



Galana Oil Kenya Limited v Commercial Mart Limited & another (Environment & Land Case 197 of 2019) [2022] KEELC 2736 (KLR) (23 June 2022) (Judgment)

Neutral citation: [2022] KEELC 2736 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 197 OF 2019**

**JO MBOYA, J
JUNE 23, 2022**

BETWEEN

GALANA OIL KENYA LIMITED PLAINTIFF

AND

COMMERCIAL MART LIMITED 1ST DEFENDANT

MUIRURI & WACHIRA ADVOCATES 2ND DEFENDANT

JUDGMENT

Introduction

1. Vide the Complaint dated 22nd April 2019, the Plaintiff approached the court seeking Judgment against the Defendants, jointly and/ or severally as follows:
 - a. Rescission of the material Contract;
 - b. Kshs 19,632,000/= owing as at 30th June 2018;
 - c. Costs of the suit;
 - d. Interest on (a) above at 14% per annum compounded and on (b) at court rates till payment in full; and
 - e. Any other or further reliefs this Honourable Court deems fit to grant.
2. Upon service of the Complaint and Summons to enter appearance the Defendants herein duly entered appearance on the 30th July 2019 and simultaneously filed a Notice of Preliminary objection, in respect of which the Defendants' contended that the Honourable Court was devoid of the requisite Jurisdiction to entertain the subject suit.



3. For clarity, it was the Defendants' contention that the Lease Agreement, which had been entered into and executed by the Parties, contained an Arbitration clause. Consequently, the Defendants challenged the Jurisdiction of the court.
4. Nevertheless, the Defendants herein thereafter abandoned the issue of Preliminary Objection and proceeded to and filed a Statement of Defense and Counter-claim dated the 30th December 2021.
5. Vide the Counter-claim, the Defendants herein sought for the following Reliefs;
 - a) An order for Specific Performance of the Lease Agreement entered into between the 1st Defendant and the Plaintiff herein pursuant to a Letter of offer dated 25th November 2016.
 - b) Special Damages for Kenya Shillings Twenty-One Million Six Hundred Thousand Only (Kshs 21,600,000 only) being Rents for the Four years of the term between 1st August 2021 to 31st July 2025 at the rate of Kenya Shillings Four Hundred and Fifty Only, (Kshs 450,000 Only,) per Month, inclusive of VAT to the Defendant.
 - c) A Declaration that the Plaintiff should pay Kenya Shillings Twelve Million Only, (Kshs 12,000,000 Only), as rent for the lease term beginning 1st August 2025 to 31st July 2027 when it becomes due.
 - d) In the alternative to the above, a Declaration that the Plaintiff is in breach of the Lease Agreement entered into between the 1st Defendant and the Plaintiff herein pursuant to the Letter of offer dated 25th November 2016.
 - e) The Plaintiff do pay General Damages for Breach of the said Lease Agreement to the 1st Defendant and Mesne profits.
 - f) Ksh.....as Costs incurred for Sub-division, Change of User and Transfer.
 - g) Interest on (b) (c) (e) and (f) above at the rate of 14% p. a until payment in full.
 - h) There be such Other or Further Reliefs as this Honourable Court deems fit and just in the circumstances.
 - i) Costs of the suit to the 1st Defendant.

Evidence by the parties

Plaintiff's evidence

6. The subject matter came up for hearing on the 7th March 2022, whereupon the Advocates for the Parties herein agreed and thereby entered into a Consent whereby the written statements filed by the witnesses for the respective Parties were adopted as the Evidence in chief and both Parties waived their rights to cross examination.
7. On the other hand, it was similarly agreed that the Bundle of Documents which were filed by and/or behalf of the Parties were to be admitted as Evidence and deemed as Documentary exhibits on behalf of the respective Parties.



8. Pursuant to and in line with the Consent, entered to by the Parties herein, the Witness Statement by one, John Magu, dated the 22nd April 2019 was constituted and hence deemed as the Evidence of the said witness.
9. For coherence, John Magu, who was deemed as PW1 stated that the the 1st Defendant herein was at the material times the registered proprietor and /or owner of all that property known as Kilifi/Mtwapa/568, (hereafter referred to as the suit property).
10. It was further averred that the Plaintiff herein was desirous and intent on contracting with the Defendant, with a view to constructing a Petrol Filling and Service Station on a portion of the suit Property.
11. Further, the witness averred that the Plaintiff herein generated a Letter of Offer dated the 25th November 2016, and which was addressed to the 1st Defendant, whereby the Plaintiff expressed her willingness to enter into a Lease with the Defendant over and in respect of a sub-division of the suit property.
12. It was further contended that the Letter of Offer, (details in terms of the preceding paragraph) contained various terms upon which the Plaintiff was keen to enter upon the intended Lease over and in respect of the sub-division of the suit property.
13. For the avoidance of doubt, the witness herein proceeded to and indeed alluded to two (2) pertinent conditions, contained in the Letter of Offer and the conditions are as hereunder;

“The 1st Defendant shall grant the lessee vacant possession of the property upon the execution of the lease with a six (6) month grace period commencing from 1st February 2017 to the 31st July 2017, to enable the Plaintiff commence construction of the petrol filling and service station.”

“A lumpsum of Kshs 19, 632, 000/= only was payable in two tranches as the rent for the first four years of the lease term at the rate of Kshs 409, 000/= per month upon registration of the lease and of the Plaintiff taking vacant possession of the property”

14. On the other hand, the witness has further averred that it was also an express and/or implied Agreement that pending the execution and registration of the Lease, the 2nd Defendant herein was obligated to hold the deposit and other payments made, albeit in trust.
15. Be that as it may, the witness has further stated that despite the terms of the Letter of offer, the Lease between the Plaintiff and the 1st Defendant was never registered. Besides, the witness has also stated that the Plaintiff was also not given vacant possession in respect of the intended Property.
16. Owing to the foregoing, the witness has thus contended that the Lease between the Plaintiff and the 1st Defendant was therefore frustrated and same stands vitiated.
17. Based on the foregoing, the witness on behalf of the Plaintiff, has therefore sought for the various reliefs, outlined and contained at the foot of the Plaint dated the 22nd April 2019.
18. Having adopted the contents of the written statement dated the 22nd April 2019, the witness herein also adopted and relied upon the Bundle of Document at the foot of the List dated the 22nd April 2019 and which Documents were admitted in Evidence and marked as Exhibits P1 to 19, respectively.



Defendants' evidence;

19. Vide Witness Statement dated the 30th December 2021, one Simon Kagiri Kamatu, has stated that same is one of the Directors of the 1st Defendant herein. Consequently, the Witness has thus indicated that same is seized of the requisite capacity to tender the Evidence on behalf of the 1st Defendant.
20. Further, the Witness has stated that at the request and instance of the Plaintiff herein, which was conveyed vide Letter of Offer dated the 25th November 2016, the 1st Defendant agreed to Lease part of her property, namely, L.R No Kilifi/Mtwapa/568, to the Plaintiff herein for a period of 10 years.
21. On the other hand, the witness also stated that the intended Lease was to commence with effect from the 1st August 2017 and same was for the purposes of construction and operation of Petrol Filling and Service station.
22. The witness has further stated that upon the issuance of the Letter of Offer vide Letter dated the 25th November 2016, the 1st Defendant contracted and engaged the 2nd Defendant herein for purposes of rendering Professional legal services in respect of the subject transaction and particularly, on behalf of the 1st Defendant.
23. However, the witness has further stated that despite the engagement of the 2nd Defendant, for the provision of legal services, the 2nd Defendant was neither Party nor privy to the terms of the Lease Agreement between the Plaintiff and the 1st Defendant.
24. Further, it has been stated that the Letter of Offer dated the 25th November 2016, contained some of the terms that were agreed upon between the Plaintiff and the 1st Defendant and same included, inter alia, that the Plaintiff would deposit the sum of Kshs 19, 632, 000/= only, on account on Rent Deposit for the first 4 years of the Lease.
25. Besides, the witness has further averred that the said sum of Kshs 19, 632, 000/= only, was agreed to be deposited in an Escrow Account, which was to be held by both the Plaintiff and the 1st Defendants advocates, albeit pending change of user, subdivision and thereafter same was to be transferred to the 1st Defendants account immediately upon change of user and subdivision of the suit property.
26. Other than the foregoing, the Witness has stated that despite the Mutual Agreement to have the sum of Kshs 19, 632, 000/= only, deposited in an Escrow Account, the Plaintiff failed and/or delayed to remit the said monies and as a result of failure and delay, the 1st Defendant proceeded to and effected the subdivision and the change of user, prior to and/or before the deposit of the agreed monies in the Escrow account.
27. Nevertheless, the Witness has also stated that upon the completion of the sub-division and the change of user by the 1st Defendant, the issue of the Escrow account was rendered redundant and became absolute.
28. Owing to the foregoing, the Witness has further stated that thereafter the Plaintiff paid the entire sum of Kshs 19, 632, 000/= only, directly to and in favor of the 2nd Defendant and that the said payment was made in acknowledgement and confirmation that the 1st Defendant had indeed completed the subdivision of the suit property and change of user thereof.
29. It has further been stated that immediately upon the completion of the subdivision and the change of user, the 1st Defendant herein intimated and/or duly informed the Plaintiff of the readiness of the resultant titles, for purposes of effecting the registration of the Lease.



30. Other than the foregoing, the Witness also stated that the 1st Defendant's advocates, namely, the 2nd Defendant herein also generated a Letter addressed to the Plaintiff's advocates and in respect of which the 1st Defendant's advocates sought for provision of a Professional Undertaking from the Plaintiff's Advocates with a view to facilitating the release of the original title for purposes of the registration of the Lease.
31. Besides, the Witness has stated that instead of collecting the titles for registration of the Lease, the Plaintiff herein authored and/or generated a Letter dated the 13th February 2018 and in respect of which the Plaintiff sought to re-negotiate and/or review the Lease terms that had hitherto been agreed upon.
32. However, the witness has stated that upon receipt of the letter dated 13th February 2018, the 1st Defendant wrote back to and in favor of the Plaintiff and indicated that same was not willing to enter into any further negotiation as pertains to the terms of the Lease Agreement and instead called upon the Plaintiff to comply with the terms with the Lease Agreement.
33. On the other hand, the Witness has further stated that the 1st Defendant also intimated to the Plaintiff that upon the execution of the Letter of offer and the Lease Agreement, the 1st Defendant entered into various Financial commitments with Third Parties and owing to the said commitments, it was not possible and/or practicable for the 1st Defendant, to enter into re-negotiation of the terms of the Lease Agreement or otherwise refund the sum of Kshs 19, 632, 000/= only, in the manner sought by the Plaintiff.
34. At any rate, the witness has further testified that upon the execution of the Lease Agreement and coupled with the payments of the rents for the 1st 4 years, the Plaintiff herein was at liberty to enter upon and take possession of the demised property.
35. Further, the witness also stated that at no point in time did the 1st Defendant deny the Plaintiff the right to enter upon and take possession of the demised property, which was the subject of the Lease Agreement.
36. Notwithstanding the foregoing, the witness has also stated that having performed her part of the bargain, including execution of the Lease Agreement, a Lease Contract was deemed to have come into effect and therefore the Plaintiff herein is obliged to pay the Contractual Rents, not only of the first 4 years of the Lease, but for the entire duration thereof, amounting to 10 years.
37. Based on the foregoing, the witness on behalf of the 1st Defendant has therefore contended that it is the Plaintiff who has not only frustrated the completion of the Lease Contract, but also violated same.
38. In the premises, the witness has thus implored the court on behalf of the Defendants that the Plaintiff's suit be dismissed with costs, while the Defendants counter-claim be allowed with costs.
39. Other than the adoption of the Written statement, whose contents have been alluded to vide the preceding paragraphs, the Witness also produced in Evidence the various documents at the foot of the List and Bundles dated the 30th December 2021 and the 2nd March 2022, which were admitted as exhibits D1 to D24, respectively.

Submissions by the parties:

40. Other than the Consent adopting the Witness Statement and Bundle of Documents as the Evidence and Exhibits, respectively, on behalf of the Parties, it was also agreed that the Parties shall file and exchange Written Submissions.



41. Pursuant to the foregoing, the Plaintiff filed her Written Submissions on the 20th April 2022 whereas the Defendants filed their written submissions on the 10th May 2022. For clarity, both Written submissions are on record and same have been duly considered and taken into account.
42. Briefly, it is the Plaintiff's submissions that the same generated a Letter of Offer dated the 25th November 2016 and which was addressed to the 1st Defendant herein and in respect of which, same conveyed the terms upon which same was keen to enter into a Lease Agreement with the 1st Defendant.
43. Further, the Plaintiff has submitted that pursuant to the terms of the Letter of Offer, the Plaintiff was obligated to pay to and in favor of the 1st Defendant the sum of Kshs 19, 632, 000/= only, in two tranches as the rents for the first 4 years of the Lease and that in any event, the said payments were due and payable upon the Plaintiff taking vacant possession of the suit property.
44. Other than the foregoing, the Plaintiff has also submitted that same proceeded to and released payments in favor of the 2nd Defendant, albeit pending the execution and registration of the lease. In this regard, the Plaintiff has submitted that the monies that were paid to and in favor of the 2nd Defendant, were not to be utilized and/or otherwise released to the 1st Defendant until execution and registration of the Lease as well as taking vacant possession by the Plaintiff.
45. Nevertheless, the Plaintiff has submitted that despite making the payments amounting to an aggregate of Kshs 19, 632, 000/= only, the Lease Agreement was neither executed nor registered, in line with the terms of the Letter of Offer.
46. On the other hand, the Plaintiff has further submitted that same was also not granted vacant possession over and in respect of the resultant subdivision of the suit property, which was the subject of the lease.
47. Based on the foregoing, the Plaintiff has thus submitted that the intended Lease Agreement was therefore frustrated and same stands vitiated.
48. In view of the foregoing, the Plaintiff has thus submitted that the Lease Agreement having collapsed, before same could be executed and registered, the Plaintiff is therefore entitled to Refund of the sum of Kshs 19, 632, 000/= only.
49. In support of her submissions the Plaintiff has relied on various decision, inter-alia, *Herbat Hahn v Amrik Singh* Nairobi Civil Appeal No 42 of 1983 (1985) eKLR, *Banque Indosuez v D. J Lowe & Company Limited*, Mombasa Civil Appeal No 79 of 2002 (2006) eKLR, *Kenya Knitting & Wiving Mills Ltd v Kenya Power & Lighting company Limited*, Nairobi Civil Appeal 171 of 2008 (2016) eKLR, *W. J Blakeman Ltd v Associated Hotel Management*, Nairobi Civil Appeal No 45 of 1984 (1985) eKLR and *Peter Mbiri Michuki v Samuel Mugo Michuki* (2014) eKLR.
50. On their part, the Defendants' have submitted that though no Formal Lease was executed and registered between the Plaintiff and the 1st Defendant, there existed an enforceable Contract between the Plaintiff and the 1st Defendant arising and/or flowing from the Letter of Offers dated the 25th November 2016, which was duly executed by the said Parties.
51. In this regard, the Defendants' have contended that to the extent that the Plaintiff and the 1st Defendant executed and performed some of the terms contained in the Letter of offer and the Agreement to Lease, there arose a binding and enforceable Contract.
52. In support of the foregoing submissions, the Defendants have relied in the decision in the case of *Kenya Commercial bank Limited v Popartlal Madavji & another* (2019) eKLR.



53. Secondly, the Defendants have also submitted that though a Formal Lease, which was contemplated pursuant to the Letter of Offer, was never registered however, the property which was the subject of the Lease Agreement was made ready and available for possession by the Plaintiff. Consequently, it was contended that the Plaintiff was therefore bound by the terms of the Letter of Offer, irrespective of the fact that the Formal Lease was unregistered.
54. Thirdly, the Defendants have further submitted that after executing the Letter of Offer, which was generated by the Plaintiff, same proceeded to and carried out the various actions that were required in accordance with the terms of the Letter of Offer, including subdivision of the suit Property and effecting the change of user thereof.
55. On the other hand, the Defendants further submitted that the 1st Defendant similarly executed the Lease Agreement and thereafter forwarded same to the Plaintiff's advocates, who were obliged to facilitate execution by the Plaintiff and thereafter progress same for registration.
56. However, it has also been submitted that despite the Lease Agreement being forwarded to the Plaintiff's advocates, same failed and/or neglected to facilitate the registration thereof and in the premises, it is the Plaintiff herein, who has breached the terms of the Contract and not otherwise.
57. Owing to the foregoing, the Defendants' have further submitted that the Plaintiff and the 1st Defendant having therefore entered into the subject Contract, anchored on the basis of the Letter of Offer, the Plaintiff herein cannot be allowed to renege and/or run away from the terms of the contract.
58. In support of the foregoing submissions, the Defendants have relied on the case of *Total Kenya Limited v Joseph Ojiem*, (1999) eKLR, *Shah v Gildus Internation Bank Ltd* (2003) eKLR and *Hassan Subeidi v Patrick Mwangangi Kibaiya & another* (2014) eKLR.
59. Fourthly, the Defendants' have also submitted that the Plaintiff herein cannot rely on the Doctrine on the frustration of the Agreement and particularly, where it is the Plaintiff who is responsible for the failure and/or breach of the subject Contract.
60. In support of the Doctrine of frustration of Contract and the circumstances where same can be invoked and relied upon, the Defendants' have relied on the Decision in the case of *Davis Contractors Limited v Farehum U. D. C* (1956) A. C 696, *Howard & Company (Africa) Ltd v Burton* (1964) E.A 157 and *Maritime National Fish v Ocean Trawlers* (1935) A. -C 524.
61. Fifthly, the Defendants have also submitted that the Plaintiff herein cannot invoke and rely on the Doctrine of Rescission of the Contract, noting that it is the Plaintiff who has breached and or violated the terms of the Lease Agreement. Consequently, the Defendants have alluded to various decisions including the case of *Muthio Nzioka v Charles Akello Onguen*, (2014) eKLR, where the Honourable Court considered the circumstances pertaining to and concerning the application of the Doctrine of Rescission.
62. Sixthly, the Defendants have submitted that based on the conduct of the Plaintiff herein and coupled with the fact that it is the Plaintiff who has violated the terms of the Lease Contract, the Plaintiff is not entitled to the reliefs sought at the foot of the Plaint.
63. Finally, the Defendants have also submitted that based on the duly executed a Letter of Offer, as well as the Lease Agreement, the latter which was not registered, a valid and enforceable Contract arose and in this regard, the Court ought to decree Specific Performance as against the Plaintiff.



64. In support of the claim for Specific Performance, the Defendants' have relied in the Decision in the case of *Gurdev Singh Birdi & another v Abubakar Mathubuti*, Mombasa Civil Appeal No 165 of 1996 and *William Kazungu Karisa v Cosmas Angore Chanzera* (2006) eKLR.

Issues for determination:

65. Having reviewed the Pleadings filed by and/or on behalf of the Parties, the Witness Statement and the Bundle of Documents, the latter which were admitted as Exhibits and having considered the written submissions filed on behalf of the Parties, the following issues do arise and are germane for Determination;
- a. Whether there arose a Valid and Enforceable Lease Contract between the Plaintiff and the 1st Defendant.
 - b. Whether the Doctrine of rescission is applicable in respect of the subject matter and whether the Plaintiff can invoke and rely on same.
 - c. Whether this Court can Decree Specific Performance in respect of the existing circumstance of the subject matter.
 - d. Whether the sum of Kshs 19, 632, 000/= Only, which was paid to the 2nd Defendant on behalf of the 1st Defendant, were to be held by same pending execution and registration of the lease and taking of vacant possession.
 - e. If issue number d is in the affirmative, whether the monies are refundable to the Plaintiff.

Analysis and determination

Whether there arose a Valid and Enforceable lease Contract between the Plaintiff and the 1st Defendant.

66. Before venturing to address and/or deal with the issue as to whether there arose a valid and enforceable lease contract between the Plaintiff and the 1st Defendant, it is imperative to note and observed that the transaction between the Plaintiff and the 1st Defendant concerned disposition of Interests in land.
67. To the extent that the transaction between the Plaintiff and the 1st Defendant concerned disposition of an interest in land, it was thus imperative that the ensuing Contract/Agreement be crafted in accordance with the provisions of Section 3(3) of the *Law of Contract Act*, Chapter 23 Laws of Kenya.
68. For convenience, the Provisions of Section 3(3) of the *Law of Contract Act*, Chapter 23 Laws of Kenya provides as hereunder;

- (3) No suit shall be brought upon a contract for the disposition of an interest in land unless—
 - (a) the contract upon which the suit is founded—
 - (i) is in writing;
 - (ii) is signed by all the parties thereto; and



- (b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a Public auction by an auctioneer within the meaning of the *Auctioneers Act* (Cap. 526), nor shall anything in it affect the creation of a Resulting, Implied or Constructive Trust.

69. Having taking cognizance of the import and tenor of the Provisions of Section 3(3) of the *Law of Contract Act*, it is also important to note that the Plaintiff and the 1st Defendant herein, admittedly did not execute and formally register a Lease agreement between themselves.
70. Suffice it to note, that though a Lease Document was prepared for purposes of execution between the Parties and though it appears that same was signed by the persons, allegedly on behalf of the Plaintiff and the 1st Defendant, the said lease was however, not attested by any witness, who was present and witnessed the affixation of the signatures of the persons, who have (sic) the lease.
71. Secondly, it is also evident from the Lease document which was produced which was as part of the exhibit by the Plaintiff that same was similarly not embossed with the seal of the respective Parties, namely, the Plaintiff and the 1st Defendant, either as required under the law or at all.
72. Thirdly, it is also evident and/or apparent that the Lease Document, was never presented for registration, nor was same ever registered, either as covenanted vide the terms of the letter of offer or as required under the law.
73. Based on the foregoing, the question that begs the answer is whether the purported Lease, which was neither attested nor embossed with the Company seal of the Plaintiff and the 1st Defendant, respectively, meets the statutory threshold underscored vide Section 3(3) of the *Law of Contract Act*, as read together with Section 38 of the *Land Registration Act*, 2012.
74. To my mind, the Lease Documents, a copy of which was placed before the court, does not meet and/or satisfy the peremptory requirements of the law.
75. In the premises, I beg to point out that no legal and/or enforceable Contract arose between the Plaintiff and the 1st Defendant, capable of being enforced or otherwise.
76. To vindicate the foregoing position, it is imperative to take cognizance of the provisions of Section 43 of the *Land Registration Act*, which provides as hereunder;

43. Instruments of dispositions

- (1) Every instrument effecting a disposition of land under this Act shall be in the form prescribed in relation to that disposition under this Act or any other written law.
- (2) No instrument effecting any disposition of an interest in land under this Act shall operate to sell or assign land or create, transfer or otherwise affect any land, lease or charge until it has been registered in accordance with the laws relating to the registration of



instruments affecting the land in respect of which the disposition has been made.

- (3) The provisions of subsection (2), shall not apply to any disposition that is exempt from registration.
- (4) This section shall not apply to or affect the operation of any contract for a disposition under this Act.

77. Other than the foregoing, it is also imperative to take cognizance of the decision in the case of *Kukal Properties Development Limited v Tafazzal H Maloo & 3 others* (1993) eKLR

“With the greatest respect, the learned trial judge misdirected himself completely. In the first place it matters not what the parties or one of them believed or was made to believe. The real issue was whether the agreement was duly executed by the parties, and if not, was the agreement binding and enforceable against any of the parties?...It is trite law on this point and is made beyond doubt under Section 3(3) of the *Law of Contract Act* (cap 23) Laws of Kenya)...I hold that the intended agreement between the appellant and the Porbundarwallas was inoperative and therefore unenforceable for lack of execution by the appellant; the sum total was that there was no valid agreement enforceable in law”

78. Consequently and in the premises, I come to the conclusion that no enforceable Lease contract arose between the Plaintiff and the 1st Defendant.

Whether the Doctrine of Rescission is applicable in respect of the subject matter and whether the Plaintiff can invoke and rely on same.

79. One of the reliefs that was contained and/or reflected at the foot of the Plaint dated the 22nd April 2019 was rescission of the material contract.

80. However, after the filing of the subject suit, the Plaintiff herein thereafter filed a Notice of withdrawal dated the 30th November 2019, but which was lodged before the court on the 2nd December 2019 and in respect of which the Plaintiff indicated as hereunder;

“Take Notice that Galana Oil Kenya Limited, the Plaintiff hereby withdraws prayer a of the reliefs sought in the Plaint”.

81. Upon the filing of the said Notice of withdrawal, whereby the Plaintiff withdrew the relief, reflected as A in the Plaint, the issue of rescission of the material contract therefore ceased to exist and same cannot be the basis of further deliberations by the court.

82. Based on the foregoing observation, it is therefore my finding and holding that the Defendants’ extensive submissions, relating to the Doctrine of rescission and its application in respect of the subject matter, are therefore moot.

83. Nevertheless, it is important to note that a Party who is in breach of the Contract, the Plaintiff not excepted, if at all that issue of Rescission was alive, would not be entitled to and/ or cannot implement and seek to rescind the contract.



84. In respect of the foregoing position, it is worthy to take cognizance and to restate the holding of the Court in the case of *Beatrice Muthio Nzioka v Charles Akello On'wen* [2014] eKLR where Justice Nyamweya quoted paragraph 242 of Halsbury's laws of England Volume 42 4th edition

“Which states that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchaser's conduct is such as to amount to a repudiation of the contract, and the Parties can be restored to their former position.

Whether this court can Decree Specific Performance in respect of the existing circumstance of the subject matter.

85. The Defendants' herein have filed a Counter-claim and in respect of which, the Defendants' have sought, inter-alia an order for Specific Performance.

86. While dealing with issue number one herein before, the court has observed that the transaction between the Plaintiff and the 1st Defendant touched on and/or concerned disposition over an interests in land and hence such a transaction, ought to be reduced into writing, be signed by the persons chargeable therewith and the contract ought to be witnessed by an attesting witness, present and witnessing the execution thereof.

87. It is also important to note that the import and tenor of Section 3(3) of the *Law of Contract Act* have similarly been reproduced- vide Section 38 of the *Land Act*, which provides as hereunder;

38.
Validity (1)
of contracts
in
sale
of
land.

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

(b) the signature of each party signing has been attested to by a witness who was present when the contract was signed by such party.’

88. Taking cognizance of the foregoing provisions of the law, which I have alluded to vide the preceding paragraphs, the question that arises is whether in the absence of a duly executed Lease Contract between the Plaintiff and the 1st Defendant an order for Specific Performance can arise and/or be granted.

89. Other than the foregoing, the other incidental question that must similarly be addressed is whether Specific Performance can issue and/or be decreed on the face of an illegal and invalid Lease Agreement, whose execution does not comply with Sections 35 and 37 of the *Companies Act* 2015.



90. Perhaps, before endeavoring to answer the question posed above, it is imperative to take cognizance of the provisions of Sections 35 and 37 of the *Companies Act*, 2015 which provides as hereunder;

“ 35. Company contracts

- (1) A contract may be made:
 - (a) by a company, in writing; or
 - (b) on behalf of a company, by a person acting under its authority, express or implied.
- (2) Any formalities required by law for a contract made by a natural person also apply, unless a contrary intention appears, to a contract made by or on behalf of a company.’

37. Execution of documents

- (1) deleted by Act No 1 of 2020, s. 30
- (2) A document is validly executed by a company if it is signed on behalf of the company—
 - (a) by two authorised signatories; or
 - (b) by a director of the company in the presence of a witness who attests the signature.
3. A document in favour of a purchaser is effectively executed by a company if it purports to be signed in accordance with subsection (2).” (Emphasis, mine)

91. Having reproduced the said provisions of the *Companies Act*, 2015, it is now appropriate to consider the law on Specific Performance. In this regard, it suffices to take cognizance of the decision in the case of *Reliable Electrical Engineers Ltd v Mantrac Kenya Limited* (2006) eKLR, where Justice Maraga (as he then was) stated that:-

“Specific performance like any other equitable remedy is discretionary and the Court will only grant it on well laid principles”

“The Jurisdiction of specific performance is based on the existence of a valid enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or enforceable. Even when a contract is valid and enforceable, specific performance will however not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even when damages are an adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the defendant.”



92. Other than the foregoing decision, the issue of Specific Performance on the face of a non-compliant contract, was also deliberated upon vide the decision in the case of *Leo Investment Ltd v Estuarine Estate Ltd* [2017] eKLR, where the Court observed as hereunder;

“In this regard, whereas a suit for specific performance or damages for breach of a non-compliant contract is a nullity, a suit for restitution (recovery of money paid in furtherance of a non-compliant contract) or a suit for declaration of a constructive trust arising from the non-compliant contractual relationship would be a valid suit.”

93. The Jurisprudence flowing from the foregoing decisions, can be stated simply that the Equitable remedy of Specific Performance can only issue, albeit in exceptional circumstances, but where the Contract between the disputants was/is legal, valid and enforceable.

94. Put differently, the Equitable remedy of Specific Performance cannot issue and/or be granted where the contract belying the question of Specific Performance is illegal, invalid, unenforceable and/or otherwise contrary to express provisions of the law.

95. In a nutshell, the claim for Specific Performance by and or at the instance of the Defendants herein, anchored and/or predicated on a Lease, which is ipso jure, a nullity, is not only misconceived but is legally untenable.

Whether the sum of Kshs 19, 632, 000/= only which was paid to the 2nd Defendant on behalf of the 1st Defendant, were to be held by same pending execution and registration of the Lease and taking of vacant possession.

96. Before endeavoring to deal with the subject issue, it is imperative to take cognizance of the provisions of clause (2) of the letter of offer dated the 25th November 2016, which was duly signed by the Plaintiff and the 1st Defendant. For clarity, the provisions of clause (2) are reproduced as hereunder;

2.1 Rent shall be payed to the lessor as follows;

2.1.1 Upon the lessor granting unto the lessee vacant possession of the property and further upon registration of this lease, a lumpsum payment of Kshs 19, 632, 000/= only being rent for the first 4 initial years at the rate of Kshs 409, 000/= only per month inclusive of Vat and all other applicable taxes.

2.1.2 At the beginning of the 5th year the prepaid rent lumpsum of Kshs 21, 600, 000/= only being Rent for the second 4 years of the term at the rate of Kshs 450, 000/= only, inclusive of the VAT and all other applicable taxes.

2.1.3 At the beginning of the 9th year the prepaid rent lumpsum of Kshs 12, 000, 000/= only being rent for the second 9th and 10th years of the term at the rate of Kshs 500, 000/= only inclusive of the VAT and all other applicable taxes.

2.1.4 Upon execution of the lease to grant unto GOKL vacant possession of the premises with a six month grace period to enable the GOKL get the necessary approvals and carryout construction works on the property as to be advised by their contractor. During this period the rent payable shall be waived. Provided that the first lumpsum payment of Kshs 19, 632, 000/= shall have been deposited in the lessors account upon execution and registration of the lease



97. From the foregoing clauses, which are contained in the Letter of offer, there is no gainsaying that the payment of the sum of Kshs 19, 632, 000/= only, being the lumpsum payment on account of rent for the 1st 4 years, was only due and payable upon the occurrence of the following events;
- a. Granting of vacant possession of the property by the lessor.
 - b. Execution of the lease document.
 - c. Registration of the lease document.
98. Notwithstanding the foregoing, it is common ground that the sum of Kshs 19, 632, 000/= only, which comprises of the lumpsum on account of rent for the first 4 year period, was indeed released to and paid out in favor of the 2nd Defendant.
99. It is also important to recall that by the time the said monies, namely, Kshs 19, 632, 000/= Only, was paid out to the 2nd Defendant, the Lease Agreement had neither been executed nor registered, in the manner stipulated vide the terms of the Letter of offer. For clarity, the aggregate sum of Kshs 19, 632, 000/= only, was paid to and/or remitted to in favor of the 2nd Defendant on or about the 22nd September 2017.
100. In any event, the fact that the Lease Agreement between the Plaintiff and the 1st Defendant was not registered is not in dispute. For the avoidance of doubt, the Defendants have confirmed as much vide paragraphs 23, 26 and 27 of the written submissions.
101. Taking into account, the circumstance under which the sum of Kshs 19, 632, 000/= only was paid to and in favor of the 2nd Defendant and given that the pre-requisite condition had not been met, it is evident and/or obvious that the payment of the said monies to the 2nd Defendant was to enable the 2nd Defendant to hold same on trust, pending compliance by the 1st Defendant.
102. Given that the Lease Agreement between the Plaintiff and the 1st Defendant was neither executed nor registered, as stipulated vide the terms of the Letter of offer and coupled with the fact that vacant possession was never granted, it is sufficient to note and observe that the monies that were released to and paid out in favor of the 2nd Defendant, could not be released in favor of the 1st Defendant.
103. In the premises, I find and hold that the 2nd Defendant herein held the sum of Kshs 19, 632, 000/= only, on trust for the Plaintiff herein and if such monies were ever released to the 1st Defendant (for which no evidence have been tendered) then the 1st and 2nd Defendants are liable.

If issue number d is in the affirmative, whether the Monies are Refundable to the Plaintiff.

104. Having found and held that the sum of Kshs 19, 632, 000/= only, ought to have been paid only upon the execution and registration of the Lease and coupled with vacant possession, the payment of same before the occurrence of the pre-requisite conditions created a trust between the Plaintiff and the 2nd Defendant.
105. Secondly, taking into account the clauses of the Letter of offer, which is the only binding document between the Plaintiff and the 1st Defendant, it therefore does arise that the monies which were paid out to the 2nd Defendant ought to be paid back and/or otherwise refunded.
106. In the premises, it is my finding and holding that the entire sum of Kshs 19, 632, 000/= only, ought to be paid back to the Plaintiff by the Defendants jointly and/or severally.



107. To buttress the foregoing position, it is sufficient to take cognizance of the holding in the case of *Maisha Investments Limited v Mohamed Hassanali Alimohamed Jammohamed & another* [2019] eKLR

“In the instant case there is clear and uncontroverted evidence that a deposit of Ksh5,250,000/= paid pursuant to the letter of offer on behalf of the plaintiff in fulfillment of a term of the letter of offer. When the deal fell through, there is also evidence that the defendants made an offer to refund the deposit paid. As the offer did not materialize as envisaged to a sale it was the proper thing to do for the defendant to make a refund of the deposit to the party who placed it. As the offer lapsed on expiry of the 30 days provided for completion and there was no provision made for default to complete, the parties in the circumstances ought to have been returned to their positions prior to signing the letter of offer. The Defendants would not be entitled to keep the deposit as that would be unjust enrichment as they cannot keep the money and the land, the transaction having aborted.”

108. Clearly, the Defendants herein, either jointly and/or severally cannot be allowed to retain the sum of Kshs 19, 632, 000/= only, whilst at the same time keeping and holding onto the land which was the subject of the intended Lease.

Final Disposition

109. Having dealt with and/or addressed the various issues for determination that were outlined herein before, it is now appropriate to dispose of the subject dispute.

110. Be that as it may, I come to the conclusion that the Plaintiff herein has established and/or proven her case in terms of the Complaint dated the 22nd April 2019, whereas the Defendants’ have failed to prove the Counter claim.

111. Consequently and in the premises, I now grant the following orders;

- i The Defendants jointly and/or severally shall Refund to and in favor of the Plaintiff the sum of Kshs 19, 632, 000/= only owing as at 30th June 2018.
- ii The Defendants shall also pay Interest at the rate of 14% per annum w.e.f 22nd April 2019 until full liquidation and/or refund.
- iii The Defendants Counter-claim be and is hereby dismissed.
- iv The Plaintiff be and is hereby awarded costs of the Suit and the Counter-claim, to be agreed upon and/or taxed by the taxing officer of the court.

112. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2022.

OGUTTU MBOYA,

JUDGE.

