



Communications Authority of Kenya v Benja Investments Limited & another (Environment & Land Case 18 of 2021) [2023] KEELC 17436 (KLR) (10 May 2023) (Judgment)

Neutral citation: [2023] KEELC 17436 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 18 OF 2021**

MD MWANGI, J

MAY 10, 2023

BETWEEN

COMMUNICATIONS AUTHORITY OF KENYA PLAINTIFF

AND

BENJA INVESTMENTS LIMITED 1ST DEFENDANT

GEOFFREY CHEGE KIRUNDI T/A KIRUNDI & CO.

ADVOCATES 2ND DEFENDANT

JUDGMENT

Background

1. This is a suit that was filed way back in the year 1999. It was formerly High Court Civil Suit No. 943 of 1999. It was only transferred to this court in the year 2021 after pending before the High Court for 22 years, hence the number ELCC 18 of 2021.
2. The Plaintiff's claim is pleaded in the amended on 25th January, 2022. It arises out of a sale agreement dated 7th November, 1991 for sale of parcels of Land known as L.R No. 12445 and L.R No. 12550 within the City of Nairobi (hereinafter referred to as 'the suit properties'). The 1st Defendant was to sell the said parcels to the Plaintiff (its predecessor then known as Kenya Posts and Telecommunications) for a consideration of Kshs. 56,047,670/=. The 2nd Defendant, who is an Advocate of the High Court of Kenya acted as the Advocate for both the Plaintiff and the 1st Defendant.
3. The Plaintiff's case is that it paid the consideration in full thereby fulfilling its part of the agreement. The Plaintiff further alleges that, on the advice and insistence of the 2nd Defendant who was its advocate, it paid a further sum of Kshs. 4,716,471.95 being a supposed penalty for delayed payment. Therefore, in total, the Plaintiff paid to the 1st Defendant a total sum of Kshs. 62,764,141/=.



4. Additionally, the Plaintiff forwarded to the 2nd Defendant (its advocate) a sum of Kshs. 3,482,860.20 by way of a cheque payable to the Collector of Stamp Duty on account of stamp duty on Transfer.
5. The Plaintiff alleges that, despite performing its part of the agreement, the 1st Defendant has failed, refused and or neglected to perform its part of the deal, more specifically to transfer the titles to the suit properties in its favour. The Plaintiff accuses the 1st Defendant of breach of the agreement as particularized in Paragraph 11 of the amended Plaintiff. Amongst other particulars of breach, the Plaintiff accuses the 1st Defendant of failing, neglecting or refusing to transfer the subject parcels of land and purporting to sell the same to the Plaintiff when the 1st Defendant was not the registered proprietor of the suit properties.
6. The Plaintiff alleges that the 1st Defendant transferred the subject-premises in its own favour on the same date designated or intended for completion of the agreement, being the 31st December, 1991 and further caused the same to be charged to the Kenya Commercial Bank Limited.
7. The Plaintiff states that the conduct by the 1st Defendant of entering into the said agreement with it and its subsequent conduct thereof was fraudulent.
8. The Plaintiff further asserts that the 1st defendant has acknowledged its indebtedness to it and offered to repay the Plaintiff by monthly installments of Kshs. 1,000,000/= by a Letter dated 21st August, 1998. Consequently, the 1st Defendant paid a sum of Kshs. 2,000,000/= to the Plaintiff pursuant to the said acknowledgement but has defaulted in the payment of all the other sums due and owing to it.
9. As against the 2nd Defendant, the Plaintiff avers that upon instructing him as its advocate in the sale transaction, a contractual relationship arose giving rise to both implied and explicit responsibilities more so as particularized in Paragraph 14 of the amended Plaintiff. The Plaintiff specifically asserts that the 2nd Defendant was obligated to fully protect the Plaintiff's interests in the transaction while employing utmost skill and acting with complete honesty, frankness and fairness.
10. By agreeing to represent the Plaintiff in the said transaction, the 2nd Defendant was bound to disclose any personal interest and not to permit any conflict between the interests of the Plaintiff and his own interests. It was the responsibility of the 2nd Defendant, according to the Plaintiff, to not only conduct a search on the titles of the suit properties and confirm that the 1st Defendant had a good title to the properties capable of being transferred to the Plaintiff but also that the suit properties were not encumbered in any manner prejudicial to the Plaintiff's position as a Purchaser.
11. The Plaintiff accuses the 2nd Defendant of breach of his contractual obligations as an advocate causing him loss and damages. The Plaintiff particularizes the 2nd Defendants' breaches at Paragraph 15 of the amended Plaintiff.
12. The Plaintiff seeks a refund of all the sums paid by it to the 2nd Defendant and purportedly released to the 1st Defendant amounting to Kshs. 62,764,141/= less the refund made to the Plaintiff, a sum of Kshs. 2,000,000/=, leaving a balance of Kshs. 60,764,141/=, with interest at the rate of 19% p.a from the date of payments by the Plaintiff. The Plaintiff avers that the rate of 19 % was the one stated or envisaged in the agreement for sale. The Plaintiff also prays for general and exemplary damages, and costs of the suit.

Statement of Defence

13. The Defendants filed a Joint Statement of Defence dated 31st May, 1999 which was further amended on the 13th November, 2022. In the Further Amended Defence, the Defendants deny the allegations



leveled against them. They contend that it was the Plaintiff who was in breach of the said agreement in that the Plaintiff failed, refused and/ or neglected to complete payment of the purchase price.

14. The Defendants accuse the Plaintiff of frustrating the Agreement by the slow rate of payments of the purchase price contrary to the clear terms of the Agreement on the mode of payment, thereby failing to complete the transaction on the 31st December, 1991, misrepresenting and misleading the Defendants that it was in a position to complete payments.
15. The Defendants further assert that the Plaintiff made false promises that it would pay the purchase price in installments despite being aware that the 1st Defendant had taken a loan. This led to the 1st Defendant defaulting in the loan repayments and thereby incurring penalties due to the late payment, interest and other banking charges.
16. The 1st Defendant avers it became aware the suit properties were being offered for sale by one Clement Gachanja sometimes in the year 1989. That the 1st Defendant entered into an Agreement with Mercantile Finance Company to purchase the said parcels of land with the knowledge of Clement Gachanja.
17. After signing the Agreement with Mercantile Finance Company Limited, the Plaintiff approached the 1st Defendant to purchase the two parcels of land at a negotiated price of Kshs. 58,047,670/= resulting into the Sale Agreement dated 31st December, 1991.
18. That Plaintiff was however, unable to complete the transaction in terms of the Sale Agreement forcing the 1st Defendant to apply for a loan of Kshs. 27,000,000/- from Kenya Commercial Bank Ltd using the suit properties as collateral. The failure by the Plaintiff to pay the purchase price in good time caused the 1st Defendant to pay a higher rate of interest, penalties, late payment charges, inflationary and devaluation effect of Kenya Shilling and other debits which it would otherwise not have incurred.
19. The 1st Defendant avers that the further sum of Kshs. 4,716,471.95 paid by the Plaintiff was part of the amount of interest at the rate of 19% that could have accrued on the purchase price as a result of the delay to pay the purchase price in breach of the Agreement.
20. The sum of Kshs. 3,482,860.20 on the other hand was stamp duty payable under the Agreement but which money was returned to the Plaintiff in total. The Defendants aver that the Plaintiff knew all along that the 1st Defendant was yet to be registered as the owner of the suit properties as well as the existing caveats on the suit properties even as it entered into the transaction.
21. The Completion Date was agreed to be 31st December, 1991 and further that the rate of 19% interest was only payable to the 1st Defendant and did not apply to the Plaintiff. The Plaintiff is not entitled to any interest at all as all the money was refunded to it.
22. The 1st Defendant averred that it was willing to transfer the suit properties to the Plaintiff but at the current market value and payment of damages for the breach of contract as prayed for in the Counterclaim.
23. The 2nd Defendant on his part admits that he indeed acted for both parties in the transaction but denies that he was to hold the money until the properties had been transferred to the Plaintiff. He alleged that he received both written and oral instructions from the Plaintiff to release the money to the 1st Defendant.
24. The 2nd Defendant avers that he acted with utmost honesty, frankness and fairness towards the Plaintiff throughout the transaction. He denied that there was conflict of interest. His position was that the Plaintiff had not suffered any damage consequent to the sale transaction. The 2nd Defendant further denied being fraudulent in any way.



25. In the alternative and on a without prejudice to the 1st Defendant's claim, the 2nd Defendant averred that the Plaintiff had frustrated efforts to refund the deposit of the purchase price and had otherwise forfeited the sum of Kshs. 5,804,767/= by refusing to bank the cheques issued to it by the 1st Defendant in good time and by further insisting on unreasonably too high and unrealistic installments knowing very well that the 1st Defendant had no income and that the only assets it owns are the suit properties.
26. The 2nd Defendant argued that the Plaintiff was estopped from claiming interest as it was agreed that in the event the 1st Defendant was unable to complete the transaction, then it would refund the purchase price paid.

1st Defendant's Counterclaim

27. The 1st Defendant avers that in 1991, it entered into an agreement with Mercantile Finance Company Limited, in whose favour the suit properties were charged, with the aim of purchasing the two properties. The 1st Defendant allegedly borrowed money from Kenya Commercial Bank to pay the purchase price with an intention to later sell some of the subplots to pay off the Bank loan and develop others.
28. However, before the properties were transferred to the 1st Defendant, the Plaintiff allegedly approached the 1st Defendant with a proposal to purchase the two parcels at an agreed price of Kshs. 58,047,670/= as per the Sale Agreement signed between the parties. The completion date was set for 31st December, 1991.
29. There was an agreement between the 1st Defendant and Mercantile Finance Company Limited that supposedly allowed the transfer of the properties to either the 1st Defendant or its nominee. The 1st Defendant alleged that it agreed with the Plaintiff that the properties would be transferred to the Plaintiff directly upon payment of the full purchase price as agreed. The Plaintiff was however, according to the 1st Defendant unable to complete the transaction. The 1st Defendant therefore applied for a loan of Kshs. 27,000,000/= from the Kenya Commercial Bank Limited and used the suit properties as collateral.
30. The 1st Defendant averred that it incurred other expenses including Stamp Duty of Kshs.1,800,006/=, mobilization fees of Kshs. 405,000/=, further Stamp Duty on the charges - Kshs. 450,00/=, registration fees - Kshs. 1,000/=, and Advocate's fees - Kshs. 215,465/= which it claims from the Plaintiff with interest at 30% from 31st December, 1991 to the date of payment.
31. The Plaintiff's non-completion of the contract resulted in the 1st Defendant incurring loss and the loan accruing more interest at the detriment of the 1st Defendant.
32. The 1st Defendant further accuses the Plaintiff of fraud as particularized therein. It accuses the Plaintiff of arranging to transfer its African Regional Advanced Level Training Institute at a cost of Kshs. 133,548, 221/= before completing the transaction with the 1st Defendant.
33. The 1st Defendant therefore prays for the amounts stated in Paragraph 32 above as well as a sum of Kshs. 21,200,000/= being the money paid to the Bank plus interest at 30% per annum until the date of actual payment, the outstanding Kshs, 81,000,000/= at the bank, land rent of Kshs. 62,484/= and Kshs. 943,554.50/= being rates to the Nairobi City Council. The 1st Defendant too prayed that the sum of Kshs. 5,804,767/= paid to it by the Plaintiff be forfeited for breach of the contract. The 1st Defendant also claims for general and exemplary damages for breach of contract.
34. In conclusion, the 1st Defendant prays for judgement against the Plaintiff as follows;



- a. A sum of Kshs. 300,000,000/= or the market value of the suit properties at the determination of this suit plus interest to be determined by the court should the suit properties be auctioned by the Kenya Commercial Bank Limited for non-payment of its debt;
- b. In the alternative, the sum of Kshs. 81,000,000/= plus interest at the rate of 30% and any penalties charges and debits which it continues to suffer from the date of filing the Defence and Counterclaim to the date of actual payment.
- c. Kshs. 46,632,705/= being the amount as particularized in paragraph 40 herein above plus interest at the rate of 30% per annum and in the Counterclaim to the date of actual payment in full.
- d. General and exemplary damages.
- e. Costs of the suit.
- f. Interest at court rates on cost from the date of filing this Defence and Counterclaim.

The 2nd Defendant's Counterclaim

35. The 2nd Defendant on his part claims Kshs. 905,000/= being legal fees for the services rendered to the Plaintiff plus interest at the rate of 30% per annum. The 2nd Defendant too avers that the Plaintiff defamed him as particularized in Paragraph 47 of the Defence before the Parliamentary Public Investment Committee.
36. The 2nd Defendant prays that the Plaintiff's suit be dismissed with costs and judgement entered against the Plaintiff as follows;
 - i. The Legal Fees of Kshs. 905,000/= plus interest at 30% owned by the 2nd Defendant from the date of filing this Counterclaim
 - ii. Kshs. 101, 719.90/= plus interest at 30 % p.a. from the date of payment to the date of actual payment
 - iii. General damages
 - iv. Exemplary or punitive damages
 - v. Costs of the suit
 - vi. Interest at court rates in (i) above from the date of filing of the Defence and Counterclaim.

Defence to the 1st Defendant's Counterclaim

37. In response to the 1st Defendant's counterclaim, the Plaintiff denied the contents of the Counterclaim averring that it paid the full purchase price in the agreement for sale. The Plaintiff denied any knowledge to the alleged agreement between the 1st defendant and Mercantile Finance Company.
38. The Plaintiff reiterated that by charging the suit premises to Kenya Commercial Bank Limited on the same date designed for completion, the 1st Defendant was in breach of their Sale Agreement and further committed fraud against it. The Plaintiff asserts that it is not responsible for the alleged expenses incurred by the 1st Defendant. That the claims contained in the Counterclaim are baseless, frivolous and vexatious and an abuse of the process of court.



39. Further, that the 1st Defendant's Counterclaim is bad in law as it was instituted in contravention of the mandatory provisions of Section 109 of Kenya Posts and Telecommunications Corporation Act, Cap. 411 of the Laws of Kenya (now repealed).
40. The Plaintiff therefore prays that the 1st Defendant's counterclaim be dismissed with costs and Judgement entered in favour of the Plaintiff as sought.

Defence to the 2nd Defendant's Counterclaim

41. The Plaintiff avers that the 2nd Defendant is not entitled to the reliefs sought and reiterates the contents of its Plaint against the 2nd Defendant. The Plaintiff avers that it paid all the legal fees due to the 2nd Defendant as demanded and no further fees are payable.
42. The Plaintiff further avers that it had no control over the 2nd Defendant's appointment or removal as a Director in Kenya Commercial Bank or any other company and the claim is spurious. The Plaintiff further stated that it did not have control over what the print and electronic media publicized or would wish to publicize and the 2nd Defendant's claim to that extent is misdirected against the Plaintiff.
43. The Plaintiff too stated that it had no control over the conduct and proceedings of the Parliamentary Public Investment Committee as well and its dealings were in response to the summonses by the said committee. That the 2nd Defendant's counterclaim is equally misconceived, frivolous, scandalous, vexatious and an abuse of the court process.
44. The Plaintiff therefore prays that the 2nd Defendant's Counterclaim to be equally dismissed with costs and Judgement entered in favour of the Plaintiff as sought.

Evidence adduced on behalf of the Plaintiff

45. Juma Kandie, the Plaintiff's Director for Human Capital and Administration since 2001 testified on behalf of the Plaintiff as PW1. He adopted his Witness Statements dated 25th January, 2022 and 21st April, 2022 as his evidence in-chief. He also produced the documents in the Plaintiff's consolidated List of Documents dated 25th January, 2022 which was marked as PE 1-117 save for the document listed as No.101 on the list.
46. On cross-examination PW1 confirmed the sale agreement dated 7th November, 1991 for sale of 2 parcels of land. The said Agreement was subject to the LSK Conditions of Sale (1989) Edition in so far as were not inconsistent with the express conditions of the Agreement. The completion date was 31st December, 1991. However, the Plaintiff had not completed paying the purchase price on the said completion date. That there was no further agreement, or any deed of variation to vary the initial agreement. The sum of Kshs. 5,804,767.00/= being 10% of the purchase price was paid by way of a cheque which was forwarded by way of the letter dated 10th December, 1991.
47. PW1 asserted that a Voucher is an internal document used to processes payment. The Vouchers referred to in Paragraph 18 of his Witness Statement were actually processed. The mode of payment should have been by way of Cheques but they have not attached copies of any cheque for payment. Further, that the payments were to be effected from a bank account although he could not tell which bank account the Plaintiff was using at the time.
48. He also referred to a penalty paid as sated at Paragraph 19 of his Witness Statement. He relied on the letter dated 27th October, 1992 at Page 66 of the Plaintiff's Bundle of Documents. He also referred to the Stamp Duty payment at Paragraph 21 and 22 of his Witness Statement evidenced by the PE 53. He stated that he was not aware that the cheque (for payment of the stamp duty) became stale. The



- Plaintiff's witness too made reference to PE 52 (a letter dated 23th February, 1993) in which the 2nd Defendant was demanding for the balance of the purchase price.
49. PW1 further testified that the Corporation had a Corporation Secretary in charge of the Legal Department whose mandated was to advise the Corporation on Legal matters and who may have known the status of the suit properties before entering into the agreement. He confirmed that the letter dated 18th July, 1991 in the Defendant's Bundle, addressed to the Corporation Secretary referred to the registered owner as Clement Gachanja.
 50. The witness testified that a total of Kshs. 62,000,000/= was allegedly transferred to the Defendants. He also relied on the document on page 79 to show that the 2nd Defendant had admitted receiving Kshs. 12.0 Million. He asserted that the letter of 18th July, 1991 was a fabrication. However, the Plaintiff had not raised any complaint regarding the fabrication of the said letter.
 51. The witness stated that the Plaintiff made a complaint to the Advocate's Complaints Commission. The letter dated 2nd April, 2002 from the Complaints Commission stated that the corporation knew about the shareholding and directorship of Benja Investments Limited.
 52. It was PW 1's evidence that although he had stated that he was not aware of any loans taken by the 1st Defendant, the letters dated 31st March, 1992 (PE 45), 31st August, 1992 (PE 44) and that of 3rd March, 1994 (PE 55) received by the corporation, makes reference to bank charges, interest and penalties thus confirming that the corporation was aware of the existence of a loan.
 53. The witness confirmed that in 1994, the corporation had re-engaged valuers to re-evaluated the parcels of land vide the letter dated 14th August, 1994. The Plaintiff's Chief Executive Officer had been prosecuted in a criminal case in relation to the agreement the subject matter of this suit but the prosecution did not proceed after an order was issued by the High Court stopping it.
 54. The witness confirmed that in the sale agreement, the completion date was 90 days. The agreement provided special conditions for the rate of interest at 19% per annum. Clause 7 of the Special Conditions provided for the mode of payment for the installments. The corporation did not pay in accordance with Clause 7. The 19% interest was only to apply to the Plaintiff.
 55. PW1 was not aware if the fee note of the 2nd Defendant had been paid.
 56. In re-examination, PW1 confirmed that the 2nd Defendant acted for both parties in the transaction. That there was a payment on account of the 10% deposit. Equally there was evidence of subsequent payments. That the Letter dated 31st March, 1992 acknowledges receipt of 3 cheques whereas the Letter dated 11th May, 1992 acknowledges receipt of Cheque No. 323260. The Vouchers exhibited as PE 37 to PE 49 confirms the payments.
 57. PE 47 is a Letter dated 17th November, 1992 is a demand for delayed payments of Kshs. 4,716,471.95 and Stamp Duty of Kshs. 3,482,870.20/=. The purchase price and the penalty charge make Kshs. 62,764,141.95, the amount stated in the Plaintiff.
 58. PE 57 is the Letter dated 23rd May, 1994 which was an opinion by the 2nd Defendant to the Corporation. The Letter advised on the 2 options available to the corporation. PE 69 seeks confirmation that the note dated 24th June, 1994 is correct.
 59. The properties that the corporation was buying were to be sold unencumbered.
 60. The search for L.R 12445 shows it was transferred to the 1st Defendant on 31st December, 1991. The property was charged to Kenya Commercial Bank Limited on the same day. L.R 12550 was also



transferred to the 1st Defendant on 31st December, 1991 and charged to Kenya Commercial Bank Limited on the same date as well.

61. The purpose of engaging the advocate was to give legal advice to the Client. There was no Search availed to the Plaintiff by the 2nd Defendant in respect of the parcels the subject matter of this suit.
62. The Letter of 20th November, 1995, Page 111 confirms that the 1st Defendant was ready to refund the money paid Kshs. 1 Million per month. Page 112 confirms that the corporation declined to accept payment by installments as proposed by the 1st Defendant.
63. The 1st Defendant made payment of Kshs. 2 Million. The 3rd Cheque issued by the Defendant did not clear.

Evidence adduced on behalf of the Defendant

64. Geoffrey Chege Kirundi, a director of Benja Investment Limited and the proprietor of Kirundi & Company Advocates testified on behalf of both Defendants. He adopted his Witness Statement dated 15th April, 2022 as his evidence in-chief. He also produced the documents listed on the Defendant's List of Documents dated 18th February, 2008 which were consequently marked as Defence exhibits (DE 1-91).
65. It was his testimony that in 1990, he was approached by Mr. Gachanja whose land was at the verge of being auctioned by Mercantile Finance Company after he failed to honour his financial obligations with an offer of plots resulting from subdivisions of the land to enable him pay his loan with Mercantile Finance Company. DW1 stated that he approached Kenya Commercial Bank Ltd to finance to purchase the plots.
66. He stated that he entered into a Sale Agreement with Mercantile Finance Company and paid it 10% deposit being Kshs.3.0 Million and a further sum of Kshs. 10.0 million thereafter. The purchase price for the two properties was Kshs. 40.0 Million. The balance of Kshs. 27 Million was to come from Kenya Commercial Bank Ltd.
67. That sometime in June 1991, the Plaintiff herein expressed interest in purchasing the properties. Eventually, the Plaintiff (KPTC, then) gave an offer on 12th August, 1991 for Kshs. 58,047,670/=. Thereafter, they entered into an agreement dated 7th November, 1991.
68. That the Agreement between himself and Mercantile Finance had a completion date of 31st December, 1991. The completion date had been synchronized with that of the other agreement with the Plaintiff. It however, did not happen as planned. That the only money they received from the Plaintiff was the deposit of 10% of the purchase price was paid 33 days later, after the due date.
69. The witness stated that in January 1992, They (Defendants) gave the termination notice to the Plaintiff for non-compliance with the terms of the agreement. The Defendants' position was that they had terminated the agreement and the Plaintiff forfeited the 10% deposit of the purchase price. There were attempts to revive the agreement. A valuation was to be done in order to come up with the new values of the properties. After Valuations were done however, the Plaintiffs refused to pay the new prices.
70. The witness renounced the letter dated 21st August 1998 that the Plaintiff termed as an admission. He stated that it was strange to him and had not originated from his law firm. He saw it first when it was produced in court. He vehemently denied acknowledging indebtedness as alleged in the said letter. He stated that the Plaintiff's claim against the Defendants had no basis.
71. The witness stated that around the year 1998, he was under a lot of pressure to refund the deposit paid by the Plaintiff and the money allegedly forwarded to him to pay for stamp duty. He confirmed that



it was the reason why he actually drew the two cheques to KPTC of Kshs. 1.0 Million each total to Kshs. 2.0 Million. He asserted that he did not have any problem refunding the 10% paid though. The management of KPTC was also under pressure from the Parliamentary Investment Committee and his agreement to refund the deposit was his attempt to help KPTC deal with the pressure. He wrote the letter of 6th October, 1997 to the Plaintiff's Managing Director complaining that he had not disclosed the truth to the Parliamentary Committee.

72. The Defendants' witness confirmed that there was a complaint against him at the Law Society Complaints Committee but upon submitting his documents, the disciplinary committee did not find him guilty. He has never been charged with a criminal offence over the transaction.
73. He adopted his Witness Statement in its entirety in respect of the Counter-claim against the Plaintiff. He asserted that he was never even paid his legal fees.
74. In cross-examination, Mr. Kirundi stated that though he had reported the forgery of his signature on the documents produced by the Plaintiff he did not produce the police occurrence book number. He reiterated that he had been under pressure from investigative agencies to admit owing the Plaintiff the amount of money the Plaintiff was claiming from him.
75. The witness stated that the Kshs. 2.0 Million he paid to the Plaintiff was a partial refund of the 10% deposit. KPTC was exempt from payment of Stamp Duty. The cheque was drawn in favour of the Collector of Stamp Duty but he did not present it to the Collector of Stamp Duty.
76. DW1 admitted that he is a director of the 1st Defendant Company together with his wife, Lucy Wamaitha Chege. He alleged that he had explained that fact in his letter of 18th July, 1991.
77. In regard to the letter from KPTC of 12th August, 1991, the witness affirmed that the Plaintiff offer was to purchase the land free from any encumbrances. The sale agreement was of 7th November, 1991 in which he acted for both parties.
78. The Letter of 10th September, 1991 to the General Manager of Kenya Commercial Bank Limited disclosed that he contemplated to sell the properties to KPTC at Kshs. 58,047,670/=. He confirms payment of 10% of the purchase price.
79. The witness informed the Court that the transaction between the 1st Defendant and Kenya Commercial Bank Limited and that with KPTC were running concurrently. He stated that Charge dated 17th December, 1991 securing Kshs. 27,000,000/= was registered on 31st December, 1991, the same date for the completion of the sale agreement with the Plaintiff. Had the Plaintiff honored its obligation by 3.00 p.m on 31st December 1991, the witness stated that he would have discharged the two properties. He however, testified that he had contemplated a default by KPTC after they failed to honour their weekly payments.
80. Further, that the Agreement with KPTC had a penalty clause. The vendor had remedies in case of default. He stated that he wrote to KPTC advising it of its options in case of default. The witness asserted that under the LSK Conditions of sale, before termination, a termination notice was required. The onus was upon on the Plaintiff to prove that they paid him. That he only acknowledged receiving the 10% deposit. He never collected the Cheque No. 311462 for the sum of Kshs. 5,313, 609/= and the receipt adduced thereto is not from his office.
81. That the Letters dated 31st March, 1992, 11th May, 1992 and that of 23rd May, 1994 and the receipts attached thereto were equally not from his office. As of June 1994, the Agreement had been terminated. The Termination Notice is dated 2nd January, 1992 in which the Defendants gave the Plaintiff 21 days to comply.



82. The witness disowned the tabulation on Page 83 of the Plaintiff's bundle. He stated that he could not recall receiving the letter dated 14th August, 1995. The letters of 15th August, 1995, and 21st August, 1995 were not his as he was not aware of the alleged meetings referred to therein.
83. After KPTC failed to honour the agreement, the witness confirmed that the properties were put on sale in order to repay Kenya Commercial Bank Ltd.
84. The witness's testimony in respect of the reports from the Parliamentary Investment Committee was that were privileged communication and that was why he did not seek to quash them in court.
85. The amounts claimed in Paragraph 42 of his Counterclaim was in respect of the charge in favour of Kenya Commercial Bank Ltd.
86. The witness, who was also the 2nd Defendant in the case asserted that he was defamed by the Plaintiff. He had separately sued the Nation Newspaper and the Kenya Commercial Bank Ltd for defamation. That the claim against Kenya Commercial Bank Ltd for defamation was settled out of court whereas the one against Nation Newspaper was still ongoing.
87. The witness confirmed that he had since subdivided the suit properties and sold some portions thereof. He had already cleared the loan with Kenya Commercial Bank Ltd.
88. In re-examination, DW 1 stated that he had raised a complaint about the receipts purported to have originated from his office with the Criminal Investigation Department. In his Letter of 10th December, 1997, he indicated that he was agreeing to refund the money allegedly paid for stamp duty under protest which fact was captured by the Parliamentary Report at Page 141 of the Defendant's documents. That Stamp Duty is payable just before presentation of transfer documents. The witness expressed the opinion that the preparation of the Cheque by KPTC was just but an attempt to hoodwink the Parliamentary Investment Committee that the transaction was on-going.
89. The Cheque in favour of the Collector of Stamp Duty bears a stamp that states that KPTC is "Stamp Duty exempt." The Plaintiff was fully aware of the status of the properties even as we entered into the agreement. However, the witness affirmed that in order to sell the properties free of any encumbrances, he needed to have cleared the amount owed to Mercantile Finance Company.

Court's directions

90. At close of the hearing, the court directed parties to file written submissions. Both parties complied and filed lengthy submissions with authorities to augment their respective positions. The court has had the opportunity to read the submissions together with the cited authorities that now form part of this court's record.

Issues for Determination

91. Having carefully considered the pleadings in this matter, the evidence adduced at the hearing and the respective submissions by the Plaintiff and the Defendants, the court's opinion is that the issues for determination in this case are;
 - a. Whether the contract between the Plaintiff and the 1st Defendant was vitiated by misrepresentation.
 - b. Whether the Plaintiff has proved its claim of Kshs. 60,764,141/=.
 - c. Whether the Plaintiff has proved its case against the 2nd Defendant.



- d. Whether the Court has jurisdiction to determine the Defendants' counter-claims.
- e. Whether the Counter-claims against the Plaintiff are time barred.
- f. Who should bear the costs of the suit and the Counter-claims?

Analysis and Determination

A. Whether the contract between the Plaintiff and the Defendant was vitiated by misrepresentation

- 92. The Plaintiff in particularizing the breach of contract averred that the 1st Defendant purported to sell the suit properties to it when it was not the registered proprietor of the said parcels of land. Subsequently, and in spite of the agreement with the Plaintiff, the 1st Defendant went ahead and transferred the parcels of land to its name and consecutively charged the titles in favour of Kenya Commercial Bank Limited on the designated date for the completion of the agreement.
- 93. The Plaintiff accused the 2nd Defendant, who was its advocate in the transaction, the subject matter of this suit, of willfully refusing to disclose to it that the 1st Defendant was not the registered proprietor of the suit properties when the sale process commenced and more specifically at the time of execution of the agreement for sale.
- 94. At this juncture, I must state that this is a classical case that demonstrates conflict of interest and all that is wrong with an Advocate acting in such a situation. The 2nd Defendant, who is an advocate, was purportedly acting for both the Plaintiff and the 1st Defendant in their intended transaction. From the evidence before the court, and on the 2nd Defendant's own admission, he was a director of the 1st Defendant company together with his wife.
- 95. Though the 2nd Defendant alleged that the Plaintiff was at all times aware of the situation, no evidence was provided to that effect. If that were so, why then was it not stated as such in the agreement for sale that the 2nd Defendant himself drafted for the parties? He instead indicated that the 1st Defendant was the proprietor of the suit properties which fact he knew was not true.
- 96. As the Plaintiff states in its pleadings, it expected the 2nd Defendant as its Advocate to not only conduct a search on the titles of the suit properties and confirm that the 1st Defendant had a good title to the properties capable of being transferred to the Plaintiff but also that the suit properties were not encumbered in any manner prejudicial to the Plaintiff's position as a Purchaser.
- 97. The Plaintiff therefore relied on the representation that the 1st Defendant was indeed the registered proprietor of the suit properties and went ahead to sign the agreement.
- 98. Gacheru J in the case of African Cotton Industries Ltd vs Rural Development Services Ltd (2021) eKLR, observed that vitiating factors in a contract are those factors the existence of (any of) which will cripple or invalidate the contract. Examples are; mistake, duress, misrepresentation, undue influence, illegality, unconscionable contracts, fraud, insanity, a party being a minor and void agreement. Vitiating factors may infect a contract either at its formation or at the performance of the contract.
- 99. So, as it turns out, the 1st Defendant at the time of execution of the agreement with the Plaintiff, was neither the lawful owner nor the registered proprietor of the suit properties. The 1st Defendant had therefore, as the Plaintiff puts it in the amended Plaintiff, purported to sell to it that which it did not own by misrepresenting that it was the owner of the suit properties.
- 100. In their further amended statement of Defence and Counter-claim, the Defendants interestingly and categorically state that there was no valid agreement as at 7th November, 1991. This was stated at



paragraph 2 of the Further Amended Defendants' Statement of Defence amended on 13th November 2022 and filed in court on the same date. The Defendants averred that, "The Defendants admit the content of paragraph 4 and 5 of the plaint but will aver at the hearing hereof that there was no valid agreement as at 7th November 2022."

101. I agree with the Defendants averment wholly. The misrepresentation by the 1st Defendant vitiated the intended contract. The 1st Defendant did not have the capacity to enter into the agreement as it purported to with the Plaintiff. The misrepresentation went to the core of the intended contract; the capacity of the 1st Defendant to contract with the Plaintiff. The contract was therefore infected by the vitiating factor at its formation. The Defendants were right to state that there was no valid contract as at 7th November 1991 when the agreement with the Plaintiff was allegedly signed.

B. Whether the Plaintiff has proved its claim of Kshs. 60,764,141/= against the 1st Defendant

102. The Plaintiff alleges to have paid a total sum of Kshs. 62,764,141/= to the 1st Defendant through the 2nd Defendant. The 1st Defendant however, refunded a sum of Kshs. 2,000,000/= leaving a balance of Kshs. 60,764,141/= which is the amount that the Plaintiff claims in this case.

103. The Plaintiff further alleges that the 1st Defendant acknowledged indebtedness and offered to repay the Plaintiff by monthly installments of Kshs. 1,000,000/= vide its Letter of 21st August, 1998.

104. The Plaintiff's claim is a claim for special damages which must not only be specifically pleaded but must be strictly proved. In the case of Hahn –vs- Singh (1985) KLR 716, the Court of Appeal held that: -

“Special damages must not only be specifically claimed (pleaded) but must also be strictly proved...for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

105. In Total (Kenya) Limited formally Caltex Oil (Kenya)Ltd –vs- Janevan Limited (2015) eKLR, the court insisted that;

“a party must present actual receipts of payments made to substantiate loss or economic injury. It is not enough for a party to provide proforma invoices sent to the party by a third party”

106. The Plaintiff has adduced payment vouchers alleging that it effected payments to the 2nd Defendant who was to hold the money as stakeholder. In cross-examination, the Plaintiff's witness, PW1 stated that the Plaintiff had not completed paying the purchase price on the said completion date. Again he stated that there was no further agreement, or any deed of variation to vary the initial agreement. The Payment vouchers were internal documents used for processing payments.

107. Looking at the annexed Vouchers in the Plaintiff's Bundle of Documents from Pages 38-49; it is indicated on the Vouchers that, "copy for preparing office not valid for payment". At the bottom of the Vouchers, there is a column stating that the payment is complete once; 'if paid by Cheque, then the Cheque Number has to be indicated, date of the Cheque and it has to be signed by the Paying Officer. If the payment was by cash; the person receiving the cash had to sign the Voucher in the presence of a Witness and indicate the date as well.'

108. None of the Vouchers allegedly effecting payment of the balance of the purchase price satisfies any of the above requirements. PW1 confirmed that he had not attached any Cheque confirming the alleged



- payments or even the Bank Account from which the payments were being effected from. No Bank Statements were adduced either to that effect to prove the alleged payments.
109. If at all the payments were made as alleged by the Plaintiff, nothing could have stopped the Plaintiff from presenting at least even the Cheque numbers or the forwarding letters as it did with the payment of the 10% deposit.
110. The Letter dated 21st August, 1998, that the Plaintiff relied on alleging admission of indebtedness does not expressly admit the amount of Kshs. 62,764,141/= and cannot qualify to be an unequivocal admission. It therefore does not exonerate the Plaintiff from the burden of specifically proving its claim.
111. I however note that the 1st Defendant has acknowledged receiving Kshs. 4,716,471.95/= vide the Letter dated 17.11.1992, which was allegedly part of the amount of interest payable at the rate of 19% that could have accrued on the Purchase Price.
112. It is also not disputed that the Plaintiff had already paid a sum of Kshs. 5,804,767/= as deposit of the purchase price, being 10% of the Purchase Price at the execution of the agreement. This is indicated in Clause 3 of the Sale Agreement.
113. Cumulatively, the Plaintiff therefore paid a total sum of Kshs. 10,521,238.95/=. Having found that the contract between the parties was vitiated by misrepresentation, this amount is refundable to the Plaintiff.
114. The Plaintiff confirms that the 1st Defendant refunded it a sum of Kshs. 2.0 Million. The said sum shall therefore be deducted from the total amount paid by the Plaintiff. This amounts to a sum of Kshs. 8,521,238.95, which shall be refunded to the Plaintiff by the 1st Defendant.
115. Regarding the rate of interest, Clause 4 of the special conditions attached to the Sale Agreement states that;
- “The rate of interest provided under Clause 2 of this Agreement is hereby amended to read nineteen (19%) per cent per annum.
113. Clause 7 of the special Conditions on the other hand provides that;
- “.....and in default of each instalment the total balance of the Purchase Price to fall special condition Number 4 hereof shall apply.”
113. I agree with the Defendants’ assertion that the said rate of 19% interest was only applicable to the 1st Defendant in case of default by the Plaintiff and not vice versa. Clause 7 cited above indicates that the Plaintiff was to pay the balance of the purchase price on a weekly basis for the first 3 weeks in installments of Kshs. 10,000,000/- and thereafter Kshs. 5,000,000/= per week excluding the deposit. This meant that for the first 3 weeks, the Plaintiff was to pay Kshs. 30 Million of the balance of the purchase price. Thereafter Kshs. 5,000,000/= every week until payment in full. It was therefore in case of default in payment of the installments by the Plaintiff, that Clause 4 on interest would apply.
114. Clearly, the interest was to be paid by the Plaintiff and not the other way round. That being the case, the court can only then resort to the provisions of Section 26 of the *Civil Procedure Act*.
115. Justice Joel Ngugi (as he then was) in the case of Jane Wanjiku Wambu –vs- Anthony Kigamba Hato & 3 others [2017] eKLR, analyzed the three principles derived from Section 26 of the *Civil Procedure Act*. The first principle is that the Court has wide discretion to award and fix the rate of interest provided that such discretion must be used judiciously.



116. Secondly, that under Section 26(1) of the *Civil Procedure Act*, the Court has discretion to award and fix the rate of interests to cover two stages namely:
- a. The period from the date the suit is filed to the date when the Court gives its judgment; and
 - b. The period from the date of the judgment to the date of payment of the sum adjudged due or such earlier date as the Court may, in its discretion fix.
113. The third principle is that when it comes to the period before the filing of the suit, Section 26 of the *Civil Procedure Act* has no application. Instead, interest prior to the date of the suit is a matter of substantive law and is only claimable where under an agreement there is stipulation for the rate of interest (contractual rate of interest) or where there is no stipulation, but interest is allowed by mercantile usage (which must be pleaded and proved) or where there is a statutory right to interest or where an agreement to pay interest can be implied from the course of dealings between the parties.
114. In the instant case, having found that the rate of 19% interest was not payable to the Plaintiff in case of default, the Court will exercise its discretion under Section 26 of the *Civil Procedure Act* and award interest on the Kshs. 8,521,238.95/= awarded to the Plaintiff against the 1st Defendant at court rates from the date of filing of this suit until payment in full.
115. Regarding the claim for general and exemplary damages, the general rule is that general damages are not recoverable in cases of alleged breach of contract. The Court of Appeal decision in *Kenya Tourism Development Corporation –vs- Sundowner Lodge Ltd. (2008) eKLR*.
116. There would be no basis of awarding any damages anyway as the intended contract was vitiated by the misrepresentation of the 1st Defendant.

C. Whether the Plaintiff has proved its case against the 2nd Defendant

113. The Plaintiff in its Plaint avers that it had a Client-Advocate relationship with the 2nd Defendant. That the 2nd Defendant was required to generally advise the Plaintiff on the intended purchase of the suit properties. He was to ensure that the Plaintiff got the value for its money. The Plaintiff further contends that the 2nd Defendant was supposed to disclose any personal interests he had either by himself or his spouse or any other person in the 1st Defendant Company.
114. It is not clear what the Plaintiff's claim against the 2nd Defendant is from the pleadings. The Plaintiff is seemingly accusing the 2nd Defendant of professional negligence and failure to disclose his interests in the 1st Defendant Company that amounted to conflict of interests but does not come out clearly.
115. If that be the case, this Court would not have been the right forum to decide on matters of professional misconduct between an Advocate and his Client. The Plaintiff ought to have raised the issue with a court of competent jurisdiction. As stated elsewhere in this judgement, jurisdiction is everything and without it the court must down its tools.
116. The Plaintiff's claim as against the 2nd Defendant is therefore struck-out.

D. Whether the Court has jurisdiction to determine the issues in the 2nd Defendant's counter-claim

113. The Supreme Court of Kenya in the case of *R -vs- Karissa Chengo (2017) eKLR* stated that,
- “By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the Statutes, charter or commission under which the



court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics.....where a court takes upon itself to exercise a Jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given.”

113. In the case of Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Limited and 2 Others, the Supreme Court reiterated that,

“A court’s jurisdiction flows from either *the constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written Law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

113. The decision in the now famous case of Owners of Motor Vessel “Lilian S” –vs- Caltex Oil (Kenya) Limited (1989) KLR 1 established that, “Jurisdiction flows from the Law and the recipient court is to apply the same, with any limitations embodied therein.”

114. The Environment and Land Court is a specialized Court whose jurisdiction of this court is provided for under Article 162 (2) (b) of *the Constitution* and more specifically under Section 13 of the *Environment and Land Court Act*, Sub- section 2 (b) of which stipulates that the court shall have power to hear and determine disputes-

- a. Relating to environmental planning & protection climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- b. relating to compulsory acquisition of land;
- c. relating to land administration and management;
- d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e. any other dispute relating to environment and land.

113. Turning to the 2nd Defendant’s Counter-claim, the 2nd Defendant’s claim against the Plaintiff is for; -

- i. Defamation as a consequence whereof the 2nd Defendant pray for general, exemplary or punitive damages.
- ii. Legal fees of Kshs. 905,000/= plus interest at 30 % from the date of filing the Counter-claim.
- iii. Kshs. 101, 719.90/= being the amount expended for an advertisement in the Daily Nation Newspaper and Standard Newspaper to ‘mitigate’ the bad reputation and press and print coverage.

134. Out- rightly, this court does not have the jurisdiction to determine the 2nd Defendant’s claim for defamation. In regard to the claim for legal fees, the *Advocates Act* and the Advocates Remuneration (Amendment) Order provide the mechanism and procedure for taxation and recovery of legal fees by and advocate from a client. That is the route the 2nd Defendant must follow.

135. In regard to the claim for Kshs. 101,719.90/=, the alleged amount does not arise out of any of the issues enumerated under Section 13(2) (b) of the Environment & Land Court Act. It is outside



the jurisdiction ambit of this court. As the 2nd Defendant states, it was the cost expended to place advertisements in the newspapers to ‘mitigate the defamation’.

136. I must point out that from the record this case was transferred from the High Court to this court with the consent of the parties. That however, cannot confer jurisdiction on the court where no such jurisdiction exists. The Court of Appeal in the case of Equity Bank Ltd vs Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR affirmed the issue above and stated that; -

“It is settled that parties cannot even by their consent confer jurisdiction on a court where no such jurisdiction exists. It is so fundamental that where it lacks, parties cannot even seek refuge under the oxygen principle or the overriding objective under the *Civil Procedure Act*, the *Appellate Jurisdiction Act* or even Article 159 of *the Constitution* to remedy the same.

136. I therefore strike-out the 2nd Defendant’s Counter-claim in its entirety for want of jurisdiction.

E. Whether the Counter-claims against the Plaintiff are statute barred

138. Section 109 of the repealed Kenya Posts and Telecommunications Corporation Act Cap. 411 Laws of Kenya provided as follows: -

“Where any action or other legal proceeding is commenced against the Corporation for any act done in pursuance or execution, or intended execution, of this Act or of any public duty or authority, or in respect of any alleged neglect or default in the execution of this Act or of any such duty or authority, the following provisions shall have effect -

- (a) the action or legal proceeding shall not be commenced against the Corporation until at least one month after written notice containing the particulars of the claim, and of intention to commence the action or legal proceedings, has been served upon the Managing Director by the plaintiff or his agent;
- (b) the action or legal proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuing injury or damage, within six months next after the cessation thereof.”

139. The Court of Appeal in the case of Mary Wahito (A minor suing thru’ next friend Gladys Wairimu Waiguru) & Another -vs- Kenya Posts & Telecommunications Corporation & another [1997] eKLR cited the Halsbury’s Laws of England Vol.28 Paragraph 601 which states that:

“All statutes of Limitation are analogous and should receive a uniform construction; they are beneficial statutes, and are to be construed liberally and not strictly. Besides the general statutes relating to limitation of actions there are special statutes fixing special periods of limitations in particular cases.”

140. The Court in holding that the said case was statute barred went on to state that;

“We derive most help from this statement of law. Section 109 is a special section in the statute which fixes special periods of limitation in particular cases...”

140. Duly guided by the above authority, I likewise find that the 1st Defendant’s Counterclaim is time barred having been filed after the statutory period and without leave of the court. It is therefore



dismissed. That would be the same position in regard to the 2nd Defendant's counter-claim which I have already struck out for want of jurisdiction.

E. Which party bears the Costs of the suit and the Counter-claim?

140. Courts have the ultimate discretion in the award of costs. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Everest Enterprises Limited* [2014] eKLR the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

140. As between the Plaintiff and the 1st Defendant, the court having found in favour of the Plaintiff against the 1st Defendant and further having dismissed the 1st Defendant counter-claim against the Plaintiff grants costs of the suit and the counter-claim to the Plaintiff against the 1st Defendant. In regard to the Plaintiff and the 2nd Defendant, the court has struck out the Plaintiff's claim against the 2nd Defendant on the one part and also struck out the 2nd Defendant's claim against the Plaintiff. The appropriate order as regards costs then is that each party bears its own costs. The court so orders.

141. In conclusion therefore, the Court makes the following orders;

- a. That judgement be and is hereby entered in favour of the Plaintiff as against the 1st Defendant for a sum of Kshs. 8,521,238. 95/= with interest thereof at court rates from the date of filing of this suit until payment in full.
- b. That the Plaintiff's claim against the 2nd Defendant is hereby struck-out.
- c. That the 1st Defendant's Counterclaim against the Plaintiff is hereby dismissed.
- d. That the 2nd Defendant's Counterclaim against the Plaintiff is hereby struck-out.
- e. That the Plaintiff is awarded costs of the suit and costs of the counterclaim against the 1st Defendant.
- f. That as between the Plaintiff and the 2nd Defendant each party shall bear its own costs.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 10TH DAY OF MAY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Towet holding brief for P.M. Gichuru for the Plaintiff.

Ms. Koko for the Defendants.

Court Assistant – Vanilla.

M.D. MWANGI



JUDGE

