



**Mawingo Construction 2010 Limited v Mombasa Water Products Limited (Environment & Land Case 288 of 2014) [2024] KEELC 5253 (KLR) (3 July 2024) (Judgment)**

Neutral citation: [2024] KEELC 5253 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 288 OF 2014**

**LL NAIKUNI, J**

**JULY 3, 2024**

**BETWEEN**

**MAWINGO CONSTRUCTION 2010 LIMITED ..... PLAINTIFF**

**AND**

**MOMBASA WATER PRODUCTS LIMITED ..... DEFENDANT**

**JUDGMENT**

**I. Preliminaries**

1. The Judgment of this Honourable Court pertains to the Plaint dated 17<sup>th</sup> November, 2014 and filed on the same day; by Mawingo Construction 2010 Limited, the Plaintiff herein against Mombasa Water Products Limited, the Defendant herein. The records hold that on 1<sup>st</sup> November, 2023, the suit by the Plaintiff in the main suit was dismissed for non attendance and want of prosecution under the provision of Order 12 Rule 1 and Order 17 Rules, 1, 2 and 3 of the Civil Procedure Rules, 2010 respectively.
2. Pursuant to that the matter was fixed for hearing with regard to the filed Counter – Claim dated the 12<sup>th</sup> April, 2022 and which subsequently proceeded on accordingly to its logical conclusion. Thus, this decision is based on the Counter – Claim filed by the Plaintiffs in the Counter – Claim and who were the Defendants from the mail suit herein.
3. Upon service of the pleading and summons to enter appearance to the Defendant, the Defendant entered appearance and filed its Amended Statement of Defence and Counter – Claim thereof.

**II. Description of the Parties in the suit**

4. The Plaintiff in the Plaint was described as a Limited Liability Company duly registered under the *Companies Act*, Republic of Kenya. While the Defendant was described as a Limited Liability



Company duly incorporated under the [Companies Act](#), Cap 486 of the Laws of Kenya and carrying on business within Mombasa County of the aforementioned Republic.

### III. Court directions before the hearing

5. The Honourable Court on 13<sup>th</sup> June, 2023 scheduled the hearing of the main suit on 1<sup>st</sup> November, 2023 where the Defendant/ Plaintiff in the Counter - Claim called (PCW - 1) after which they marked their case closed. The Plaintiff/Defendant in the Counter Claim did not call any witness neither did they cross examine the Plaintiff in Counter Claim's witness. After which parties were directed on the filing of their submissions.
6. This matter proceeded for hearing by way of adducing "Viva voce" evidence with the Plaintiff's witness (PCW - 1) testifying in Court on 1<sup>st</sup> November, 2023.

### IV. The Plaintiff's case

7. From the filed pleadings, vide Sale Agreements dated 23<sup>rd</sup> December 2011, the Deed of Settlement dated 15<sup>th</sup> March 2012 and the Addendum dated 30<sup>th</sup> July 2012, the Defendant sold to the Plaintiff ALL THOSE parcels of land known as subdivision numbers 4478, 4468, 4469, 4482, 4483, 4484, 4485, 4489, 4490, 4473, 4474, 4496, 4497, 4498, 4499, 4500, 4501, 4476, 4477, 4505, 4506, 4507, 4508, 4509, 4510, 4511 and 4512/VI/MN. It was a term of the said Agreements that upon payment of the ten percent (10%) deposit, (which the Plaintiff duly paid on 2<sup>nd</sup> December 2011), the Plaintiff would then take vacant possession. In addition to the plots set out in (3) above, the Plaintiff further purchased ALL THOSE - parcels of land known as subdivision numbers 4479, 4486, 4487 and 4488/ V1/MN from private individuals which plots were adjacent to those purchased from the Defendant.
8. Upon taking possession, the Plaintiff erected a perimeter fence demarcating the entire plots as one plot. It was a term of the said Agreements and further understanding between the Plaintiff and the Defendant that instead of the later transferring to the Plaintiff the individual plots purchased, it would procure their consolidation into one plot together with the plots set out in paragraph 5 where after the consolidated plot would be transferred to the Plaintiff free from any encumbrances. The Defendant in conjunction with the Plaintiff obtained all the necessary approvals and consents for the said consolidation. On or about 15<sup>th</sup> April 2014, the Defendant executed a Transfer instrument transferring the suit property to the Plaintiff free of all encumbrances as envisaged in the Sale Agreements herein before mentioned.
9. According to the Plaintiff on or about 20<sup>th</sup> August 2014, without any justification and color of right, pending the registration of the Transfer instrument in favor of the Plaintiff, the Defendant unilaterally, fraudulently and illegally granted an easement against the sui property thereby substantially affecting, varying and diminishing the acreage and value of the suit property which actions were equally a breach of the Sale Agreement.
10. The Plaintiff relied on the following particulars of the Defendant's fraud and breach:-
  - a. Granting an easement against the suit property without consultation, or consent and/or the Plaintiff's knowledge,
  - b. Illegally granting an easement on the suit property whereas the same had already been sold to the Plaintiff,
  - c. Granting an easement to third parties who were not privy to the sale to the Plaintiff without the latter's consent and/or knowledge.



11. The said easement cuts across the perimeter fence erected by the Plaintiff as stated at paragraph(6) above. On 10<sup>th</sup> November 2014, the Defendant moved into the suit property in the purport and guise of implementing the easement and commenced the malicious damage and destruction of the Plaintiff's perimeter fence and the Plaintiffs property. The Defendant's actions had caused and continue to cause great harm and prejudice upon the Plaintiff. Despite demand and notice of intention to sue, the Defendant had failed, ignored and/or refused to rescind the said easement or compensate the Plaintiff for the damage caused.
12. There was no dispute before any court of competent jurisdiction between the parties herein over the same subject matter and that the Honourable Court had the jurisdiction to adjudicate over the matter.
13. The Plaintiffs prayed for Judgment against the Defendants whether jointly and/or severally for:-
  - a. A declaration order that the Defendant's action of granting an easement over parcel of land L.R. No. 5046 (Original No. 5045/1/VI/MN is illegal and void ab initio.
  - b. A mandatory order do issue directing the Registrar of Lands, Mombasa Lands Registry to cancel and rescind the easement registered on 20<sup>th</sup> August, 2014 against parcel of Land L.R. No. 5046 (Orig. No. 5045 /1/VI/MN vide entry number 142.
  - c. General damages
  - d. Cost of this suit
14. The Plaintiff/Defendant on 8<sup>th</sup> September, 2022 filed a Statement of Defence to the Counter - Claim where it was averred that the Defendant admitted the contents of Paragraphs 2, 3, 4 and 5. In response to Paragraph 5A of the Counter - Claim, the Defendant averred that the entire purchase price was paid as agreed and there was no outstanding balance. In response to Paragraph 5B of the counter-claim, the Defendant averred that there was no condition in the contract or at all for NIC Bank to withhold the title deeds for payment of the sum of Kenya Shillings Thirteen Thousand Two Sixty Hundred (Kshs.13,260,000/-) or at all.
15. In further response to Paragraph 5B of the counterclaim the Defendant denied in totality allegation of collusion with I & M Bank or at all to defraud the Plaintiff of the sum of Kenya Shillings Thirteen Thousand Two Sixty Hundred (Kshs.13,260,000/-) at all. There had never been any criminal inquiry if at all the allegations of fraud were true. The Defendant had no knowledge of the contents of Paragraph 5C of the counterclaim. In response to Paragraph 5D of the counterclaim the Defendant denied the existence of any breach on its part as to entitle the Plaintiff to any interest or at all. In response to Paragraph 5E of the counterclaim, the Defendant averred that the correct position under the Agreement is that the Title Deeds were to eventually be handed over to the Defendant upon completion and that is exactly what took place. They could not have ended in the Plaintiff's hands without completion.
16. In further response, the Defendant averred that at all material times the Plaintiff was NIC Bank's customer and the Defendant had never had any relations with the said Bank. It would thus be impossible to expect the Defendant to issue instructions of any kind for deposit of whatever title deeds with the Bank or even colluded with the Bank against its own customer. The Defendant denied the contents of Paragraphs 5F and 5G of the counter claim and averred that the Plaintiff was not entitled to any damages. The Defendant had no knowledge of the contents of Paragraph 5H of the counterclaim and the content of Paragraphs 5I and 5J of the counterclaim and averred that it is quite absurd that a vendor would incur costs for transferring a property it has already sold.



17. In response to Paragraph 6 of the Counter - Claim the Defendant averred that all the title deeds to the property that the Plaintiff holds were transferred voluntarily under the Agreement after all condition had been met as such the issue of return of title deed cannot arise. In response to Paragraphs 6A, 6B, 6C, 6D, 6E, 6F, 6G the Defendant denied the existence of any contract as alleged. In further response, the Defendant averred that if ever there was a contract which turned out to be fraudulent and/ or null and void as pleaded, the Plaintiff could not be heard to be sought to enforce an illegality or a void contract.

## **V. The Defendant's case**

18. The Defendant entered appearance and filed its statement of defence and counter claim dated 1<sup>st</sup> December, 2019 which it later amended on 12<sup>th</sup> April, 2022. The Defendant admitted the contents of paragraph 3 of the Plaintiff and added that even though the agreement for sale dated 23<sup>rd</sup> December, 2011 was in respect of transfer of fourteen (14) plots the Defendant consolidated 31 sub-plots and transferred the same to the Plaintiff as per the terms of the agreement for sale dated 23<sup>rd</sup> December, 2011 and the subsequent false addendums dated 15<sup>th</sup> March, 2012 and 30<sup>th</sup> July, 2012.
19. Further to paragraph 3 above, the Defendant stated that in summary the agreement between the Plaintiff and the Defendant was for sale of 2.5 acres at a consideration of a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-); the Plaintiff agreed to purchase for a consideration of a sum of Kenya Shillings Fourty Seven Million (Kshs. 47,000,000/-); and thereafter, the Plaintiff a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) thus making a total of 6 acres for a total consideration of a sum of Kenya Shillings Sixty Seven (Kshs. 67,000,000/-). The Defendant stated that vide a letter dated 9<sup>th</sup> September, 2012 the Plaintiff through Mawingo Construction Company Limited confirmed its intention to purchase the 6 acres as set out in the agreement for sale and the addendums and undertook to pay the agreed consideration of a sum of a sum of Kenya Shillings Sixty Seven Million (Kshs. 67,000,000/-).
20. The Defendant admitted Paragraph 4 of the Plaintiff save for the fact that the Plaintiff was to take possession of its individual plots as they were saved for the public road existing prior to consolidation. The Defendant denied the contents of Paragraph 5 of the Plaintiff. In the alternative and without prejudice to the foregoing paragraph 5 the defendant averred that it was quite clear that the plots 4486, 4487 and 4488/VI/MN are adjacent to a public road which no one had authority to either sell or purchase. The Defendant admitted the contents of Paragraph 6 of the Plaintiff but averred that the Plaintiff had built a wall demarcating his and also blocking off the public road.
21. The Defendant admitted the contents of Paragraph 7 of the Plaintiff but averred that the interests sold and subsequent transfer of consolidated title did not include Plot no. 4470 was not to be consolidated with the other plots as the same is located far away from the other plots. The said consolidation and subsequent transfer was done subject to the terms contained in the agreement for sale dated 23<sup>rd</sup> December, 2011, in particular Clause 9.1 thereof which provides that the properties were being sold subject to all existing easements, quasi-easements and rights of way, equities, quasi-equities and overriding interests.
22. The Defendant admitted the contents of Paragraph 8 of the Plaintiff save for the fact that the consolidation was precedent fulfilling statutory and County conditions. The Defendant admitted Paragraph 9 of the Plaintiff and added that clause 5.1 of the agreement for sale provided that the completion period would be ten (10) calendar months from the date when the Defendant would have handed over the consolidated title to the Plaintiff. As such, the completion period was 5<sup>th</sup> March, 2015. The Defendant stated that even though the Plaintiff confirmed the contract and undertook to pay a sum of Kenya Shillings Fifty Two Million (Kshs. 52,000,000/-) through Mawingo Construction 2010



- Limited the Plaintiff did not make the said payment as agreed. The Defendant had since learnt that Mawingo Construction Company does not exist and/or its not registered as a company under the laws of Kenya. The Plaintiff used the said addendums for purposes of frustrating the Defendant with payment and shielding itself using Mawingo Construction Company Limited as the Plaintiff was aware that the Defendant would not recover anything from the non- existent entity.
23. Further, to the above, the Defendant stated that the subsequent addendums dated 15<sup>th</sup> March, 2012, 10<sup>th</sup> September, 2013 and 30<sup>th</sup> July, 2012 were entered into between the Defendant and Mawingo Construction Company Limited which was a non – existent entity. As such, the said addendums were a nullity as Mawingo Construction Company Limited never had the capacity in law to sign addendums. Furthermore, the Defendants had never executed any agreement for sale with Mawingo Construction Company Limited. Therefore, the said addendums were standing on a nothing and had no legal effect at all since the provision of Section 3(3) of the Law of Contract Act and Section 38 of the Land Act make it mandatory that any disposition in land must be in writing.
  24. According to the Defendant without prejudice to what was stated hereinabove, the Defendant stated that Clause 15.2 provided that the Plaintiff would be liable to pay interest with respect to any balance of purchase price which was not paid at the completion date. Even though the Plaintiff acknowledged a balance of a sum of Kenya Shillings Thirteen Million Two Hundred and Sixty (Kshs. 13,260,000/-) vide a letter dated 10<sup>th</sup> September, 2014 and 10<sup>th</sup> April, 2015.; a balance of sum of Kenya Shillings Thirteen Million Two Hundred and Sixty (Kshs. 13,260,000/-)vide a letter dated 26<sup>th</sup> August, 2016, the Plaintiff had to date not paid the same. Therefore, the Defendant herein raised a Counter - Claim for immediate payment of the aforesaid admitted sum plus interest as per the terms of the agreement for sale.
  25. The Defendant stated that despite the Plaintiff having admitted the aforesaid debt through Mawingo Construction 2010 Limited and having failed to pay the same, the Plaintiff proceeded to file Replying Affidavit dated 16<sup>th</sup> May, 2017 as Mawingo Construction Company Limited in the Civil case of: “Mombasa Chief Magistrate Civil Suit No. 307 of 2016” denying the said debt. The Plaintiff’s character was therefore wanting and was only intended to frustrate the Defendant in the aforesaid sale transaction. Even though the Plaintiff took possession of the Defendant’s property in December, 2011 the Plaintiff had been reluctant to complete the payment of the purchase price or even to sign an agreement for sale in respect of the properties covered in the addendums under the name, Mawingo Construction Company Limited. The Defendant had been forced to watch its property being used by the Plaintiff who has refused to pay the balance of the purchase price while the Defendant is suffering hardship. This was in clear violation of Article 40 which guarantees the Defendant’s its right to own property and only lose it upon payment of due consideration.
  26. The Defendant admitted the contents of Paragraph 10 of the Plaint and averred that the interest sold for the individual plots was transferred to the Plaintiff without any encumbrances. The Defendant also admitted to the contents of Paragraph 11 of the Plaint and averred that the only interest transferrable was for the individual plots sold and purchased as contained in the sale agreement and not including the parcel of land known as MN/VI/4420/1. The Defendant denied the contents of Paragraph 12 and 13 of the Plaint and particulars of fraud and breach enumerated (i) to (iii) therein and reiterates the contents of Paragraph 8 herein above. Further, the Defendant pleaded estoppel and Res - Judicata by reason of the Ruling rendered by the court on 26<sup>th</sup> February, 2015 with the Plaintiff neither appealed against or sought a review of the same.
  27. In the alternative and without prejudice to the foregoing paragraph, the Defendant averred in response that the easement over the Plaintiff’s property was for the public road reserve alluded to at paragraph 6



of the defence and which the Plaintiff acknowledged on 10<sup>th</sup> September, 2014. The defendant denied the contents of paragraph 18 of the plaint. The Defendant averred that the easement was on a public road surveyed as MN/VI/4420/1. The Defendant denied the contents of Paragraphs 14,15 and 16 of the Plaint. Paragraph 17 and 18 of the Plaint were admitted. The Defendant prayed that the Plaintiff's suit be dismissed with costs.

28. On the Counter - Claim, the Plaintiff in Counter - Claim herein reiterated all the contents of its defence above as if the same were set out herein seriatim. The description of the Plaintiff and the Defendant was as set out at Paragraph 2 of the Defence. The Plaintiff in Counter - Claim herein averred that it entered into an agreement for sale with the Defendant in Counter - Claim, dated 23<sup>rd</sup> December, 2011 and transferred to the Defendant thirty one (31) parcels of land contained in the schedule to the said agreement and the subsequent addendums dated 15<sup>th</sup> March, 2012 and 30<sup>th</sup> July, 2012. The interest sold to the Defendant was for the parcels individually excluding the 9m access road that was adjacent to (original) plots MN/VI/4486, MN/VI/4487, and MN/VI/4488. It was an express term of the agreement at clause 5.1 that the vendor would at completion hand over the consolidated title to NIC Bank Ltd.
29. In fulfillment of this clause the vendor consolidated the parcels itemized in the schedule as contained in the agreement and on 6<sup>th</sup> August, 2014 the Plaintiff issued the Defendant with a Certificate of Title L.R No. 5046(Original No. 5045/I/VI/MN). Clause 5.1 of the agreement for sale provided that the completion period shall be ten (10) calendar months from the date when the Plaintiff would hand over the consolidated title to the Defendant. As such, the completion period was 6<sup>th</sup> June, 2015 as the Plaintiff issued the Defendant with the Certificate of title on 6<sup>th</sup> August, 2014.
30. Clause 15.2 provided that the Defendant would be liable to pay interest with respect to any balance of purchase price which was not paid at the completion date. The Plaintiff states that out of the agreed purchase price of a sum of Kenya Shillings Sixty Seven Million (Kshs. 67,000,000/-) the Defendant has paid a total of a sum of Kenya Shillings Thirty Three Million Three Fourty One Thousand (Kshs.33,341,000/-) leaving an outstanding balance of a sum of Kenya Shillings Thirty Three Million Six Fifty Nine Thousand (Kshs. 33,659,000/-) with the Defendant has not paid to date. Indeed, vide a letter dated 10<sup>th</sup> September, 2014 the Defendant acknowledge an outstanding amount of a sum of Kenya Shillings Thirteen Million Two Sixty Thousand (Kshs. 13,260,000/-) but had not paid the same.
31. Vide a letter dated 12<sup>th</sup> March, 2015 the Plaintiff forwarded the original certificate it received for the property known as Plot No. 5046 (Original No.5046/I/MN) CR. No. 63198 to the NIC Bank Limited with instructions that it holds the said title document until the sum of a sum of Kenya Shillings Thirteen Million Two Sixty Thousand (Kshs. 13,260,000/-) was paid by the Defendant. However, the created a scheme vide I & M Bank Limited which procured the release of the said title document from NIC Bank Limited without first paying the sum of a sum of Kenya Shillings Thirteen Million Two Sixty Thousand (Kshs. 13,260,000/-).
32. The Plaintiff had since instituted Mombasa High Court Civil Suit No.402 of (formerly Mombasa Chief Magistrate Civil Case No. 307 of 2016) for recovery of the sum of a sum of Kenya Shillings Thirteen Million Two Sixty Thousand (Kshs. 13,260,000/-) since the bank breached the Plaintiff's instructions to hold the certificate for Plot No. 5046 (Original No.5046/I/MN) CR. No. 63198 and to release the same to the Defendant only when the sum of a sum of Kenya Shillings Thirteen Million Two Sixty Thousand (Kshs. 13,260,000/-) was paid in full. Clause 1 (d) of the agreement for sale provides that the interest rate would be a rate which is 2% above the base lending rate as may be published by Barclays Bank of Kenya Limited. The Barclays Bank typically follows the Central Bank base lending rates. The Central Bank of Kenya base lending rate was at an average of 17.210 % from July 1991 to



June, 2019 and at an average of 12.470% from July, 2019. Therefore, the Plaintiff is entitled to interest on the balance of the purchase price at a rate of 19.210% p.a from 6<sup>th</sup> March, 2015 to June, 2019 and 14.470% from July,2019 until when the Defendant would have fully repaid the outstanding purchase price. The Plaintiff was therefore entitled to interest in the sum of a sum of Kenya Shillings Thirty Seven Million Six Thirty Six Hundred Thousand and fourty four cents (Kshs. 37,630,600.44/=) on the outstanding sum of a sum of Kenya Shillings Thirty Three Million Six Fifty Nine Thousand (Kshs. Kshs. 33,659,000/- stated above as at November, 2021.

33. Further, the Plaintiff states that it had handed over the original certificates of title and duly executed transfers for plot nos. 4519, 4520, 4521, 4522,4523,4524,4525, 4526, 4527, 4531, 4532,4533,4534,4535,4536,4537,4538,4539, 4544, 4545, 4546, 4552 and 4553 to the Defendant so that the Defendant would hold the same as security for the advance payment which had been made in respect of the agreement for sale dated 23<sup>rd</sup> December, 2011. It was a condition precedent that the said titles would be kept for safe custody at NIC Bank Limited and not otherwise. Even though the Plaintiff issued the Defendant with the certificate of title in respect of the consolidated titles on 6<sup>th</sup> August, 2014 the Defendant had failed to return the aforesaid titles together with the executed transfers to the Plaintiff. The Plaintiff therefore sought an order for the Defendant to forthwith and unconditionally return the aforesaid original certificates of titles and the executed transfers to the Plaintiff.
34. The Plaintiff fulfilled all the obligations placed upon it under the agreement for sale dated 23<sup>rd</sup> December, 2011 the subsequent false addendums dated 15<sup>th</sup> March, 2012 and 30<sup>th</sup> July, 2012 but the Defendant breached the same in the following instances:
35. The Plaintiff in the Counter - Claim relied on the following particulars of breach of agreement for sale dated 23<sup>rd</sup> December, 2011 by the Defendant:-
  - a. The Defendant failed to complete the payment of the purchase price as per the agreement.
  - b. Even though the Defendant had not completed the payment of the purchase price, the Defendant obtained a facility of a sum of Kenya Shillings Ninety Million (Kshs. 90,000,000/-) from the I & M Bank Limited using the transferred property to wit, L.R No. 5046/I/VI/MN as security.
  - c. The Defendant failed to return the original certificates of title and the executed transfer documents with respect to Plot nos. 4519, 4520, 4521, 4522, 4523,4524, 4525,4526, 4527,4531, 4532, 4533, 4534, 4535, 4536, 4537, 4538, 4539, 4544, 4545, 4546, 4552 and 4553 after the Plaintiff had handed over the certificate of title L.R No.5046/I/VI/MN. Instead the Defendant moved into the said properties and took possession of the same.
36. The Plaintiff in the Counter - Claim therefore sought general damages for breach of the contract dated 23<sup>rd</sup> December, 2011 from the Defendant. The addendums dated 15<sup>th</sup> March, 2012 and 30<sup>th</sup> July, 2012 were fraudulent due to the following reasons:
  - a. Mawingo Construction Company Limited never existed and/or it's not registered as a company under the laws of Kenya. The Defendant had used the said addendums for purposes of frustrating the Plaintiff with payments and shielding itself using Mawingo Construction Company Limited] as the Defendant was aware that the Plaintiff could not recover anything from the aforesaid non-existent entity.
  - b. The addendums dated 15<sup>th</sup> March, 2012, 10<sup>th</sup> September, 2013 and 30<sup>th</sup> July, 2012 were entered into between the Defendant and Mawingo Construction Company Ltd which was a non -



existent entity. As such, the said addendums are a nullity as Mawingo Construction Company Limited did have the capacity in law to sign the addendums.

- c. Furthermore, the Defendant had never executed any agreement for sale with Mawingo Construction Company Limited. Therefore, the said addendums were standing on a nothing and had no legal effect at all since Section 3 (3) of the Law of Contract Act and Section 38 of Land Act make it mandatory that any disposition in land must be in writing.
37. The Plaintiff stated that the Defendant purchased Plot No. 4470/VI/MN which was far apart from the other properties at a consideration of a sum of Kenya Shillings Eight Fifty Thousand (Kshs. 850,000/=). However, even though the Plaintiff transferred the said property to the Defendant, the Defendant was yet to pay the agreed consideration. The Plaintiff stated that during the transfer exercise, it incurred several expenses on behalf of the Defendant which the Defendant undertook to refund the Plaintiff. However, to date the Defendant had not refunded the Plaintiff the said costs. The costs are as follows:
- a. Costs of transferring 4 plots from Munyao and Alusha and payment of stamp duty Kshs. 144,000/-
  - b. Munyao and Alusa share of Land Rent/Rates Kshs. 18,600/-
  - c. County Government Land Rates Kshs 28,400/-
  - d. Advocates Fees Kshs 100,000/-
  - e. Advocates Fees on main transfer (Plot No.5046 /MN/VI for Kshs. 10,000,000/=) Kshs 720,000/-
  - f. Survey and Consolidation costs Kshs 120,000/-
  - g. Cost incurred in transferring the main plot and Stamp duty paid Kshs 400,000/-
  - h. Valuation expenses for Plot No. 5046/MN/VI Kshs 550,000/-
  - i. Consent to transfer the 4 plots Kshs 10,000/-
- Total Kshs 2,091,000/-
38. The Plaintiff in the Counter - Claim therefore sought the immediate payment of a sum of Kenya Shillings Two Million Ninety One Thousand (Kshs. 2,091,000/-) from the Defendant. Furthermore, even though the agreement for sale dated 23<sup>rd</sup> December, 2011 was in respect of transfer of fourteen (14) plots the Plaintiff consolidated 31 sub – plots and transferred the same to the Defendant as per the term of the agreement for sale dated 23<sup>rd</sup> December, 2011 and the subsequent false addendums dated 15<sup>th</sup> March, 2012 and 30<sup>th</sup> July, 2012.
39. The Plaintiff stated that in summary the agreement between the Plaintiff and the Defendant was for the sale of 2.5 acres at a consideration of a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-); the Defendant agreed to purchase another extra 2 acres for a sum of Kenya Shillings Twenty Seven Million (Kshs. 27,000,000/-) making it a total of 4.5 acres for a consideration of a sum of Kenya Shillings Thirty Nine Million (Kshs. 39,000,000/-); and thereafter, the Defendant agreed to purchase an additional 1.5 acres at a consideration of a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) thus making a total of 6 acres for a total consideration of a sum of Kenya Shillings Sixty Seven Million (Kshs. 67,000,000/-). Vide a letter dated 9<sup>th</sup> September, 2012 the Defendant through Mawingo Construction Company Limited confirmed its intention to purchase the 6 acres as set out in the agreement for sale and the addendums and undertook to pay the agreed consideration of a sum of Kenya Shillings Sixty Seven Million (Kshs 67,000,000/-).



40. The Plaintiff in the counter claim averred that even though the Defendant confirmed the contract and undertook to pay a sum of Kenya Shillings Sixty Seven Million (Kshs. 67,000,000/-) through Mawingo Construction 2010 Limited the Plaintiff did not make the said payment as agreed. The Plaintiff had since learnt that Mawingo Construction Company Limited never existed and/or its not registered as a company under the laws of Kenya. The Defendant had used the said addendums for purposes of frustrating the Plaintiff with payments and shielding itself using Mawingo Construction Company Limited as the Defendant was aware that the Plaintiff would not recover anything from the aforesaid non – existent entity.
41. The Plaintiff stated the subsequent addendums dated 15<sup>th</sup> March, 2012, 10<sup>th</sup> September, 2013 and 30<sup>th</sup> July, 2012 were entered into between the Plaintiff and Mawingo Construction Company Limited which was a non – existent entity. As such, the said addendums were a nullity as Mawingo Construction Company Limited never had the capacity in law to sign the addendums. Furthermore, the Defendant had never executed any agreement for sale with Mawingo Construction Company Limited. Therefore, the said addendums were standing on a nothing and had no legal effect at all since Section 3(3) of the Law of Contract Act and Section 38 of the Land Act make it mandatory that any disposition in land must be in writing.
42. Even through the Defendant took possession of the Plaintiff's property in December 2011 the Defendant had been reluctant to complete the payment of the purchase price or even to sign an agreement for sale in respect of the properties covered in the addendums under the name, Mawingo Construction Company Limited. The Plaintiff had been forced to watch its property being used by the Defendant in the counter claim who had refused to pay the balance of the purchase price while the Plaintiff was suffering hardship. This was in clear violation of the provision of Article 40 which guaranteed the Plaintiff its own property and only lose it upon payment of due consideration.
43. The Plaintiff stated that vide a letter dated 6<sup>th</sup> August, 2019 the Plaintiff rescinded the contract dated 23<sup>rd</sup> December, 2011. However, since the Defendant was already holding a title for the property, the Plaintiff prays for an order for cancellation of the said title and retransfer of the property in the name of the Plaintiff. The Plaintiff was therefore seeking for a declaration that the addendums dated 15<sup>th</sup> March, 2012, 10<sup>th</sup> September, 2013 and 30<sup>th</sup> July, 2012 are a nullity and a consequential order directing the Defendant to release the original titles for the properties known as plot nos. 4469, 4473, 4476, 4484, 4490, 4505, 4506, 4507 and 4509/VI/MN.
44. The Plaintiff stated that the Defendant had been using the properties known as Plot nos. 4469, 4473, 4476, 4484, 4490, 4505,4506,4507 and 4509/VI/MN and has in turn denied the Plaintiff the right to enjoy the use of the said properties. The Plaintiff therefore seeks mesne profits from the Defendant at the sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-) per month from July 2012 when the Defendant started using the said properties. The Plaintiff being the registered owner of the adjoining parcels of land consolidated the portions sold to the Defendant but still reserved the 9metres access road for use by both the Defendant and M/s. Ocean freight (EA) Limited and also as storm water drainage. The 9m access road served as the storm water drainage as the Defendant constructed culverts in the year 2007 underneath the said 9 metres road and the main 18 metres road for the benefit of all persons and in public interest.
45. The Defendant purchased the suit property as individual plots with full knowledge of the existence of culverts on the 18 metres main road draining its contents in the culverts beneath the 9 metres access road adjoining (original)plots MN/VI/4486, MN/VI/4487, and MN/VI/4488. It was an express term of the agreement at Clause 9 that the property was sold subject to all subsisting easements. The Defendant on taking possession constructed its drainage and directed the water beneath a boundary



wall constructed by M/s. Ocean freight (EA) Limited leading to its collapse. As a consequence of the Defendants action alluded in Paragraph 10 above M/s. Ocean freight (EA) Limited demanded from the plaintiff herein (as agents of the Purchaser/Defendant) Kshs. 3,015,547.60/- on 25<sup>th</sup> August, 2014 through its lawyers Ms. Cootow & Associates Advocates.

46. As a consequence of the blockage of the drainage by the Defendant large volumes of water continue to flood the Plaintiff's property downhill rendering it unsuitable for meaningful economic use. As a consequence of the large volumes of water carrying large volumes of mud emanating from the defendant property the Plaintiffs construction on its property downhill had suffered considerable delay as every time it rains work had to stop. As a consequence of the above the plaintiff has to incur huge financial outlay to clear the mudslides and other incidental damages. The said costs had been assessed by Precise Cost Engineering International at a sum of Kenya Shillings Seven Million Two Hundred and Sixty Thousand (Kshs.7,200,060/-) and the Plaintiff claimed the same from the Defendant.
47. The actions of the Defendants in blocking the drainage have caused and continue to cause harm and great prejudice on the plaintiff. The Plaintiff therefore seeks general damages with respect to the aforesaid wrongs committed by the Defendant and a sum of Kenya Shillings Seven Million Two Hundred and Sixty Thousand (Kshs. 7,200,060/-) being the costs for rectifying the damage caused by the storm drainage. The Plaintiff stated that despite demand having been made to the Defendant to admit liability and pay the outstanding amount, the Defendant has failed to reply to the said demand.
48. The Plaintiff stated that there was no other pending suit relating to the subject Plaintiff has sued the Bank for breach of instruction given to it by the Plaintiff to hold the original certificate of title for Plot No. 5046 (Original No.5046/I/MN) CR. No. 63198 and to release the same to the Defendant only when the sum of a sum of Kenya Shillings Seven Million Two Hundred and Sixty Thousand (Kshs. 13,260,000/-) was paid in full.
49. The Plaintiff in the Counter Claim/Defendant prayed for Judgment against the Defendant in the Counter - Claim/Plaintiff for:-
  - a. That the Defendants' suit be dismissed.
  - b. General damages for breach of contract
  - c. Immediate payment of Kshs. 33,659,000/- being the balance of the purchase price
  - d. Interest on (3) above at a rate of 19.210% p.a. from 6<sup>th</sup> June,2015 to June,2019 and 14.470% from July, 2019 July, 2015 until when the Defendant will have fully repaid the outstanding purchase price.
  - e. An order directing the Defendant to forthwith and unconditionally handover the original certificates of title and with duly executed transfers with respect to plot nos. 4519, 4520, 4521, 4522, 4523, 4524, 4525, 4526, 4527, 4531, 4532, 4533, 4534, 4535, 4536, 4537, 4538, 4539, 4544, 4545, 4546, 4552, 4553 and 4470.
  - f. General damages by way of mesne profit for use of the properties known plot nos. 4519,4520, 4521, 4522, 4523, 4524, 4525, 4526, 4527, 4531, 4532, 4533, 4534, 4535, 4536, 4537, 4538, 4539, 4544, 4545, 4546, 4552, 4553 and 4470.
  - g. A mandatory injunction directing the Defendant to vacate and render vacant possession of the properties known as plot nos. 4519, 4520, 4521, 4522, 4523, 4524, 4525, 4526, 4527, 4531, 4532, 4533, 4534, 4535, 4536, 4537, 4538, 4539, 4544, 4545, 4546, 4552, 4553 and 4470.



- h. An order directing the Defendant to Pay the Plaintiff the sum of Kshs. 2,091,000/- being the total expenses incurred by the Plaintiff on behalf of the Defendant.
  - i. Kshs. 850,000/- being the agreed consideration for Plot No. 4470/VI/MN together with interests from December 2012 when the same was payable.
  - j. Interest on 6 above at court rate from the date of the counter-claim.
  - k. General damages for storm drainage as pleaded at paragraphs 10 to 15 of the counter-claim.
  - l. Special damages of Kshs. 7,200,060/- being the costs for rectifying the damage caused by the storm water drainage.
  - m. An order directing the Defendant to stop draining storm water on the Plaintiff's parcels of land know as plots nos. MN/VI/4486, MN/VI/4487, MN/VI/4488, MN/VI/4489 and MN/VI/4490.
  - n. A declaration that the addendums dated 15<sup>th</sup> March, 2012, 10<sup>th</sup> September, 2013 and 30<sup>th</sup> July, 2012 are null and void for all purposes.
  - o. An order directing the Defendant to forthwith release the original titles for the properties known as plot nos. 4469, 4473, 4476, 4484, 4490, 4505, 4506, 4507 and 4509/VI/MN to the Plaintiff.
  - p. General damages by way of mesne profit in the sum of Kshs. 300,000/=per month from 2012 when the Defendant started using plot nos. 4469, 4473, 4476, 4484, 4490, 4505, 4506, 4507 and 4509/VI/MN.
  - q. Costs of the suit.
  - r. Any other relief that the court may deem fit to grant
50. The Plaintiff in the Counter - Claim/Defendant called its witness on 1<sup>st</sup> November, 2023 who testified as follows:-

**A. Examination in chief of PCW - 1 - by Mwanzia Advocate.**

51. PCW – 1 testified on oath in the English language. He identified himself as Mr. Joseph Mbugua Gichanga and provided all the particulars of his Kenyan identity card details. He stated that he prepared a witness statement dated (undated ) filed on 13<sup>th</sup> June, 2013. He prepared documents dated 15<sup>th</sup> May, 2022 being 37 documents; Plaintiff in Counter - Claim Exhibit numbers 1 to 37. He was the Managing Director of Mombasa Water Products Limited; they had invested in a lot of land in Mombasa. He sold the land to the Defendant in the Counter - Claim – Mawingo Construction Limited 2 ½ acres in 2011 for a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) and they had a sale agreement dated 23<sup>rd</sup> December, 2011. Eventually he sold the land and he transferred the land to them; he further asked for 2 acres and 2 acres.
52. According to PCW – 1 hence 6 acres were transferred to the Defendant but the agreement was for 2 ½ acres; the total purchase price a sum of Kenya Shillings Sixty Million (Kshs. 67,000,000/-); he had paid a sum of Kenya Shillings Thirty Three Million (Kshs. 33,000,000/-) leading an outstanding balance of a sum Kenya Shillings Thirty Four Million (Kshs. 34,000,000/-). He had given him 24 title deeds for each parcel. The 24 titles were with him, he transferred 4 ½ acres to him. He decided the cancel for the six (6) acres but he may remain the 2 ½ . He can not pay for the 4 ½ acres; Referred to paragraph 5A of the amended defence.



53. In conclusion, the Plaintiff in Counter - Claim/Defendant through its Counsel, Mr. Mwanzia marked the close of its case.

## **VI. Submissions**

54. On 11<sup>th</sup> November, 2023, the Plaintiff and Defendant marked the close of this case. Subsequently, the Honourable court directed that parties to file their submissions within stringent timeframe thereof on. Pursuant to that, by the time of penning down this Judgement, the Honourable Court was only able to access the Submissions by the Plaintiff (In the Counter – Claim) and not not any from the Defendants (In the Counter – Claim) whatsoever.

55. Be that as it may, the Honourable Court proceeded to reserve a date to deliver its Judgement on 9<sup>th</sup> July, 2024.

### **A. The Written Submissions by the Plaintiff in Counter - Claim/Defendant**

56. The Plaintiff in Counter - Claim/Defendant through the Law firm of Messrs. Mutisya Mwanzia & Ondeng Advocates filed its written submissions dated 9<sup>th</sup> February, 2024. Mr. Mwanzia Advocate submitted that on 1<sup>st</sup> November, 2023 when this matter came up for hearing the Court dismissed the Plaintiff's suit with costs and the Defendant proceeded to testify on his counter-claim. Therefore, for consideration and determination is the Defendant's Counter-Claim dated 12<sup>th</sup> April, 2022. The Defendant sought the above stated reliefs.

57. The brief facts according to Learned Counsel were that vide an Agreement for Sale dated 23<sup>rd</sup> December, 2011, the Plaintiff purchased the leasehold interest comprised in land reference number 4468,4469, 4470,4473, 4474, 4478, 4482, 4483,4484, 4485, 4496,4497,4498, 4499 VI/MN (a total of fourteen (14) subdivisions) from the Defendant at a consideration of a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-). Further, the Plaintiff agreed to purchase another extra 2 acres for a sum of Kenya Shillings Twenty Million (Kshs. 27,000,000/-) making it a total of 4.5 acres for a consideration of a sum of Kenya Shillings Fourty Seven Million (Kshs.47,000,000/-) and thereafter, the Plaintiff agreed to purchase additional 1.5 acres at a consideration of a sum Kenya Shillings Twenty Million (Kshs. 20,000,000/=) thus making a total of 6 acres for a consideration of a sum of Kenya Shillings Sixty Seven Million (Kshs. 67,000,000/=). The Defendant therefore consolidated 31 sub-plots instead of 14 and transferred the same to the Plaintiff.

58. The Learned Counsel submitted that on 6<sup>th</sup> August, 2014, the Defendant issued the Plaintiff with a certificate of title L.R No. 5046 (Original No. 5045/I/VI/MN). Clause 5.1 of the agreement for sale provided that the completion period shall be ten (10) calendar months from the date when the Defendant would hand over the consolidated title to the Plaintiff. As such, the completion period was 6<sup>th</sup> June, 2015 as the Defendant issued the Plaintiff with the certificate of title on 6<sup>th</sup> August, 2014. Clause 15.2 provided that the Plaintiff would be liable to pay interest with respect to any balance of purchase price which was not paid at a sum of Kenya Shillings Sixty Seven Million (Kshs. 67,000,000/-) the Plaintiff has paid a total of a sum of Kenya Shillings Thirty Three Million Three Fourty One Thousand (Kshs. 33,341,000/-) leaving a balance of a sum of Kenya Shillings Thirty Million Six Fifty Nine Million (Kshs. 33,659,000/-) which the Plaintiff had not paid to date. Indeed, vide a letter dated 10<sup>th</sup> September, 2014 the Plaintiff acknowledge an outstanding amount of a sum of Kenya Shillings Thirteen Million Two Sixty Thousand (Kshs. 13,260,000/-) but had not paid the same.

59. According to the Learned Counsel, vide a letter dated 12<sup>th</sup> March, 2015 the Defendant forwarded the original certificate it received for the property known as Plot No. 5046 (Original No. 5046/I/MN) CR. No.63198 to the NIC Bank Limited with instructions that it holds the said title document until the



sum of a sum of Kenya Shillings Thirteen Million Two Sixty Thousand (Kshs. 13,260,000/-) was paid by the Plaintiff. However, the created a scheme vide I & M Bank Limited which procured the release of the said title document from NIC Bank Limited without first paying the sum of a sum of Kenya Shillings Thirteen Million Two Sixty Thousand (Kshs.13,260,000/-). Furthermore, Clause 1 (d) of the agreement for sale provides that the interest rate would be a rate which is 2% above the base lending rate as may be published by Barclays Bank of Kenya Limited. The Barclays Bank typically follows the Central Bank base lending rates. The Central Bank of Kenya base lending rate was at an average of 17.210% from July 1991 to June, 2019 and at an average of 12.470% from July, 2019. Therefore, the Defendant is entitled to interest on the balance of the purchase price at a rate of 19.210% p.a. from 6th March, 2015 to June, 2019 and 14.470% from July, 2019 until when the Plaintiff will have fully repaid the outstanding purchase price. The Defendant was therefore entitled to interest in the sum of a sum of Kenya Shillings Thirty Seven Million Six Thirty Thousand Six Hundred and Fourty Four cents (Kshs. 37,630,600.44/=) on the outstanding sum of a sum of Kenya Shillings Thirty Three Million Sixty Fifty Nine Thousand (Kshs. 33,659,000/-) stated above as at November, 2021.

60. The second part of the Defendant's claim was that it had handed over the original certificates of title and duly executed transfers for plot nos.4519, 4520, 4521, 4522, 4523,4524, 4525, 4526, 4527, 4531, 4532, 4533, 4534, 4535, 4536, 4537, 4538, 4539, 4544, 4545, 4546, 4552 and 4553 to the Plaintiff so that the Plaintiff would hold the same as security for the advance payment which had been made in respect of the agreement for sale dated 23<sup>rd</sup> December, 2011. It was a condition precedent that the said titles would be kept for safe custody at NIC Bank Limited and not otherwise. The second part of the Defendant's claim was that it had handed over the original Certificates of title and duly executed transfers for plot nos. 4519, 4520, 4521, 4522,4523, 4524, 4525, 4526, 4527, 4531, 4532, 4533, 4534, 4535, 4536, 4537, 4538, 4539, 4544, 4545, 4546, 4552 and 4553 to the Plaintiff so that the Plaintiff would hold the same as security for the advance payment which had been made in respect of the agreement for sale dated 23<sup>rd</sup> December, 2011. It was a condition precedent that the said titles would be kept for safe custody at NIC Bank Limited and not otherwisethe Plaintiff to forthwith and unconditionally return the aforesaid original certificates of titles and the executed transfers to the Defendant. It was not disputed that Mawingo Construction Company Limited never existed and/or it was not registered as a company under the Laws of Kenya. However, the Plaintiff had used addendums for purposes of frustrating the Defendant with payments and shielding itself using Mawingo Construction Company Limited as the Plaintiff was aware that the Defendant could not recover anything from the aforesaid non - existent entity.
61. The Learned Counsel submitted that the addendums dated 15<sup>th</sup> March, 2012, 10<sup>th</sup> September, 2013 and 30<sup>th</sup> July, 2012 were entered into between the Defendant and Mawingo Construction Company Limited which was a non - existent entity. As such, the said addendums are a nullity as Mawingo Construction Company Limited never had the capacity in law to sign the addendums. The Plaintiff had never executed any agreement for sale with Mawingo Construction Company Limited. Therefore, the said addendums are standing on a nothing and have no legal effect at all since provided Section 3(3) of the Law of Contract Act and Section 38 of the Land Act, No. 6 of 2012 make it mandatory that any disposition in land must be in writing.
62. The third part of the Defendant's claim is that the Plaintiff purchased Plot No. 4470/VI/MN which was far apart from the other properties stated herein above at a consideration of sum Kenya Shillings Eighty Five Thousand (Kshs. 850,000/-). However, even though the Defendant transferred the said property to the Plaintiff, the Plaintiff was yet to pay the agreed consideration. The Defendant therefore sought to recover the said consideration and/or a retransfer of the property back to the Defendant. The fourth part of the Defendant's claim was that during the transfer exercise of the 31 consolidated plots, it incurred several expenses on behalf of the Plaintiff which the Plaintiff undertook to refund the



Defendant. However, to date the Plaintiff had not refunded the Defendant the said costs. The costs was as follows:

- a. Costs of transferring 4 plots from Munyao and Alusha and payment of stamp duty Kshs. 144,000/-
  - b. Munyao and Alusa share of Land Rent/Rates Kshs. 18,600/-
  - c. County Government Land Rates Kshs 28,400/-
  - d. Advocates Fees Kshs 100,000/-
  - e. Advocates Fees on main transfer (Plot No.5046 /MN/VI for Kshs. 10,000,000/=) Kshs 720,000/-
  - f. Survey and Consolidation costs Kshs 120,000/-
  - g. Cost incurred in transferring the main plot and Stamp duty paid Kshs 400,000/-
  - h. Valuation expenses for Plot No. 5046/MN/VI Kshs 550,000/-
  - i. Consent to transfer the 4 plots Kshs 10,000/-
- Total Kshs 2,091,000/-

63. The Learned Counsel submitted that the Defendant therefore sought the immediate payment of a sum of Kenya Shillings Two Million Ninety One Thousand (Kshs. 2, 091,000/-) from the Plaintiff in terms of Clause 14.1 of the sale agreement dated 23<sup>rd</sup> December 2011. Even though the Plaintiff took possession of the Defendant's property in December, 2011 the Plaintiff has been reluctant to complete the payment of the purchase price or even to sign an agreement for sale in respect of the properties covered in the addendums under the name, Mawingo Construction Company Limited. The Defendant had been forced to watch its property being used by the Plaintiff who has refused to pay the balance of the purchase price while the Defendant was suffering hardship. This was in clear violation of provision Article 40 which guarantees the Defendant its right to own property and only lose it upon payment of due consideration.
64. Since the Plaintiff had been using the properties known as Plot nos. 4469, 4473, 4476, 4484, 4490, 4505, 4506, 4507 and 4509/VI/MN and has in turn denied the Defendant the right to enjoy the use of the said properties. The Defendant therefore sought mesne profits from the Plaintiff at the sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-) per month from July, 2012 when the Plaintiff started using the said properties.
65. On the analysis of the facts and the Applicable law, the Learned Counsel submitted that the Plaintiff had not opposed the Defendant's Counter - Claim and/or in any way controverted the evidence tendered by the Defendant. Failure by the Plaintiff to controvert the evidence of the Defendant meant that the Court should deem that the fact in issue as proved by the Defendant on the basis of its director's testimony in court. The repercussion of a party failing to lead evidence of a fact in issue was observed in the decision of "Linus Nganga Kiongo & 3 Others – Versus - Town Council of Kikuyu [2012] eKLR" where the court stated that;

“What are the consequences of a party failing to adduce evidence?”



66. In the case of “Motex *Knitwear Limited – Versus - Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002*” Justice Lesiit, citing the case of “Autar Singh Bahra and Another – Versus - Raju Govindji, HCCC No. 548 of 1998” stated:

“Although the Defendant has denied liability in an amended Defence and Counter - Claim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1<sup>st</sup> Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in the Defence and Counter - Claim are unsubstantiated. In the circumstances the Counter - Claim must fail.”

Again in the case of Trust Bank Limited – Versus - Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCC No.1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

67. The Learned Counsel urged this Court to apply the good reasoning in the above case and find that the Defendant has proved its claim in the absence of any evidence by the Plaintiff to oppose the claim and/or controvert the same.
68. In conclusion, the Learned Counsel submitted that they had stated enough to demonstrate that the counter claim dated 12<sup>th</sup> April, 2022 was merited and the same should be allowed with costs.

## VII. Analysis and Determination

69. I have keenly assessed the filed pleadings by all the Plaintiffs herein, the written submissions and the cited authorities, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
70. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following four (4) issues for its determination. These are: -
- a. Whether the Plaintiff’s claim from the filed Counter – Claim is sustainable?
  - b. Whether the Plaintiff/ Defendant in the Counter - Claim complied with the requirements of the agreement for sale between itself and the Defendant/Plaintiff in the Counter - Claim?
  - c. Whether the Defendant/Plaintiff in the Counter - Claim has a meritorious the Counter - Claim and whether it is entitled to the prayers sought;
  - d. Whether the Defendant/Plaintiff in the Counter - Claim is entitled to prayers sought.
  - e. Who bears the costs of the suit and the counter claim?

### ISSUE No. a). Whether the Plaintiff’s claim from the filed Counter – Claim is sustainable

71. Under this sub - title, the Honourable Court will examine the Plaintiff’s case from the filed Counter – Claim is sustainable. The Plaintiff filed this suit on 17<sup>th</sup> November, 2014 through a Plaint dated the same day against Mombasa Water Products Limited, the Defendant herein. The Defendant upon service of the pleading and summons to enter appearance; entered appearance and filed its amended statement of defence and counter claim dated 12<sup>th</sup> April, 2022 to which the Plaintiff responded to. At the hearing on 1<sup>st</sup> November, 2023, the Plaintiff was required as much as the Defendant to adduce



evidence to prove their pleadings but failed to when this matter came up for hearing the Court dismissed the Plaintiff's suit with costs and the Defendant proceeded to testify on his counter-claim. Pleadings are mere allegations. Pleading do not prove an allegation which can lead to the entry of judgment unless the allegation/the claim is undefended and is a claim for liquidated demand. In this case the Plaintiff/ Defendant in Counter Claim did not at all call evidence to prove the defence, it follows that the Plaintiff/Defendant in Counter Claim's defence remained mere allegation.

72. In the case of "North End Trading Company Limited (Carrying on the Business Under the Registered Name of) Kenya Refuse Handlers Limited – Versus – City Council of Nairobi (2019) eKLR" the court opined as follows:-

“ 18. In *Edward Muriga Through Stanley Muriga Vs. Nathaniel D. Schulter Civil Appeal No.23 of 1997*, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.

19. In the case of *Motex Knitwear Limited – Versus - Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002*, Lesiit, J. citing the case of *Autar Singh Bahra And Another – Versus - Raju Govindji, HCCC No.548 of 1998* appreciated that:-

‘Although the Defendant has denied liability in an Amended Defence and Counter - Claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1<sup>st</sup> Plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter - Claim are unsubstantiated. In the circumstances, the Counter - Claim must fail.’”

73. It is instructive to note that the Plaintiff's claim in the main suit was dismissed. Further, its Defence to the Counter Claim was found to have been unproved by evidence. Thus, the same remains unavailable for consideration. This was made clear in the case of "CMC Aviation Ltd – Versus – Crusair Ltd (No. 1) (1987) KLR 103":-

“The pleadings in a suit are not normally evidence. They may become evidence if they are expressly or impliedly admitted as then the admission itself is evidence. Evidence is usually given on oath. Averments are not made on oath. Averments depend upon evidence for proof of their contents.” (Emphasis mine).

74. For all these reasons, therefore, I strongly find that the Plaintiff/Defendant in Counter claim's defence is not sustainable taking that the Plaintiff in Counter claim's claim uncontested.

**ISSUE No b). Whether the Plaintiff/ Defendant in the Counter - Claim complied with the requirements the of the agreement for sale between itself and the Defendant/ Plaintiff in Counter claim**

75. Whenever a Court of Law is faced with a dispute regarding disposition of land, it must satisfy itself at the first instance that indeed the said transaction was in compliance with the provisions of Section 3 (3) of the Law of contract. Section 3(3) of the Law of Contract reads as follows:-

“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”

76. The provision of Section 38 of the *Land Act* provides as follows;

“(1)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 to by a witness who was present when the contract was signed by such party.(2)Subsection (1) shall not apply to –(a)a contract made in the course of a public auction.(b)the creation or operation of a resulting, implied or a constructive trust; or(c)any agreement or contract made or entered into before the commencement of this Act, provided that–(i)the verbal contracts shall be reduced to writing within two years from the date of the enactment of this Act; and(ii)the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing in a newspaper of nationwide circulation.”

77. The Court has carefully perused the agreement for sale dated 23<sup>rd</sup> December, 2011 produced as Exhibit by the Plaintiff in the Counter claim and noted that the same is in writing and is signed by the parties. It thus met the requirements of Section 3(3) of the Contract Act. Further the agreement for sale contains the names of the parties, the description of the property, the purchase price and the conditions thereto. A look at the said sale agreement confirms that the same is a valid sale agreement which is enforceable by the parties. See the case of “Nelson Kivuvani – Versus -Yuda Komora & Another, Nairobi HCCC No.956 of 1991”, where the Court held that:-

“ the agreement for sale of land which contains the names of the parties, the number of the property, the purchase price and the conditions attached thereto, the obligations, express or implied, of each of the parties and signed and witnessed by two witnesses who signed against their names amount to a valid contract”.

78. The Sale agreement having met all the requirements between the Plaintiff and the Defendant and therefore the sale agreement between the two is valid and it thus met the requirements of Section 3(3) of Contract Act, Cap. 23. It then follows that the Court must further interrogate whether there was breach of the said Contract. Black’s Law Dictionary, 9<sup>th</sup> Edition , page 213 defines a breach of Contract as;

“ a violation of a contractual obligation by failing to perform one’s own promised, by repudiating, or by interfering with another parties performance. A breach may be one by non-performance or by repudiation or both. Every breach gives rise to a claim for damages and may give rise to other remedies . Even if the injured party sustains no pecuniary loss or unable to show such loss with sufficient certainty he has at least a claim for nominal damages”.



79. As the Court had earlier held that the Plaintiff's testimony remained uncontroverted and having held that the contract was valid, the Court will then interrogate whether there was breach of the Contract.
80. The witness for the Plaintiff in the Counter - Claim averred that he was the Managing Director of Mombasa Water Products Limited; they had invested in a lot of land in Mombasa. He sold the land to the Defendant in the counter claim – Mawingo Construction Limited 2 ½ acres in the year 2011 for a sum of Kenya Shillings Twenty Thousand (Kshs. 20,000,000/-) and they had a sale agreement dated 23<sup>rd</sup> December, 2011. Eventually he sold the land and he transferred the land to them; he further asked for 2 acres and 2 acres. According to PCW hence 6 acres were transferred to the Defendant but the agreement was for 2 ½ acres; the total purchase price a sum of Kenya Shillings Sixty-Seven Million (Kshs. 67,000,000/-); he had paid a sum of Kenya Shillings Thirty-Three Million (Kshs. 33,000,000/-) leading an outstanding balance of a sum of Kenya Shillings Thirty-Four Million (Kshs. 34,000,000/-). He had given him 24 title deeds for each parcel. The 24 titles were with him, he transferred 4 ½ acres to him. He decided the cancel for the six (6) acres but he may remain the 2 ½ . He cannot pay for the 4 ½ acres; Referred to paragraph 5A of the amended defence.
81. The Plaintiff stated that the Defendant purchased Plot No. 4470/VI/MN which was far apart from the other properties at a consideration of a sum of Kenya Shillings Eight Hundred and Fifty (Kshs. 850,000.00/=) However, even though the Plaintiff transferred the said property to the Defendant, the Defendant was yet to pay the agreed consideration. The Plaintiff stated that during the transfer exercise, it incurred several expenses on behalf of the Defendant which the Defendant undertook to refund the Plaintiff. However, to date the Defendant has not refunded the Plaintiff the said costs. The costs are as follows:
- a. Costs of transferring 4 plots from Munyao and Alusha and payment of stamp duty Kshs. 144,000/-
  - b. Munyao and Alusa share of Land Rent/Rates Kshs. 18,600/-
  - c. County Government Land Rates Kshs 28,400/-
  - d. Advocates Fees Kshs 100,000/-
  - e. Advocates Fees on main transfer (Plot No.5046 /MN/VI for Kshs. 10,000,000/=) Kshs 720,000/-
  - f. Survey and Consolidation costs Kshs 120,000/-
  - g. Cost incurred in transferring the main plot and Stamp duty paid Kshs 400,000/-
  - h. Valuation expenses for Plot No. 5046/MN/VI Kshs 550,000/-
  - i. Consent to transfer the 4 plots Kshs 10,000/-
- Total Kshs 2,091,000/-
82. The Plaintiff in the Counter - Claim therefore sought the immediate payment of a sum of Kenya Shillings Two Million and Ninety One Thousand (Kshs. 2,091,000/-) from the Defendant. Furthermore, even though the agreement for sale dated 23<sup>rd</sup> December, 2011 was in respect of transfer of fourteen (14) plots the Plaintiff consolidated 31 sub – plots and transferred the same to the Defendant as per the term of the agreement for sale dated 23<sup>rd</sup> December, 2011 and the subsequent false addendums dated 15<sup>th</sup> March, 2012 and 30<sup>th</sup> July, 2012.



83. The Plaintiff stated that in summary the agreement between the Plaintiff and the Defendant was for the sale of 2.5 acres at a consideration of a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-); the Defendant agreed to purchase another extra 2 acres for a sum of Kenya Shillings Twenty Seven Million (Kshs. 27,000,000/-) making it a total of 4.5 acres for a consideration of a sum of a sum of Kenya Shillings Thirty Nine Million (Kshs. 39,000,000/-); and thereafter, the Defendant agreed to purchase an additional 1.5 acres at a consideration of a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) thus making a total of 6 acres for a total consideration of a sum of Kenya Shillings Sixty Seven Million (Kshs. 67,000,000/-). Vide a letter dated 9<sup>th</sup> September, 2012 the Defendant through Mawingo Construction Company Ltd confirmed its intention to purchase the 6 acres as set out in the agreement for sale and the addendums and undertook to pay the agreed consideration of a sum of Kenya Shillings Sixty Seven Million (Kshs. 67,000,000/-).
84. The Plaintiff in the counter claim averred that even though the Defendant confirmed the contract and undertook to pay a sum of Kenya Shillings Sixty Seven Million (Kshs. 67,000,000/-) through Mawingo Construction 2010 Ltd the Plaintiff did not make the said payment as agreed. The Plaintiff had since learnt that Mawingo Construction Company Limited never existed and/or its not registered as a company under the laws of Kenya. The Defendant had used the said addendums for purposes of frustrating the Plaintiff with payments and shielding itself using Mawingo Construction Company Limited as the Defendant was aware that the Plaintiff would not recover anything from the aforesaid non – existent entity.
85. The Plaintiff stated the subsequent addendums dated 15<sup>th</sup> March, 2012, 10<sup>th</sup> September, 2013 and 30<sup>th</sup> July, 2012 were entered into between the Plaintiff and Mawingo Construction Company Limited which was a non – existent entity. As such, the said addendums were a nullity as Mawingo Construction Company Limited did have the capacity in law to sign the addendums. Furthermore, the Defendant had never executed any agreement for sale with Mawingo Construction Company Limited. Therefore, the said addendums were standing on a nothing and had no legal effect at all since the provision of Section 3(3) of the [Law of Contract Act](#) and Section 38 of the [Land Act](#) make it mandatory that any disposition in land must be in writing.
86. Even through the Defendant took possession of the Plaintiff's property in December 2011 the Defendant had been reluctant to complete the payment of the purchase price or even to sign an agreement for sale in respect of the properties covered in the addendums under the name, Mawingo Construction Company Ltd. The Plaintiff had been forced to watch its property being used by the Defendant in the counter claim who had refused to pay the balance of the purchase price while the Plaintiff was suffering hardship. This was in clear violation of the provision of Article 40 which guaranteed the Plaintiff its own property and only lose it upon payment of due consideration.
87. The Plaintiff stated that vide a letter dated 6<sup>th</sup> August, 2019 the Plaintiff rescinded the contract dated 23<sup>rd</sup> December, 2011. However, since the Defendant is already holding a title for the property, the Plaintiff prays for an order for cancellation of the said title and retransfer of the property in the name of the Plaintiff. The Plaintiff was therefore seeking for a declaration that the addendums dated 15<sup>th</sup> March, 2012, 10<sup>th</sup> September, 2013 and 30<sup>th</sup> July, 2012 are a nullity and a consequential order directing the Defendant to release the original titles for the properties known as plot nos. 4469, 4473, 4476, 4484, 4490, 4505, 4506, 4507 and 4509/VI/MN.
88. The Plaintiff stated that the Defendant has been using the properties known as plot nos. 4469, 4473, 4476, 4484, 4490, 4505, 4506, 4507 and 4509/VI/MN and has in turn denied the Plaintiff the right to enjoy the use of the said properties. The Plaintiff therefore seeks mesne profits from the Defendant at the sum of Kenya Shillings Three Thousand (Kshs. 300,000/-) per month from July 2012 when the



Defendant started using the said properties. The Plaintiff being the registered owner of the adjoining parcels of land consolidated the portions sold to the Defendant but still reserved the 9metres access road for use by both the Defendant and M/s. Ocean freight (EA) Limited and also as storm water drainage. The 9metres access road served as the storm water drainage as the Defendant constructed culverts in the year 2007 underneath the said 9metres road and the main 18m road for the benefit of all persons and in public interest.

89. The Defendant purchased the suit property as individual plots with full knowledge of the existence of culverts on the 18metres wide main road draining its contents in the culverts beneath the 9 metres access road adjoining (original) plots MN/VI/4486, MN/VI/4487, and MN/VI/4488. It was an express term of the agreement at clause 9 that the property was sold subject to all subsisting easements. The Defendant on taking possession constructed its drainage and directed the water beneath a boundary wall constructed by M/s. Ocean freight (EA) Limited leading to its collapse. As a consequence of the Defendant's action alluded in Paragraph 10 above M/s. Ocean freight (EA) Limited demanded from the Plaintiff herein (as agents of the Purchaser/Defendant) a sum of Kenya Shillings Three Million Fifteen Thousand Five Fourty Seven Hundred and Sixty cents (Kshs. 3,015,547.60/-) on 25<sup>th</sup> August, 2014 through its lawyers, the law firm of Messrs. Cootow & Associates Advocates.
90. As a consequence of the blockage of the drainage by the Defendant large volumes of water continue to flood the Plaintiff's property downhill rendering it unsuitable for meaningful economic use. As a consequence of the large volumes of water carrying large volumes of mud emanating from the defendant property the Plaintiff's construction on its property downhill has suffered considerable delay as every time it rains work has to stop. As a consequence of the above the Plaintiff has to incur huge financial outlay to clear the mudslides and other incidental damages. The said costs have been assessed by Precise Cost Engineering International at a sum of Kenya Shillings Seven Million Two Hundred and Sixty Thousand (Kshs. 7,200,060/-) and the Plaintiff claims the same from the Defendant.
91. The actions of the defendants in blocking the drainage have caused and continue to cause harm and great prejudice on the Plaintiff. The Plaintiff therefore seeks general damages with respect to the aforesaid wrongs committed by the Defendant and a sum of Kenya Shillings Seven Million Two Hundred and Sixty Thousand (Kshs. 7,200,060/-) being the costs for rectifying the damage caused by the storm drainage. The Plaintiff stated that despite demand having been made to the Defendant to admit liability and pay the outstanding amount, the Defendant has failed to reply to the said demand.
92. The Plaintiff states that there is no other pending suit relating to the subject Plaintiff has sued the Bank for breach of instruction given to it by the Plaintiff to hold the original certificate of title for Plot No. 5046 (Original No. 5046/I/MN) CR. No. 63198 and to release the same to the Defendant only when the sum of Kenya Shillings Thirteen Million Two Sixty Thousand (Kshs. 13,260,000/-) was paid in full.
93. The Plaintiff in the Counter - Claim was able to produce proof of the agreement and the initial payment of the Defendant in the counter claim. It is a settled principle of law that "He who alleges must prove". Up to this juncture, I strongly find that the Plaintiff in the Counter - Claim has satisfactorily proved its case to the required standards.
94. In conclusion, therefore, the Court finds that the Plaintiff/Defendant in the Counter claim was in breach of the agreement for sale by failing to make the agreed upon a sum of Kenya Shillings Sixty Seven Million (Kshs. 67,000,000/-) for the purchase of 6 acres supported by agreement for sale dated 23<sup>rd</sup> December, 2011 which the Defendant in the Counter - Claim was required to pay.



**ISSUE No. C. Whether the Defendant/ Plaintiff in the Counter Claim has a meritorious the Counter claim and whether it is entitled to the prayers sought**

95. Under this Sub heading, the Plaintiff in the Counter - Claim has sought for various Reliefs as contained at the foot of the Plaintiff, herein. Prayer (a) is spent as the Plaintiff/Defendant in the Counter - Claim's suit was dismissed on 1<sup>st</sup> November, 2023. On the second prayer, this Court having held and found that the Defendant was in breach of the said contract further finds that the Plaintiff is entitled to the Damages of 25% of the sum of Kenya Shillings Sixty-Seven Million (Kshs. 67,000,000/-) which was the purchase price as parties are bound by the terms of the contract that they signed.
96. Before this court determines whether it should award the order of specific performance, it must first satisfy itself that the sale agreement that the Plaintiff seeks to rely on meets the requirements of a contract of sale of land. The Court has already held and found that there was a valid sale agreement as per section 3(3) of the contract Act. The Granting of the equitable remedy of specific Performance is discretionary and as such the Court should in deciding whether or not to grant the orders look at the merits of the case based on a case to case basis and whether there is an adequate alternative. See the Case of "Reliable Electrical Engineers Ltd – Versus - Mantrac Kenya Limited (2006) eKLR", wherein 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 adequate remedy specific performance may still be refused on the ground of undue influenced or where it will cause severe hardship to the Defendant.”
97. As already found and held by this Court, there was a valid sale agreement by the parties that was duly signed. Further the said agreement has not been vitiated by any factors nor has there been any allegations or form of illegality that has been alluded to. However in deciding whether or not to grant the order of specific performance the Court should be careful not to order the grant of specific performance where it will cause severe hardship to the Defendant. The Court was provided with evidence as to the proprietorship of the suit properties. As it stands its determination is that the Plaintiff in the Counter claim is the legal owner of the properties. Clause 15.2 provided that the Defendant would be liable to pay interest with respect to any balance of purchase price which was not paid at the completion date. In this regard as the Honourable Court has also established that the Defendant in counter claim was in default of the agreement of sale dated 23<sup>rd</sup> December, 2011 there prayer (c), (d), (e), (g), (h), (i), (m), (n) and (o) are hereby granted as the Plaintiff has proved its claim on the suit land by providing the previous titles to the suit properties and the agreement itself.
98. On the prayer for general damages by way of mesne profits, the testimony of the Plaintiff in Counter - Claim's witness confirmed that the Plaintiff in counter claim was the legal owner of the suit property. Essentially therefore, the Plaintiff being the lawful proprietor of this property is entitled to compensation in form of mesne profits for all that time that it has been denied use of the suit



premises. In the case of “Attorney General – Versus - Halal Meat Products Limited [2016] eKLR”, the court of Appeal stated that:-

“It follows therefore that where a person has been deprived of his property he/she is entitled to damages known as mesne profits for loss conferred as a result of the wrongful period of occupation of his/her property by another.”

99. The Plaintiff in Counter - Claim avers that since the Defendant in Counter - Claim has been using the properties known as plot nos. 4469, 4473, 4476, 4484, 4490, 4505, 4506, 4507 and 4509/VI/MN and has in turn denied the Defendant/ Plaintiff in counter claim the right to enjoy the use of the said properties. The Plaintiff in Counter - Claim therefore seeks mesne profits from the Plaintiff at the sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-) per month from July, 2012 when the Plaintiff started using the said properties. Hence, I am persuaded that the Plaintiff in the Counter - Claim is entitled to the mesne profits at the rate of at the sum of Kenya Shillings Three Hundred Thousand (Kshs. 300,000/-) per month from July 2012 to the date of this Judgment with interest at court rates from the date of this Judgment until payment in full.
100. The Plaintiff in Counter - Claim has additionally sought special damages. Special damages means those which are ascertainable and quantifiable at the date of the action. The Plaintiff was obligated to prove those claims which are claim in special damages, as was stated in the Court of Appeal decision of:- “Capital Fish Kenya Limited – Versus - Kenya Power & Lighting Company Limited (2016) eKLR” as follows:-
- “Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See “National Social Security Fund Board of Trustees – Versus - Sifa International Limited (2016) eKLR, Macharia & Waiguru – Versus - Muranga Municipal Council & Another (2014) eKLR and Provincial Insurance Co. EA. LTD – Versus - Mordekai Mwangi Nandwa, KSM CACA 179 of 1995 (UR). In the latter case this Court was emphatic that “... It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract ...”
101. It is the duty of the Plaintiff to prove its claim for damages as pleaded. It is not enough simply to put before the court a great deal of material and expect the court to make a finding in his favour. It was said by Lord Goddard, CJ in the case of:- “Bonham Carters Hyde Park Hotel Limited [1948] 64TR 177” –
- “The Plaintiff must understand that if they bring actions for damages it is for them to prove damage. It is not enough to write down particulars and, so to speak, throw them at the head of the court, saying, “this is what I have lost, I ask you to give me these damages.” They have to prove it.”
102. Hence, I find that the Plaintiff in Counter - Claim has sufficiently proved the special damages prayed for and I hereby grant them as prayed in the counter claim.
103. Accordingly, a mandatory injunction and a permanent injunction will issue in favour of the Plaintiff against the Defendant but after the grace period of 30 days from the date of this Judgment to give the Defendant in Counter - Claim to put their affairs in order.



**ISSUE NO. d). Who bears the costs of the suit and the counter claim.**

104. It is trite law that the issue of Costs is the discretion of Court. The Black Law Dictionary defines “Cost” to mean, “the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”.
105. The proviso under the provisions of Section 27(1) of the *Civil Procedure Act*, Cap. 21 holds that Costs follow events. In the case of: “Reids Hewett & 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.....”
106. From this provisions of the law, it means the whole circumstances and the results of the case where a party has won the case. In the instant case, the Plaintiff in Counter Claim herein has successfully established its case and thus is entitled to Costs for the dismissed Plaintiff and the Amended Counter - Claim thereof to be paid by the Plaintiff/ Defendant in Counter claim.

**VIII. Conclusion and Disposition**

107. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff in Counter Claim herein has successfully established its case against the Plaintiff/Defendant in Counter - Claim herein. Thus, the Court proceeds to make the following specific orders:-
- a. Judgment be and is hereby entered in favour of the Plaintiff in the Counter - Claim against the Defendant in Counter - Claim herein in terms of the Amended Counter claim dated 12<sup>th</sup> April, 2022 in its entirety.
  - b. THAT the Plaintiff dated 17<sup>th</sup> November, 2014 by the Plaintiff in Counter claim be and is hereby dismissed with costs.
  - c. the Plaintiff in Counter claim is hereby awarded general damages for breach of Contract amounting to Kenya Shillings Sixteen Million, Seven Hundred and Fifty only (Kshs 16,750,000/-) being 25 % of the purchase price.
  - d. an order be and is hereby issued of the immediate payment of Kenya Shillings Thirty-Three Million, Six Hundred and Fifty-Nine Thousand only (Kshs 33,659,000/-) being the balance of the purchase price plus interest at a rate of 19.210% p.a. from 6<sup>th</sup> June, 2015 to June, 2019 and 14.470% from July, 2019 July, 2015 until when the Defendant will have fully repaid the outstanding purchase price.
  - e. an order be and is hereby issued directing the Defendant in the Counter claim to forthwith and unconditionally handover the original certificates of title and with duly executed transfers with respect to plot Nos. 4519, 4520, 4521, 4522, 4523, 4524, 4525, 4526, 4527, 4531, 4532, 4533, 4534, 4535, 4536, 4537, 4538, 4539, 4544, 4545, 4546, 4552, 4553 and 4470.
  - f. the Plaintiff in the Counter claim be and is hereby awarded general damages by way of mesne profits at the rate of Kenya Shillings Three Hundred Thousand only (Kshs 300,000/- ) per



month from July 2012 to the date of this judgment with interest at court rates from the date of this judgment until payment in full for when the Defendant started using 4519,4520, 4521, 4522, 4523, 4524, 4525, 4526, 4527, 4531, 4532, 4533, 4534, 4535, 4536, 4537, 4538, 4539, 4544, 4545, 4546, 4552, 4553, 4470, 4469, 4473, 4476, 4484, 4490, 4505, 4506, 4507 and 4509/VI/MN.

- g. a mandatory injunction be and is hereby issued directing the Defendant in the Counter Claim to vacate and render vacant possession of the properties known as plot Nos. 4519, 4520, 4521, 4522, 4523, 4524, 4525, 4526, 4527, 4531, 4532, 4533, 4534, 4535, 4536, 4537, 4538, 4539, 4544, 4545, 4546, 4552, 4553 and 4470.
- h. an order be and is hereby issued directing the Defendant in the Counter Claim to Pay the Plaintiff the sum of Kenya Shillings Two Million, Ninety-One Thousand Shillings Only (Kshs. 2,091,000/-) being the total expenses incurred by the Plaintiff in the Counter Claim on behalf of the Defendant.
- i. the Defendant is to pay Kenya Shillings Eight Hundred and Fifty Thousand only (Kshs. 850,000/-) being the agreed consideration for Plot No. 4470/VI/MN together with interests from December 2012 when the same was payable with interest at court rate from the date of the counter-claim.
- j. the Plaintiff in Counter claim is awarded Kenya Shillings Seven Million, Two Hundred Thousand and Sixty Only (Kshs 7,200,060/-) as special damages being the costs for rectifying the damage caused by the storm water drainage and the cost of the storm drainage to be available to the Defendant in Counter Claim for the same to be compensated.
- k. an order be and is hereby issued directing the Defendant to stop draining storm water on the Plaintiff's parcels of land know as plots nos. MN/VI/4486, MN/VI/4487, MN/VI/4488, MN/VI/4489 and MN/VI/4490.
- l. a declaration be and is hereby issued that the addendums dated 15<sup>th</sup> March, 2012, 10<sup>th</sup> September, 2013 and 30<sup>th</sup> July, 2012 are null and void for all purposes.
- m. an order be and is hereby issued directing the Defendant to forthwith release the original titles for the properties known as plot nos. 4469, 4473, 4476, 4484, 4490, 4505, 4506, 4507 and 4509/VI/MN to the Plaintiff.
- n. THAT the costs of the Amended Counter - Claim and the dismissed Plaint be awarded to the Plaintiff in the Counter claim thereof to be paid by the Plaintiff in the Counter Claim jointly and severally.

It is so ordered accordingly.

**JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 3<sup>RD</sup> DAY OF JULY 2024.**

.....  
**HON. MR. JUSTICE L. L. NAIKUNI**  
**ENVIROMNENT AND LAND COURT AT**  
**MOMBASA**

Judgement delivered in the presence of:-

a. M/s. Firdaus Mbula – the Court Assistant.



b. Mr. Omollo & Mr. Mwanzia Advocate for the Plaintiff in the Counter Claim.

c. M/s. Ngoizi Advocate for the Defendant in Counter claim

JUDGMENT: ELC NO. 288 OF 2014 Page 13 of 13 HON.JUSTICE L.L. NAIKUNI (ELC JUDGE)

