still registered in the names of the Plaintiff. The Plaintiff is still in possession of the original Certificate of Title deed.

34. In the given circumstances, the major question this court needs to answer is whether there has been any breach of Contract or not and the consequences therefrom.

The Advocate for the Plaintiff has assisted this Honourable Court in defining the term "Breach of Contract" based on the definition from the Black Laws Dictionary to mean:-

" A violation of a contractual obligation failing to perform one's own promise, by repudiating it or interfering with another's performance. A breach may be one by non performance or by reputation or by both. Every breach gives rise for a claim of damages and may give rise to other remedies...."

In the case of "*Photo Production – Versus – Securicor Limited* (1980) AC 827 at page 848 Lord Diplock remarked that a characteristically, commercial contracts are a source of primary legal obligations upon each party to it to procure that whatever has been promised will be done.....Every failure to perform a basic term of contract, is a breach of contract. The secondary obligation on the part of the contract on the part of the contract breaker to which it gives rise by....common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of breach".

The other issue raised was on time. According to Halsbury Laws of England (4th Edition) Vol. 9 Para. 481 Page 338 holds:-

" The modern law, in the case of contracts of all types, may be summarized as follows:- Time will not be to be of the essence unless (1) the parties expressly stipulates that conditions as to time must be strictly complied with; or (2) the nature of the subject matter of the contract or the surrounding circumstances show that the time should be considered to be of the essence; or (3) a party who has been subjected to unreasonable delay gives notice to the party in default making time of the essence. Even if time is not of essence a party who fails to perform within the stipulated time will be liable in damages". context

35. Undoubtedly, in the instant case, and from surrounding facts and inferences in the matter, this Honourable Court will not hesitate to conclude that the Defendant is in utter breach of the terms from the two duly executed agreements for the sale of the suit land. I dare say that, it has been adequately proved that there was failure to make the payment of the outstanding balance, wrongful possession of the suit property and failure to comply despite being issued with a proper 14 days notice in accordance with the provision of Clause 7.0 of the sale agreements.

Be that as it may, during the pendency, as provided for under the provision of Article 159 (2) (c) of *the Constitution* of Kenya, in an attempt to explore an out of court negotiation, the Honourable Court "Suo Moto" summoned the Directors of the Company for the Defendant. But despite this effort, they willfully failed to embrace that olive branch. Further, this Court has taken cognizance that the said the Directors to record and file witness statements. They only send an Employee who had no authority to represent the Defendant; The employee rendered very sketchy evidence and confessed the Defendants were facing dire financial constraints; Non payment of the outstanding balance.

36. On the issue of Mesne Profits.

It is trite law and as defined under Section 2 of the *Civil Procedure Act*, Cap. 21 Mesne Profits thus:-

> "Mesne profits in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, but does not include profits due to improvements made by the person in wrongful possession"

The operative words here are "Wrongful possession". It follows that for a person to be seeking for mesne profits must of necessity, prove that the Defendant is in wrongful possession of the suit land. In the instant case, the pleadings and the evidence adduced in Court indicates that the Defendant has been in occupation of the suit land from 15th August, 2014. Acting in good faith, the Plaintiff allowed the Defendant to take possession and they commenced cultivation of Sugar cane for commercial purposes. Despite taking possession and the use of the land they failed to complete the payment and knowing very well of the consequences as enshrined in the sale agreements. They failed to vacate the land though well served with the notice. All these constitutes wrongful possession of the suit land. This tantamount to trespass whereby a person enters without reasonable excuse or remains, erects any structure on or cultivates or fills or grazes stock in private land without the consent of the occupier. The Plaintiff adduced evidence that all this time the Defendants was making profits from the use and occupation of the suit land. The evidence of PW – 2 was cogent and compact in testifying that the profits were derived from the original crop in the year 2014 and the subsequent crops referred to as ratoons harvested annually from the year 2014 todate. He testified that sugar cane being a unique crop that regenerates, and once planted, it could survive for a period of fifteen (15) years. He held that a farmer therefore makes pecuniary gain from yearly harvests of the crop. In the instant case, the Defendant has been harvesting the crop from the year 2014 and continue to do so until they will have handed over the possession of the suit land to the Plaintiff. According to the expert, and whose evidence was never controverted by another expert, the Defendant had made a profit of a sum of Kenya Shillings Eighty Million, Nine Hundred and Six Thousand Eight Hundred Forty Four (Kshs. 80,906,844/=) upto December, 2021. This Court has noted that the Defendant through its Advocates have mounted a very strong defence and fully castigated the report by the expert – PW – 2, unfortunately it was made under the submissions and not while adducing evidence. It is taken to be evidence from the bar.

Fundamentally, by the time of the delivery of this Judgement the profits will have increased drastically by a further period of five (5) months down the line. It is for that understanding that this court proceeds to award the Mesne profits to the Plaintiff as prayed.

37. On the issue of the consequences upon the breach of the contract. The Honorable Court has been persuaded by the two cases cited by the Advocate for the Plaintiff - the Cases of Kenya Tourism Development Corporation (Supra) and Consolota Anyango Ouma (Supra)

In the "William R. Anson's "The principles of the Law of Contract", 28th Edition at pages 589 and 590 the law is stated to be:-

> "Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damages , loss or injury the claimant has suffered through that breach. A Claimant who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal"

According to the Halsbury's Laws of England, Third edition Vol. II defines nominal damages as follows:-

> " ..388. Where a Plaintiff whose rights have been infringed has not in fact sustained any actual damage therefrom, or fails to prove that he has; or although the Plaintiff has sustained actual damage, the damage arises not from the Defendant's wrongful act, but from the conduct of the Plaintiff himself; or the Plaintiff is not concerned to raise the question of actual loss, but brings his action simply with the view of establishing his right, the damages which he is entitled to receive are nominal.....Thus in actions for the breach of contract nominal damages are recoverable although no actual damage can be proved.."

On the same issues, the Court wishes to further rely on the decision

In the case of "*Kinake Co – operative Society – Versus – Green Hote*l (1988) KLR 242, where the Court of Appeal held that where damages are at large and cannot be quantified, the Court may have to assess damages upon some conventional yardsticks. But if a specific loss is to be compensated and the party was given a chance to prove the loss and did not he cannot have more than nominal damages, a position also taken in the case of "*Nyamongo & Nyamongo Advocates – Versus – Barclays Bank of Kenya Limited* (2015) eKLR.

Defence:- made some deposit of Kshs. 6, 000, 000.00; not having money;

taking of possession – Clause 3; not using the land at all eg no cultivation of the land or sugar cane; lack of communication – failure to any demand notices; issue the 14 days notice as per Clause 7.0 of the agreement;

ISSUE No. b). Whether the parties herein are entitled to the reliefs sought from the filed suit.

38. Under this Sub heading, the Court wishes to reiterate that the facts of the case are as clear as day and night. Undoubtedly, the Plaintiff and the Defendant entered into two sale agreements for the sale of the suit property all the terms and conditions clearly stipulated thereof. Upon payment of the first deposit, the Defendant was allowed to take possession of the land and indeed commenced cultivation of sugar cane on it. The Defendant has been in occupation of the suit land for close to seven (7) years. Apart from paying a paltry sum of Kenya Shillings Six Million Two Twenty Five Thousand (Kshs. 6,225,000/=) out of the total sum of Kenya Shillings Twenty Four Million Two Sixty Thousand Three Forty Six Hundred (Kshs. 24,260,346/=) the Defendant failed to finalize on the payment of the purchase price.

Clearly, they have been making use of the land and hence the profits at the expense of the Plaintiff. The only main defence advanced by the Defendants which this court takes to be pure semantics and splitting of hairs is the failure to be issued with the completion documents and the fourteen (14)

days notice. A keen assessment of Clauses 4.0 and 7.0 of the Sale Agreement, the Vendor was to pass the completion documents to the Purchaser upon the full payments of the purchase price was made. This never happened and therefore called for the rescinding of the agreement by the operation of the agreements.

39. Suffice it to say, the Court has also taken cognizance of the conduct of the two (2) Directors of the Defendants Company - Mr. Rajeshi Papari and Mr. Kaushik Papari. They have been extremely unco - operative and insensitive to the whole issue. For instance, they deliberately refused to records any statements nor issue an authority for their only witness who testified in Court – an employee of the company. Despite this Court making emphatic efforts to summoned them with a view of exploring an out of court settlement as provided for under Article 159 (2) (c) of *the Constitution* of Kenya they willfully refused, failed and/or neglected to show up all the time providing lame excuses here and there. For these reasons, the Court concludes that the Plaintiff has fully demonstrate and proved her case on the preponderance of probability and should be awarded all the reliefs sought from the filed Plaint hereof.

ISSUE No. c). Who will bear the costs of the filed Suit.

40. The Black Law Dictionary defines "Cost" to means, "the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other".

The provisions of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. The issue of Costs is the discretion of Courts. In the case of "*Reids Heweet & Company – Versus – Joseph* AIR 1918 cal. 717 & *Myres – Versus – Defries* (1880) 5 Ex. D. 180, the House of the Lords noted:-

> "The expression "Costs shall follow the events" means that the party who, on the whole succeeds in the action gets the general costs of the action, but where the action involves separate issues, whether arising under different causes of action or under one cause of action, the word 'event' should be read distributive and the costs of any particular issue should go to the party who succeeds upon it....."

From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case.

The events in the instant case is the Plaintiff in the Counter Claim has succeeded in his case. For that very fundamental reason, therefore, the costs of this suit will be made to the Plaintiff in the Counter Claim by the 1st and 2nd Defendants in the Counter Claim herein.

VI. Conclusion and Disposition

41. Ultimately, after hearing all the evidence, conducting the concise analysis of all the framed issues and application of the relevant provisions of the law and *the Constitution* of Kenya, on the principles of preponderance of probability and sound legal logic, this Honorable Court in all fours finds that the Plaintiff has been able to successfully demonstrate and prove it case against the Defendant. Subsequently, the case by the Plaintiff is allowed. For avoidance of doubt, this Honorable Court grants the following orders. These are:-

> a) THAT an order be and is hereby granted to the effect that there is a breach of Contract by the Defendant to the two Sale Agreement duly executed by the Plaintiff and the Defendant on 14th May, 2015 and the Supplementary Agreement duly executed on 30th April, 2016 for the sale of all that parcel of land described as TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectres (approximately 161.7356 acres).contrary to the

terms and conditions stipulated thereof and the provisions of the Laws of Contract, Cap. 23 of the Laws of Kenya.

b) THAT a declaration that the contract between the Plaintiff and the Defendant stands rescinded and that the Defendant to the effect that they are in the wrongful possession of the suit land known as land Reference Numbers TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectres (approximately 161.7356 acres).

c) THAT an order be and is hereby issued granting the Plaintiff the right to take immediate possession of the land described as TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectres (approximately 161.7356 acres) and registered in the names of the Plaintiff, together with the improvement thereon.

d) THAT an order of Mesne Profits a sum of Kenya Shillings Eighty Million Nine and Six Thousand (Kshs. 80, 906, 000.00) actually receivable or which with ordinary diligence have been received from the Defendant on the account of wrongful possession of all that parcel of described as TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectres (approximately 161.7356 acres) from the 15th August, 2014 upto the time the Plaintiff regains possession of the said parcel of land.

e) THAT an order be and is hereby issued for the award of damages for the breach of the contract of sale of the land described as TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectres (approximately 161.7356 acres).

f) 'THAT an order be and is hereby issued that all the monies paid pursuant to the sale of the land described as TITLE NO. KWALE/MNANASINI/763 situated within Kwale County measuring 65.0 hectres (approximately 161.7356 acres) stands forfeited.

g) THAT by an order of this Court, the Defendant be and is hereby granted Ninety (90) days notice pursuant to the provision of Section 151E of the *Land Act*, No. 6 of 2012 to lawfully vacate the suit land but leaving behind all the improvements fixed and/or made on the said land.

h) THAT an order of this Court be and is hereby issued to the Officer In Charge of Diani Police Station, Ukunda to ensure full compliance of this Court Order to the letter thereof.

i) THAT the Costs of the suit and interest at the Court's rate to be awarded to the Plaintiff herein.

JUDGEMENT DELIEVERED ON THIS 24TH DAY OF MAY 2022

HON. JUSTICE L.L NAIKUNI (JUDGE),

ENVIRONMENT & LAND COURT,

MOMBASA

In the presence of:

M/s. Yumna, Court Assistant.

Mrs. Grace N. Katasi Advocate for the Plaintiff.

Mr. Njuru Advocate for the Defendant.