



Thuku v Kenya Ports Authority & another (Environment & Land Case 144 of 2014) [2023] KEELC 21596 (KLR) (6 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21596 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 144 OF 2014
LL NAIKUNI, J
NOVEMBER 6, 2023**

BETWEEN

FRANCIS KARURI THUKU PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

THE NATIONAL LAND COMMISSION 2ND DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment before this Honourable Court pertains to the suit instituted by Francis Karuri Thuku the Plaintiff herein through a Amended Plaint dated 5th July, 2017 and filed on the same day against Kenya Ports Authority and the National Land Commission the 1st and 2nd Defendants herein.
2. Upon service of the pleadings and summons to enter appearance the 1st Defendant entered appearance on the 2nd April, 2013 and subsequently, on 7th August, 2017, filed an Amended Defence. Likewise, the 2nd Defendant filed their statement of defence on 5th March, 2017.
3. On 18th February, 2022 upon all parties having fully complied on the provisions of Order 11 of the Civil Procedure Rules 2010 with regard to the Pre-trial conference, it was fixed for full trial on the 21st June, 2022.
4. Eventually, this matter proceeded for hearing in earnest by way of adducing “Viva Voce” evidence. The Plaintiff’s witness, PW – 1 and PW - 2 testified in Court on 21st June, 2022 while PW - 3 tendered evidence on 20th February, 2023. Thereafter, the Plaintiff closed his case. Subsequently, the 1st Defendant called DW - 1 on 20th February, 2023 whereby after the hearing of the Defence case, the 1st Defendant it closed its case afterwards. From the record, for unclear reasons, the 2nd Defendant never participated in the hearing of the matter.



II. The Plaintiff's case

5. From the filed pleadings, the Plaintiff is described as a male adult of sound mind residing and working for gain at Mombasa in the Republic of Kenya. The Plaintiffs claimed that at all material times to this suit he was and is the registered owner of land parcel No. 2823/VI/MN (hereinafter referred to as "The Suit land") as the Administrator of the estate of his mother, Susan Mwiwaki [Now deceased]. Sometimes on or about the 18th May, 2007, the 1st Defendant through his employee and/or representative invited the Plaintiff and others for a consultative Public meeting at Bandari College, Mombasa whose purpose was to address issues related to land acquisition, resettlement and compensation of land owners to give way for the construction of the proposed Kipevu West Container Terminal project which was to be funded jointly by the Government of Kenya and the Government of Japan [JICA]. The suit land was located within the area to be covered by the proposed project as it was lying just next to the path of the access road where a new port access road was to be constructed connecting the new terminal with the existing Port Reitz road.
6. The Plaintiff and other plot owners in the area were made to understand at the said meeting of 18th of May, 2007, that the construction of the project was to begin during the year 2007 and they were informed not to carry out any new improvements or developments in that area and to prepare to vacate the place upon being paid compensation. Following such representations as stated herein above in paragraph 6, the Plaintiff terminated the lease of a school they had granted to one of their tenants and caused their plot – the suit land to be valued by one Mr. W. J. Mukhongo, Registered Valuation Surveyor of Wyco Valuers Company. The same was duly valued as per the Report and Valuation dated 20th June, 2007 at a sum of Kenya Shillings Thirteen Million Four Hundred Thousand (Kshs.13,400,000/-). Despite the fact that the Plaintiff had terminated the tenancy of his tenants on the suit property in the year 2007 in readiness for the takeover of the property by the 1st Defendant in the cause of that year nothing materialized in the cause of that year and in the subsequent years, 2008, 2009 and 2010 and the Plaintiff lost the income from that property till the 18th July, 2011 when a Sale Agreement was duly signed between him and the 1st Defendant to facilitate the payment of compensation for the land.
7. The Plaintiff was paid an inadequate compensation for his property L.R.2823/VI/M.N based on the 2007 valuation and report by his valuer Mr. W. J. Mukhongo who valued the property at a sum of Kenya Shillings Thirteen Million Four Hundred Thousand (Kshs.13,400,000/-) which was later slightly adjusted by the 1st Defendant by an additional 10% following his presentations to make a total sum of a sum Kenya Shillings Fourteen Million Eighty Fifty Hundred and Fifty Thousand (Kshs.14,850,000/-) which was finally paid to him on the 8th March, 2012. It was the contention of the Plaintiff that there was material non - disclosure and concealment on the part of the 1st Defendant at the time he was being paid compensation for the said property based on the year 2007 Valuation Report which gave him a low figure for compensation not based on the market value of the property at the time payment was made and yet there was another Valuation Report by a Government Valuer dated 9th January, 2012 in possession of the Defendant who had valued the said property at a higher figure of Kshs.20,000,000/-.
8. In all fairness, the Defendant ought to have paid him compensation based on the valuation by the Government Valuer at Kshs. 20,000,000/- for the suit property at the then prevailing market price instead of basing such compensation payment on the 2007 valuation report at Kshs.14,850,000/- .It appears to the Plaintiff that the value of his plot had appreciated by the year 2012 when payment was made and the Plaintiff avers that he ought to have been paid compensation based on the market value as at the time of payment and not based on the year 2007 valuation. The Plaintiff's immediate neighbor



a Mr. Khatib whose property was lying right behind his suit property which was on the road frontage was paid compensation by the 1st Defendant in the sum of Kenya Shillings Thirty Million (Kshs. 30,000,000.00/=) and yet he was paid less by the same 1st Defendant.

9. The Plaintiff averred that he was duped by the 1st Defendant into accepting a lower sum for compensation for his property through material non-disclosure and concealment of the prevailing market price for his property to the extent that he became a laughing stock within the neighborhood for accepting such a low figure for his property which was quite prime. The Plaintiff was short - changed during the compensation process for his suit property by the 1st Defendant who ought to have paid him an additional sum of Kenya Shillings Fifteen Million Four Fifty Seven and three thousand (Kshs.15,457,003/-) for his property based on the valuation by the Government valuer thereby making a total sum of Kenya Shillings Thirty Million Three and Seven and three thousand (Kshs.30,307,003/-) which ought to have been paid to him as reasonable compensation in the circumstances. The Plaintiff now claimed from the 1st Defendant was an additional payment of compensation for his suit property in the sum of sum of Kenya Shillings Fifteen Million Four Fifty Seven and three thousand (Kshs.15,457,003/-) made up as follows-Land and existing improvements/buildings – a sum of Kenya Shillings Nine Million Six Hundred Thousand (Kshs.9,600,000/-)15% statutory compensation – a sum of Kenya Shillings One Million Four Fifty Five Thousand One Fifty Four Hundred (Kshs. 1,455,154/-)10% injurious affection – a sum of Kenya Shillings One Million Sixty Seven Thousand (Kshs. 1,067,122/-)25% severance for absolute loss of whole property and rental income – a sum of Kenya Shillings Three Million Three Thirty Four Thousand Seven Twenty Seven Hundred (Kshs. 3,334,727/-)
10. Despite demands being made to the 1st and 2nd Defendants to pay the additional compensation demanded, the 1st and 2nd Defendants had declined and or ignored the claim thereby making this suit necessary.
11. Thus, the Plaintiff prayed for Judgment to be entered against the 1st and 2nd Defendants jointly and severally for:-
 - a. A declaration that the Plaintiff was not paid adequate compensation by the Defendant for his property L.R. No. 2823/VI/MN in the process of acquisition of the same.
 - b. Payment of additional compensation in the sum of Kshs.15,457,003/-.
 - c. Costs and interest on (b) above
 - d. Any other or further relief this Honourable Court may deem just to grant.

III. The Testimonial Evidence By The Plaintiff

12. On 21st June, 2022, the hearing for the Plaintiff commenced the hearing of his case in earnest. He summoned three (3) witnesses – the PW – 1, PW – 2 and PW – 3 who testified as follows:-

A. Examination – in - Chief of PW - 1 by Mr. Hayanga Advocate

13. PW - 1 was sworn and he testified. He identified himself as Francis Karuri Thuku. He was the Plaintiff herein. He was employed by Kenya Port Authority as a Folk Lift Operator. He was in Court over a parcel of land. The land belonged to his parents who died and he was appointed the Legal Administrator of the estate of his deceased parents. Plot No. 2823/MN was a freehold which was 0.2542 Ha. He was from a family of four other dependants who his parents were taking care of. He told the court that he recorded a statement dated 13th March, 2013. In the year 2007, the appointee of



Kenya Ports of Authority informed him that there would be a meeting at Bandari College. He told the court it was for the people who were affected by the project (PAPs).

14. He attended the meeting which was conveyed by Engineer Towea. The meeting was about the acquisition of the land. They were told to present the valuation reports as the project was urgent and that by November 2007 the process should have been concluded. They were told not to do anything else in the land. The land had a family house and structures – well built structures and a perimeter wall. The family practiced poultry; there was a school there rented to an NGO.
15. He told the court that they had cultivated trees:- mangoes, coconuts and other trees. They engaged the services of a land surveyor/ valuer who gave it a value of a sum of Kenya Shillings Thirteen Million Four Hundred Thousand (Kshs. 13,400,000/-) for the suit property. The KPA waited until the year 2011 and gave them a valuation four (4) years after the value they had been given. They valued the property at a sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000/-). They said it was an increase of 10% of what the Plaintiff and the other members of the public had given them. They wrote a letter dated 24th June, 2010 complaining to the 1st Defendant on their valuation which was on the lower side and that the sum had appreciated. They had proposed to be paid a sum of Kenya Shillings Eighteen Million (Kshs. 18,000,000/-). The Government valuer gave a value at a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-). It was until 18th March, 2012 the 1st Defendant paid the Plaintiff a sum of Kenya Shillings Fourteen Million Eight Hundred Thousand (Kshs. 14,800,000/-). The government valuer gave a higher and more reasonable value. The more accurate valuation was to have been paid the current valuation. There was an agreement prepared by their advocate dated 16th July, 2011 and which was signed by the KPA General Manager and the PW - 1.
16. He further stated that by this agreement, he to be paid a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-) as his estimate. KPA asked them to either take the sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000/-) or KPA would invoke compulsory acquisition or alternatively he sought legal action. As an employee of KPA he felt oppressed and intimidated. Had he been independent from the employment to the 1st Defendant, perhaps he would have engaged his own valuer. The agreement was to last for 90 days but they were paid after 8 months i.e. they would be paid with the year 2007. They were paid a sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000/-). After the year 2007, they were stopped from doing any development on the land. They terminated the lease with the school and they looked for a separate premises to take the children who were street children.
17. The witness told the court that he was not satisfied on the payments made by KPA. The difference in time from the promise made in the year 2007 to 2012, the land had appreciated. He asked the court to increase the amount payable to them in the year to 2007 to 2012 stating that between the year 2007 and 2012 the land remained underutilized and they had already issued the notice to vacate the land. They never had any attempt on getting a KPA valuation.

B. Cross Examination Of Pw - 1 By Mr. Cheruiyot Advocate

18. The witness reiterated that the acquisition was a private treaty between KPA and the owners of the land. It was compulsory acquisition. He had not filed any letter or complaint on the coercion. It was in writing not to anything on the property. There would be no developments undertaken on the land. The agreements did not talk about termination of lease. There was no letter to advise them to undertake private valuation for the purposes of sale. There was no Government valuer. The government valuation would have been for the purposes of payment of stamp duty. It was done on 9th January, 2022 and they signed the agreement in the year 2011. Each property was acquired separately. It was not a collective



acquisition. He had several advocates representing him. There were advocates who were negotiating with the 1st Defendant.

19. He further reiterated that he also wrote a letter to the 1st Defendant. They eventually they increased the amount by 10% to a sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000/-) and he signed the agreement. It was prepared by Kipkenda Advocate for KPA dated 18th July, 2011 and by his advocate Hassan Abdi. He admitted they all signed the agreement. Thereafter he signed the transfer and it was registered. There was no letter compelling him to sign the agreement.

C. Re - Examination Of Pw - 1 By Mr. Hayanga Advocate

20. The witness referred to an email written by his brother to the Managing Director summoning him. Further, him wanting the insight on all what had transpired between the KPA and them at the meeting held at Bandari College.

D. Examination - In - Chief Of Pw - 2 By Mr. Hayanga Advocate

21. PW – 2 was sworn and testified in Kiswahili language. He identified himself as Maxwell Thuku. He stated that he was the Plaintiff's brother. He was supporting this case. The land taken by KPA originally belonged to their late mother. They had a bungalow which they leased out to a private school. They would use the money by themselves for their upkeep. They were paid by the 1st Defendant a sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000/-). It was after the valuation was done in the year 2007, they had been made to believe that they were to be paid that year. When KPA came to pay them that year they protested and KPA agreed to pay them with an increase of 10%.
22. He told the court that he and his brother tried to engage a land valuer Musyoki but he refused to come over to testify. There had been differences in the valuation. They did one in year 2007 which placed the value of the land at a sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000/-) while the government valued the land at a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-). They would like to be paid a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-). They had neighbours who were paid higher figured i.e. ranging between a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-); Kenya Shillings Twenty Five Million (Kshs 25,000,000/-) and Kenya Shillings Thirty (Kshs. 30,000,000/-). They felt that a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-) would be reasonable. They filed an application in court to get the KPA report.

E. Cross Examination Of Pw - 2 By Mr. Cheruiyot Advocate

23. He told the court that he had not been a party to this case. The case was filed by his brother Francis Karuri Thuku. There was no order given by the Court. They did not own the land. There was no valuation issued to them. They had their lawyers all through the transaction.

F. Re-examination Of Pw - 2 By Mr. Hayanga Advocate

24. He told the court that there was an application for the production of the valuation report by KPA but it was not produced.



G. Examination In Chief Of Pw - 3 By Mr. Hayanga Advocate

25. PW – 3 was sworn and testified in Kiswahili language. He told the court he was Mr. Samuel Nthanze Musyoki, a Valuation Surveyor. He valued the property and the land and recalled the facts of this case. He was approached by the Plaintiff in November, 2018 to undertake a valuation report of the land. Thereafter, he prepared a report dated 28th September, 2018 and it was filed in court. He made many efforts to visit the site. After the survey, he made some observations and reading the report prepared by Wyco Valuers.
26. He made reference to page 4 of the reports. It contained general and valuation remarks (PW - 3 read the part of the report loudly in Court). He got the data from the land's office. The compensation value for the L.R. No. 2824/VI/MN was put at a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-) in June 2012 but for Plot 2823/VI/MN was valued at a sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000/-) in February, 2012 and valued at a sum of Kenya Shillings Thirteen Million Four Hundred (Kshs. 13,400,000/-) by Wyco Valuers in the year 2007 which was five years. There was a very big difference as by this time it was already absolute. The value of Wyco Valuers was for a sum of Kenya Shillings Two Million (Kshs. 2,000,000/-) per square metre. But according to him the value for the land within that area was Kshs 1,180/- @ Kshs 2,158/- per square metre. There was a big appreciation of the land. If they were to have been paid what was justifiable would have been a sum of Kenya Twenty Five Million Four Sixty Eighty Thousand One Thirty Three Hundred (Kshs. 25,468,133/-) for the Plot No. 2824/VI/MN.
27. The witness confirmed that these two properties were sharing boundaries and were similar. Plot No. 2824 measured 2158 square metres. To him, the Plaintiff should have been paid more. The amount of a sum of Kenya Shillings Fourteen Million (Kshs. 14,000,000/-) was very low. It should have been raised to a higher figure as stated herein. The value kept increasing like a pendulum depending on the activities within the areas. From his report under the valuations remarks. He held that he did not understand why the compensation for the claim was not paid the stamp duty value i.e. Kshs 9,267/- per square metre @ Kshs 2,158 sq metre - Kshs 20,000,000/-. Clearly the government valuer also noticed the value. The property No. 2823/VI/MN had been given a value of a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-) as it was much bigger. He produced the Valuation report as Plaintiff Exhibit No. 11.

H. Cross Examination Of Pw - 3 By Mr. Cheruiyot Advocate

28. He confirmed that he did not attach the letter of instruction from the Plaintiff, Mr. Francis Karuri Thuku in his report as per page 1. He was referred to page 3. They were tempted to ignore the other valuation report. Plot No. 2824/VI/MN was much bigger and it was paid a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-). However, he did not have the source of the information in his report. Also while he was doing an analysis of Plot No. 2439/Sec. VI/MN, he held that it was paid a sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/-) but he had not attached any source or proof of this information. There were no beacons on the land numbers 2824, 2823 and 2439. But when he went there, he only found a road on Plots no 2823, 2824 and 2439. They conducted the valuation in the year 2018. He was not aware that these properties were transferred to KPA based on private treaties and not compulsory acquisition. He did not know whether there had been trees there. He did not know what caused Wyco Valuers to have arrived at their valuation. His report did not mention the appreciation and depreciation of the land.
29. He was referred to Page 4 on general remarks. He stated that it was shocking how individuals covering themselves in a mask of an institution could disinherit dependants and beneficiaries. The beneficiaries bowed to pressure from dependants after waiting for 5 years for compensation. It was not one of his



duties to determine this aspect. He just did it for his own observation. He did not conduct a valuation for Plot No. 2823/VI/MN nor the house on it. He only used the data available. There was no Plot No. 2823/VI/MN. There was only a tarmac road and no beacon in the year 2018.

I. Re - Examination Of Pw - 3 By Mr. Hayanga Advocate

30. He confirmed that he did appreciate the difference of appreciation and depreciation of the value of the land. There was an appreciation on Plot No. 2824/VI/MN. He was basing his valuation on the:-
 - a. The plot area
 - b. The site area
31. He told the court that he understood that the stamp duty was based on the transfer. It was the government revenue collected. KPA was an corporate institution. The Plaintiff closed his case.

IV. The 1st Defendant's Case

32. The 1st Defendant is a state corporation incorporated in the Republic of Kenya under the [*Kenya Ports Authority Act*](#), Chapter 391 Laws of Kenya with a mandate to maintain, operate, improve and regulate the Sea Ports in Kenya.. In reply to paragraph 3 of the Amended Plaintiff, the 1st Defendant denied that the Plaintiff was the current registered owner of land parcel situated at Mombasa Municipality in the Mombasa district comprising by measurement nought decimal two one five eight (0.2158) hectares of thereabout and being subdivision number 2823 (original number 2437/1) of section VI Mainland North were particularly delineated on survey plain number 96436-hereinafter called "the property". The property was now lawfully registered in the name of the 1st Defendant.
33. The 1st Defendant admitted the contents of Paragraphs 4 and 5 of the Amended Plaintiff in that the 1st Defendant through their employees and/or representatives invited the Plaintiff and others for a consultative public meeting at Bandari College, Mombasa whose purpose was to give way for construction of the proposed Kipevu West Container Terminal Project which was funded jointly by the Government of Kenya and the Government of Japan (JIKA). In reply to paragraph 6 of the amended Plaintiff, the 1st Defendant averred that whereas the project did not commence as earlier scheduled, the Plaintiff negotiations that was eventually reduced to written agreements. Payments in the form of compensation were made pursuant to the agreements.
34. The 1st Defendant argued that it was a stranger to the averments in Paragraph 7 of the Amended Plaintiff and made no admission as to the contents thereof. In reply to the contents of Paragraph 8 of the Amended Plaintiff, the 1st Defendant denied the allegations therein. Even assuming the allegations were true, which was denied, the averments contained therein ought to have been, but were never made the subject of negotiations leading to the agreement dated 18th July 2011 signed between the Plaintiff and 1st Defendant herein. In response to the contents made out under Paragraph 9 of the Amended Plaintiff, the 1st Defendant denied that the compensation, which the Plaintiff admitted he was paid, was inadequate. The issue of adequacy or lack thereof was resolved by the 10% adjustment and in any case, could not be raised lawfully subsequent to the signed agreement.
35. The 1st Defendant denied the allegations of material non - disclosures alleged in Paragraphs 10 and 11 of the Amended Plaintiff. Paragraph 12 of the amended Plaintiff and specifically that the property appreciated in value as alleged, or that the Plaintiff ought to have been paid a higher price for the same. The Plaintiff should have contested the agreed consideration prior, rather than subsequent to the signing of the agreement. Each property acquired was unique in its own way and among the factors that informed the compensation included the valuation, size, user, negotiated amount with proprietor



amongst other factors. It was therefore misguided for the Plaintiff to claim that he was, or was entitled, to compensation equal to other property owners.

36. The 1st Defendant denied the contents of Paragraphs 14 and 15 stating that the allegations read like an afterthought by an insatiable former property owner. In response to the averments made out under Paragraph 16 of the amended Plaintiff, the 1st Defendant denied that it owes the Plaintiff the claimed amount of a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-) or any other monies whatsoever. The Plaintiff was to be put to strict proof thereof. Furthermore, there was no basis in law for the demand as illustrated under paragraph 16 of the amended Plaintiff. The 1st Defendant denied that it was or is obliged to make good any demand as alleged or at all from the Plaintiff.
37. The 1st Defendant admitted the averments made out under Paragraphs 18 and 19. The 1st Defendant prayed that the Plaintiff be dismissed with costs.

V. The Testimonial Evidence By The Defendant

38. On 20th February, 2023 the 1st Defendant called its first witness DW - 1 who testified as follows:

E. Examination In Chief Of Dw - 1 By Mr. Cheruiyot Advocate

39. DW – 1 was sworn and testified in English language. He was called John Charles Mwangi. He was an employee of KPA as a Senior Estate and Rate Officer, in the Legal Department. He was a Land Economist and a registered Land Valuer. His employment number was 563043. On 27th September, 2015, he recorded a statement filed on the same date. The 1st Defendant was acquiring several plots surrounding it for the expansion of building a new berth/harbor and access road to the berth. The mode of the acquisition of land was by engaging the owners of the properties. There were engaging with the PAPs and that also included correspondence.
40. DW – 1 stated that in the course of KPA engaging the Plaintiff. After this mutual engagement process, agreements were signed. A valuation was done in the year 2007. The Plaintiff received compensation in the year 2011. He was represented by an advocate. Since the valuation was done in year 2007, and there was a delay in making payments, KPA caused the value to be enhanced by 10%. The total costs was a sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000/-). In paragraph 16 of the valuation report, KPA indulged the Plaintiff for the period of the valuation in 2007 and time of payment. There was an increment of value improvement, crop, loss of income and hence an increment of 10% of the total values. All these were negotiated. The 1st Defendant filed documents No. 1 to 20 dated 5th April, 2023 and filed 11th April, 2023 (Defendant Exhibit 1 to 20).
41. He told the court that the stamp duty valuation came after the transaction. It might differ and based on the going concern and market. Private treaty transaction never necessarily mirror on the stamp duty. KPA agreed on enhancing the value. It acted in good faith to compensate the Plaintiff and particularly taking that he was its staff member. The Plaintiff signed an agreement and was represented by an advocate. Hence he did not think it exploited the Plaintiff.

I. Cross Examination Of Dw - 1 By Mr. Hayanga Advocate

42. He told the court that the government valuation was for purposes of levying stamp duty. It was for a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) which was the valued amount. But the Plaintiff was paid the sum of a sum of Kenya Shillings Fourteen Million Five Hundred Thousand (Kshs. 14,500,000/-). The Plaintiff voluntarily signed the agreement; KPA considered the period of 5 years and hence caused it to be enhanced. The payment was made to compensate the loss of the period i.e. KPA negotiated a figure and enhanced it from its initial offer. They agreed to pay to cover



the period of 6 years from 2007 to 2011. It was not for the appreciation of the land. The two parties sat down and agreed to pay for the five years period lost. From the design, the area was earmarked for the road use; KPA had the power to acquire land through private treaty agreement. But if the people refused, then KPA would have to revert to compulsory acquisition.

43. According to the witness, the transaction was based on the valuation; KPA never undertook any valuation; KPA paid on the valuation made by the Plaintiff's claim.

J. Re - Examination Of Dw - 1 By Mr. Cheruiyot Advocate

44. He told the court that the nature of the transaction was based on the private treaty.

VI. The 2nd Defendant's Case

45. The 2nd Defendant is described as a public corporate body. It averred that it was a stranger to the contents of Paragraph 3 and 4 of the Plaintiff since no evidence by way of letters of administration or certificate of lease/certificate of title are on record and since the 2nd Defendant was only established in the year 2012 and operationalized in the year 2013 way after the said project had been finalized. The Proper Party would have been the Ministry of Lands and Physical Planning who were responsible for compulsory Acquisition of land as at that time. The 2nd Defendants had no knowledge of the matters set out in paragraphs 5,6,7,8,9,10,11,12,13,14,15,16 and 17 of the Amended Plaintiff and made no admissions thereto since the 2nd Defendant was not involved at all in the said compulsory acquisition.
46. The 2nd Defendant stated that the Plaintiff voluntarily participated in the said Compulsory acquisition process before the Ministry of Land, accepted the award of compensation and was paid and in the circumstances the instant suit was an afterthought brought many years after the cause of action if any arose. There was no evidence of any loss incurred had been specifically pleaded or proved. The interest on land compulsorily acquired only becomes due upon taking possession of the land and not before. The contents of paragraph 18 and 19 were admitted. The 2nd Defendant prayed that the Plaintiff's suit be dismissed with costs together with interest thereon.

VII. The Submissions

47. On 15th March, 2023 after all the parties closed their case, the Honourable court directed that parties to file their written submissions within stringent timeframe thereof on. Pursuant to that they all complied accordingly and on 11th May, 2023, the Honourable court reserved a date to deliver its judgement on notice.

A. The Written Submissions Of The Plaintiff

48. The Plaintiff through the Law firm of Messrs. A.I. Hayanga & Associates Advocates filed its written submissions dated 24th April, 2023. The Learned Counsel for the Plaintiff informed Court that that the Plaintiff was an employee of the 1st Defendant who's land construction of the proposed Kipevu West Terminal Project which was funded jointly by the 2823/VI/MN was located within the area to be covered by the said project.
49. On the brief facts and evidence of the case, the Learned Counsel informed Court that the acquisition was done by KPA on behalf of the Kenya Government and in a style they said was through private treaty although again they said it was done by compulsory acquisition. In one sense this gave the seller a feeling of compulsion and undue pressure. This was said by Margret Mbosi in her witness statements filed with their defence. To the contrary, the buyer, KPA, on the other hand insisted that the purchase was private treaty. The buyer did not pay promptly, but to the contrary the seller was hurried to vacate the



plots to remove the school he had on the plot in the year 2007 and to have valuation done immediately yet but after valuation by Plaintiff the payment was not made until after the lapse of 5 years.

50. After 5 years KPA, the seller wrote another un negotiated agreement for sale and seller was unilaterally paid the second time and arbitrarily given 10% on top of original valuation in addition to the valuation of five years earlier. The seller kept on writing to the 1st Defendant KPA complaining that payment to the Plaintiff of the 2nd time was not adequate and alleged that the buyer was using undue influence. The payment of the land was not adequate and the buyer KPA used coercion.

1. The seller was employee and was subdued in his bargain
2. The buyer KPA wrote the agreement and gave seller to sign agreement and denied coercion saying seller had an advocate.
3. The choice of 10% payment of the addition on top of the amount earlier paid was done arbitrarily and was not negotiated with the seller.
4. The seller being an employee of the buyer was coerced and was not given a free space to negotiate.

51. It was a situation where one had to accept what was offered. It was a case where one of the parties drew more influence than the other. The Defendant paid stamp duty on the same property on transfer and registration valued at a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) Although the value of the property was at least a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000.00/=) but they paid an amount of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000/-) being an addition of 10% arbitrarily put by the buyer and which was based on no known ground. The Plaintiff's valuer DW - 3 called by the Plaintiff was not challenged in his evidence and in his estimation, he valued the land at a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000.00/=).

52. The Learned Counsel submitted that the Plaintiff proposed a compensation of a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000.00) as estimated by their Valuer - PW – 3. He gave reasons yet these suggestions were not challenged by the buyer. Normally it was in law that expert evidence could only be challenged adequately by another expert's evidence. This did not happen here. Plaintiff's expert's evidence was not controverted. He asserted that the Defence Witnesses such as DW - 2 – John Chau Mwangi said in his written statement and evidence that his duties included:-

- “ 1. Facilitating acquisition of land in tune with the authority's needs and advising on open market value of land and development thereon be so in this negotiation with the Plaintiff their hidden aim was to acquire for defendants benefits in his statement dated 27th September 2018. John Chau Mwangi gives a value of what was considered as the value of the plot but did not take into account the removal of the school and the income lost in 5 years without payment. The KPA officer who represented KPA in negotiation had it as their duty to get property in the interest of KPA not to consider interest of the seller.
2. This was evidence of one-sided approach of officers of KPA who were negotiating with the plaintiff in consideration to the detriment of the seller and indeed. In his evidence PW1 confirms that he was made to believe that payment and everything would be done by the year end that is by end of 2007.

53. On the issue of the 10% increment, the Learned Counsel submitted that this amount was decided on by the seller himself without giving any reason or discussing it the sellers as a party to the contract. On



the issue of compulsory acquisition versus individual treaty (contract) the Learned Counsel argued that in his written evidence of John Chau Mwangi, DW - 1 said:-

“From the meeting and other public meetings on the site it was agreed by all parties that the best way for Defendant to acquire the affected parcels was by using the private treaty”

54. The Learned Counsel held that the time for completion was not agreed the buyer was a Government Corporation and was acting on behalf of the government no wonder other offices of buyer corporation believed and said it was “compulsory acquisition” given the picture between the buyer and the seller of a smaller party and the buyer a bigger party. The first payment of a sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000.00/=) was arbitrary. Stamp duty valuation done by V .O. Olonde valuer, for the government gave the value of the plot at a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000.00/=) on 9th January 2012 for transfer date of 30th December 2011.

55. The Learned Counsel submitted that by a letter dated 4th October, 2012 the Plaintiff complained to KPA saying:

“Prior to the said land sale agreement our client had in the year 2007 caused to be done a valuation and appraised of the same land No. 2823/VIMN and the same was valued at Kshs 13,400,00.00 this was really 4 years before the agreed sale. On the basis of the said valuation property the amount of Kshs 14,850,000.00 which was offered was way below the prevailing market value. We are also aware that the valuation officer at the lands department Mombasa valued the land parcel at Kshs 20,000,000.00 for purposes of stamp duty that the said land sale agreement was executed on the basis of “undue influence”. Plaintiff demanded additional payment of Kshs 15,457,003.00 in their agreement for sale.

56. The Counsel wonder whether the transaction was a private treaty or compulsory acquisition written statement dated 16th January, 2018 by Caroline Mbote, officer of KPA said; [enlisted by defendant on its list of documents]

“This consultative public meeting was preceded by other public forum meetings in the site where “compulsory acquisition” was to take place. It means in the mind of KPA Officer, negotiating the contract acquisition were compulsory. The purpose of the meeting was to discuss adequate compensation for the property, the Plaintiff agreed to the term of the agreement as evidenced by signing over property ownership of his property in the presence of the lawyer and an additional 10% was added to the agreed price that factored in for the inflation and subsequent loss of income”.

57. On the issue of undue influence, the Learned Counsel submitted that the KPA advocate gave a copy of valuation to the Plaintiff showing the government valuation on a sum of Kenya Shillings twenty Million (Kshs. 20,000,000.00) on 30th December 2011. There was belief that 1st Defendant had another last valuation of plot No. 2823/VI/MN value in the year 2011 but for an application for its production, the court found that there was evidence that another valuation was ordered but they were compelled to produce for inspection of the Plaintiff the original transfer of plot No.2832/VI/MN, but they failed



to comply with the court order. The agreement of sale of 18th July 2011 between the Plaintiff and the 1st Defendant was written by the 1st Defendant. It stated that:-

“In accordance with the mandate and objects of the Act the purchaser was to reclaim the sea from adjacent to the property”

58. The ‘Act’ meant here was compulsory land acquisition act. The understanding was that this was still Compulsory Acquisition. KPA was Government Corporation acting on behalf of the Government so in all considerations the acquisition was very much like Government acquisition.
59. According to the Learned Counsel, the facts were that Valuation was done in the year 2007 but the payment was made in the year 2012 and was negative on the seller? Could there have occurred depreciation between the times discussed. If it was compulsory acquisition there ought to be established market value. In his evidence, Mr. Maxeuel Thuku – PW - 2 said, they were made to believe the payment would have been done by the end of year 2007. The government valuation was at a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000.00/=) but they should have been paid a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000.00). The Learned Counsel reiterated that the 1st Defendant made the payment of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000.00/=) without any supporting valuation report or basis but PW - 1 and PW - 4 complained against this immediately. PW - 1 started complaining immediately 1st Defendant stamp duty for the property valued at a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000.00) yet they paid the Plaintiff the sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000.00/=) and claimed it was an enhancement based on an increase of 10% of the initial offer it had made to the Plaintiff. PW - 1 wrote a complaint Letter of 2010 to KPA Corporation immediately. It would be noted that the Plaintiff both the seller and at the same time an employee to KPA. The buyer who was the employer prepared the agreement.
60. The Learned Counsel further submitted that in his letter to the 1st Defendant, the Plaintiff complained of undue influence. However, the Defendant retorted that undue influence was not possible because the Plaintiff had a lawyer. To them undue influence would not affect a contract because as Chitty on Contracts 15th Edition on page 331 says:-

“To give validity to a contract the law requires the free assent by the party who is to become chargeable thereon. It therefore allows him to avoid any promise extorted from him by Terror Or Violence whether or the part of the persons to whom the promise is made on that of his agent contact made under such circumstances law which took a narrow view as the facts which would establish or threatened violence or imprisonment court of equity however administered the wider doctrine of undue influence. Equity might therefore grant relief where the compulsion complained of was something less than that required by the court law same the *Judicature Act* 1873 it has been the duty of all courts to administer both doctrine conveniently and it has not been always easy to distinguish between them.”

61. Equity looks at a case where one was in a position of influence to the other where one was in a position that was likely to succumb to pressure and to agree with suggestion of other. In this case the seller the Plaintiff herein was an employee of the buyer. The buyer suggested the price and paid it without discussion.
62. The Learned Counsel intimated to the court that there was evidence on duress that the Plaintiff was an employee of the buyer, so he was in a subordinate relationship to the buyer. It would be possible for employer to manipulate him and be over bearing. Plaintiff was not a free agent. The fact that it was



a requirement by court and the buyer was acting on behalf of the government made the buyer enters into this contract with a posture of contradiction and dictator and to the Plaintiff with a show that he takes what he was given and if he refused it would still be taken. Defendant witness Caroline Mbute KPA project Office said that KPA had no duty that the Plaintiff agreed to the taxes of the ownership of the property in the presence of his land and additional 10% was added to the agreed price to cater for inflation and subsequent loss of land. Kenya Ports Authority was under obligation to cater for other demands in that the stamp duty of the seller's advocate, this amount the Plaintiff was demanding was therefore dishonest since he was present at all stages and well presented by his advocate. The disposition by the seller representation was own bearing and position.

63. The Learned Counsel submitted that the seller's representatives were ignorant by believing that the Lawyer for seller was to bring terms of the agreement. There was no evidence considered regarding inflation or other loss to support the payment of 10%. This was arbitrary, the Learned counsel submitted that price was not agreed and was unpaid. In this case the buyer went on and demolished the buildings and the school and took over the plot before agreed price was paid alleging these remedies relate to sale of goods. In this case evidence of duress the buyer obtained title of the land including:-

- i. a suit for the price, included self helps remedies which can exercise directly against the goods.
- ii. Unpaid seller in lieu
- iii. Rescission and sale by the seller
- iv. Resale.

64. According to the Learned Counsel, all the conduct of the buyer to immediately get the property and get transfer while the seller was complaining about the price was evidence of undue influence. He referred Court to "Seally & Hooley In Commercial Law Text Cases and Materials, 4th Edition. Pg. 661 says:-

"Undue influence is one of the grounds of relief developed by the courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life people constantly seek to influence the decisions of others. They seek to pursue that with what they are dealing to enter into transactions whether great or small."

65. To buttress his point, the Learned Counsel cited the Kenyan Court of Appeal where it confirmed the Law in The Appeal Judgment of Nambuye, Karanja and Kiage J. at "Nairobi Civil Appeal No. 80 Of 2017. Basil Criticos And National Bank of Kenya Limited, National Capital Corporation Limited "Kenyac" And Kenya National Capital Corporation". The court emphatically pronounced. In a case where the bank acted with high handedness to the detriment of the other party. The basis of the concern was that difference in position between the two parties relationship one the parties causing undue influence. The court of appeal in Basil Criticos case discussed the principle emphatically at length like this. Quoting "Kenya Commercial Finance Co. Ltd – Versus - Ngeny and [2002]1 KLR" they said:-

"This court has never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse, due formation of the terms that are unreasonably favorable to one party and would produce meaningful choice or the other party. And that is extremely unfair-substantive unconscionability is which results from actual contract terms that are unduly harsh, commercially, unreasonable and grossly unfair given the existing circumstance of the case."



66. The Learned Counsel in his submission stated that the court quoted, Halsbury's Laws of England Vol.22 [2012] 5th Edition Pg. 298 states of Conscionability:-
1. Even in the absence of duress of persons or undue influence there has long been jurisdiction to interfere with harsh and unconscionable transaction price, if this was a proof.
 2. Treaty contract that price ought to have been fixed by the parties in the contract but here it was not so fixed but arbitrarily given by the buyers.
67. Additionally, the Learned Counsel submitted that the decision of the court of appeal ought to be followed under the principle of stare decisis. This Honourable Court also applied rightly this decision under principles of stare decisis. This Judgment of "Basil Criticos" (Supra) contained what in the contract law under, was called "undue influence" which if proved, avoids the contract. The court of appeal said that, when there was evidence of coercion and undue influence exerted between the parties particularly where one party had more weight than the other and terms of the contract were reached which bare influence, those terms cannot be held to constitute that contract. And he submitted that the relationship between the seller and the buyer, where the buyer called the shorts and the seller meekly accepted those terms. In case of "Basil Criticos" (Supra), there was a question of charge and guarantee and issue of overdrafts and unfair conduct by the bank to the customer imposing rates unilaterally.
68. The Counsel asserted that there were issues of limits of the guarantee where the borrower, the guarantor borrowed a particular amount but the lender had another one and reserved a right to impose rates on any amount held to the credit of the borrower as long as the principal debt remained unpaid and that any variation in the disbursement of the loan, the principal debtor/indulgences granted from time to time was not to affect the guarantee. The Court found it unconscionable and morally wrong particularly that the bank would raise interest rate from 19% p. a to 35% per month, and found it unfair, that attempt to redeem the charge was frustrated by the bank. The court criticized the practice by the bank of charging interest from 14% to 45% p. a and the court said that, even when a lending institution which had a written clause, permitting the practice, would still be wrong act so unilaterally. The court said that it was not right that the bank should have at its sole discretion from time to time to charge different rates from different accounts when such interest was calculated on daily balances.
69. The court said that it found it objectionable that the lender could vary interest to its benefit without any recourse or passing such information to the borrower. In that case, the bank unilaterally offered several accounts. Here the buyer fixed its own price without negotiating with the seller who was his employee. Further, in the case of:- "Basil Criticos Case", the court said:-
- "The court will not interfere where parties have contracted on arm-length basis. However by its jurisdiction, this court will set aside any bargain which is harsh, unconscionable and oppressive or where having agreed to certain terms and conditions thereafter impose additional terms upon the other party. Equity can intervene to relieve that party of such conditions".
70. The Learned Counsel informed Court that several respectable legal writers had commented on this issue. He provided some of these write up and the authors as follows. Such like book was entitled "The Law in the Making 7th Edition By C.K Allen on Pg.413 which states:-
- "These principles and their many subsidiary departments have for a century at least, been established in our Law as a stable system, and from the beginning of our legal studies we are accustomed to think of law and equity as sharply divided. The distinction has certainly



been modified by the Judicature acts, but the policy of those statutes, so of the referred to as a “fusion” in no sense meant the merger of one system in the other”.

71. The Judgment of Basil Criticos case was following on Modern understanding of effect of “undue influence” like in the book called “Commercial Law by Ls Sealy and Hooley in Pg.661 says;-

“The issues raised by these appeals make it necessary to go back to first principles. Undue influence is one of the grounds of relief developed by courts of equity as a court of conscience. The objective is to ensure that the influence of one person over another is not abused. In everyday life of people, constantly seek to influence the decisions of others”.

72. He cited the second book called “Principles of The English Law of Contract and of Agency in Its Relation to Contract by Sir. William P. Anson 22nd Edition by A.G. Guest. Pg. 245 further states that:-

“The term ‘Undue Influence’ sometimes used by the court to describe the equitable doctrine of coercion which has just been referred to but it also includes, and it would perhaps be convenient to confine it to forms of pressure, much less direct/substantial than those already discussed.”

73. In the Judgment of the case of Basil Criticos, the facts stated by Learned Counsel for the bank, left out the ratio and as a factor in any contract, it was a matter for this Honourable Court to give effect to, by dint of the principle of stare decisis which principle had been illustrated here by the quotation of court of Appeal, in the case of “Dodhia – Versus - National & Grindlays Bank Ltd and Another-[1970] E.A. PG.198”, stated an opinion on stare decisis.

“This Honourable Court should be bound by the principle of stare decisis and accept the ratio “decidendi,” in the case of BASIL CRITICOS, and rule that Plaintiff an employer to the seller acted under duress and the agreement between them as customer and the buyer should be disallowed.”

74. The Learned Counsel referred Court to yet another the book called Tannan’s Bankers Manual, 25th Edition on Pg.889:

The buyer and the seller who is an employee to KPA fall under this category, where the lender had several accounts and his businesses on the bank.

75. On another book of entitled “Law of Adverse Possession with Special Emphasis on Property, Possession, Dispossession and Ownership by Bhuvneshwar Singh ‘Bhuvan’ S.K Ghosh M.Com. LLB 15th Edition reprint 2016. Pg. 42 says;-

“Stare Decisis-is a well-known doctrine in legal jurisprudence. The doctrine of stare decisis, meaning to stand by decided cases, rests upon the principle that law by which men are governed should be fixed, definite and known, and that, when the law is declared by a court of competent jurisdiction authorized to construe it, such declaration, in absence of palpable mistake or error, is itself evidence of the law until changed by competent authority. It requires that rules of law when clearly announced and established by court of last resort should not be lightly disregarded and set aside but should be adhered to and followed. What it precludes is that where a principle of law has become established by a series of decisions, it is binding on the courts and should be followed in similar cases. It is a wholesome doctrine which gives certainty to law and guides the people to mold their affairs in future”.



76. It was the Learned Counsel's submission that this Honourable Court should be hesitant to give a decision in favor of 1st Defendant's suggested price in this case contrary to that given by the plaintiff's expert witness, in the Court of Appeal Judgment of Basil Criticos. The court should be bound by the ratio in Basil Criticos case. This important ratio in the case was not discussed by the seller. It was the ratio decidendi of the Basil Criticos case.
77. The Learned Counsel further submitted that this Honourable Court should follow same application of the principle of stare decisis in Basil Criticos case.
- “Now it is the first-time court of appeal. The strict application of the principle result in certainty of the law. That there is a greater need for certainty in a developing country than in a developed country. That without that certainty, advocates would not know what to advise their clients with the result that there would be lack of uniformity and unnecessary increase in litigation and that changes in the law should be left to the legislature”.
78. Further, the court of Appeal stated that;-
- “The court has never been shy to interfere with or refuse to enforce contracts which are unconscionable, unfair or oppressive due to a procedural abuse, due to formation of the contract or due to contract terms that are unreasonably favorable to one party and would produce meaningful choice for the other party. And unconscionable contract is one that is extremely unfair-substantive unconscionability is that which results from actual contract terms that are unduly harsh, commercially, unreasonable and grossly unfair given the existing circumstance of the case.”
79. The court said, ‘being of the same opinion as stated above, they cannot possibly enforce the oppressive interest rates as claimed by the Respondents, nor should any court lend its support to such Honorius unconscionable unplainly usurious conduct by the lenders’. This contract was not strictly legal. The price was not agreed.
80. In conclusion and for these reasons, the Learned Court prayed that this Honourable Court should feel bound by the Court of Appeal decision on the Judgment of Basil Criticos case as it clarified the effect of undue influence and coercion in the dealings between the bank and customers and to be allowed and find the terms of the contract void and give a reasonable price by accepting price suggested by plaintiff's expert witness which was not contravened.

B. The Written Submissions By The 1st Defendant

81. The 1st Defendant through the Law firm of Messrs. Turasha J. Kinyanjui Advocates filed its written submission dated 5th July, 2023. Mr. Cheruyiot Advocate commenced the submissions by providing the Court with a full background of the matter. He stated that before the Court was a suit that emanated from an agreement duly entered and executed between the Plaintiff and the 1st Defendant, for the sale of the Plaintiff's parcel of land known as LR NO.2823/VI/MN, to KPA, the 1st Defendant herein terms and conditions stipulated thereof. The negotiations of the parties commenced sometime in the year 2007 and culminated in mutual agreement depicted in their sale agreement dated and signed on 18th July 2011. During that period, KPA purchased various parcels of land through private treaty agreements with the respective owners, for purposes of its capital project of expansion of the Port of Mombasa.



82. The Learned Counsel held that the valuations upon which the purchase prices were based were independently generated by the respective owners of the parcels of land. However, in addition to the land values, the negotiations of parties culminating in their signed agreements also factored in, among other things, the developments on the land as well as the fixtures and plants, disruption costs and other inconveniences, all of which were valued, and the respective owners were paid as per their signed agreements. The duly signed agreement dated 18th July 2011 between the Plaintiff and KPA was filed in Court as the 1st Defendant's Exhibit No. 11 appearing on pages 16 to 22 of the Defendant's Bundle of Documents. The Transfer dated 30th December 2011 was filed as the Defendant's exhibit No. 19 appearing on pages 31 to 33 of the Defendant's bundle. As depicted on its face, the Transfer was registered on 14th February 2012.
83. The Learned Counsel submitted that subsequently, after the execution of the sale agreement and payment of the negotiated and agreed purchase price, the Plaintiff moved this Honourable Court vide a Plaint dated and filed on 14th March 2013. The Plaint was later Amended. The Plaintiff sought a declaratory order that it was not paid adequate compensation by both Defendants, an order for payment of additional compensation sum of Kenya Shillings Thirty Million (Kshs.30,000,000/=), costs and interest. The Plaintiff's suit was anchored on allegations of undue influence.
84. The Learned Counsel stated that KPA amended and filed its Defence on 7th August, 2017. It also filed a List & Bundle Chau Mwangi dated 27th September 2018. He testified in Court on 20th February the agreement of the parties, long after they performed their respective obligations in the agreement and perfected the transaction. KPA is a creature of statute; the [Kenya Ports Authority Act](#), Chapter 391 of the Laws of Kenya. In that regard, it could exercise powers, functions and mandate only in so far as it was conferred by the law. For purpose of this suit, he urged the Court to draw its attention to the provision of Sections 3 (2) and 13 (1) of the [Kenya Ports Authority Act](#). These were the provisions which empowered the KPA to acquire, hold and dispose of movable and immovable property for its own purposes. The provision of Section 13(1) (a) specifically empowered KPA to acquire privately-owned land through negotiation and agreement with the registered owner.
85. The Learned Counsel averred that the foregoing were the legal provisions upon which the transaction between the Plaintiff and KPA were anchored, being private negotiations for the sale and purchase of land. As depicted in the documents filed by KPA, the Plaintiff was represented by G.A. Okumu & Co. Advocates and later by Hassan Abdi & Co Advocates in the transaction. Defence Exhibit No. 10 which appeared on page 15 of KPA's Bundle of Documents shows the letter from the Plaintiff's Advocate forwarding the signed agreement to KPA with an undertaking to furnish the completion documents. It shall be noted that – 2nd Defendant – the National Land Commissions played no role whatsoever in the negotiations, agreement, sale and purchase of the suit land. The Plaintiff's suit styled as enforcement of a compulsory acquisition process should therefore fail forthwith.
86. It was in this regard that he urged the Court to be bound by the decision of the Court of Appeal in the case of:- “National Bank of Kenya Ltd – Versus – Pipe Plastic Samkolit (K) Ltd & another [2001] eKLR”, that:
- “A court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion fraud suggestion of coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.



87. Further, the Learned Counsel referred Court to another case where this position was restated by the Appellate Court. This was in “Pius Kimaiyo Langat – Versus - Co-operative Bank of Kenya Limited [2017] eKLR”, which stated that:

“We are alive to the hallowed legal maxim that it is not the business of courts to rewrite contracts between parties.”

88. Similarly in its binding decision, the Court of Appeal in “Housing Company of East Africa Limited – Versus - Board of Trustees National Social Security Fund & 2 others [2018] eKLR”, correctly held that:

“It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court's role is to interpret the contract as written and not rewrite it because, just as with any other contract, a contract for the sale of land can only be changed judge's ultimate findings cannot by any stretch of imagination be faulted.

89. The Learned Counsel urged the Court to be guided by its decision in the case of:- “Ngere Tea Factory Company Ltd – Versus - Alice Wambui Ndome [2018] eKLR”, that:

“102. The terms of the Agreement to sale are clear and I find that the defendant herein did not breach any of them. A party cannot run away from the terms of its agreement. It has often been stated that the Court's functions are to enforce contracts that the parties enter into. The court cannot rewrite the party's agreements.

103. In the case of Shah – Versus - Guilders International Bank Ltd [2003]KLR the Court in considering the terms of the parties contract stated-

“The parties executed the same willingly and they are therefore bound by it.”

104. The Plaintiff herein is clearly trying to run away from obligations lawfully imposed and with its full knowledge and participation to which I shall not aid it in that quest....”

90. The Learned Counsel contended that as depicted in the 1st Defendant's and the Plaintiff's filings before Court, parties, the negotiations culminating to the sale and transfer of the land. At no point did any party nor their counsel raise any issue bordering on coercion or undue influence. On the contrary, each of them engaged in the negotiations having was noteworthy that from the onset, KPA engaged all the owners of the different admitted by the Plaintiff. Therefore, he urged the Court to disallow the prayers for the Plaintiff's assertions remain only as allegations without any iota of evidence whatsoever.

91. Among the Defendant's exhibits were letters from the Plaintiff's Advocates addressed to the 1st Defendant in the course of the negotiations and transaction between the parties. Defendant Exhibit 10 specifically was a letter from the Plaintiff's Advocate dated 21st June 2011 forwarding the Agreement for Sale duly signed by the Plaintiff, for execution by the 1st Defendant. Vide the same letter, the Plaintiff also promised to furnish the completion documents. The Agreement for Sale (Defendant Exhibit - 11) was duly signed by the Plaintiff in the presence of his Advocate, independent of the 1st Defendant.



92. Further, the Learned Counsel urged the Honourable Court to be guided by its Judgment in the case of:- “Solomon Ndegwa Kuria – Versus - Peter Nditu Gitau [2019] eKLR”, that:

“The Court has carefully perused the sale agreement produced as Exhibit by the Plaintiff 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”.

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.

93. He stated that although the Plaintiff raised a raft of allegations of undue influence allegedly by the 1st Defendant, the Learned Counsel submitted that the Plaintiff never prosecuted any of these other than only mentioning his employment relationship with the 1st Defendant. The employment relationship was mutual and continued to subsist as such. In totality, the Plaintiff’s allegations were unfounded and unsubstantiated.
94. On this aspect, the Learned Counsel urged the Honourable Court to be bound by the decision of the Court of Appeal in “Patel & another – Versus - MJC & another (Suing as the guardians of PJP)(Civil Appeal 182 of 2019) [2022] KECA 364 (KLR) (4 February 2022) (Judgment)”, where it was held that:

“40. From the foregoing it is trite that undue influence, coercion and fraud has to be specifically pleaded. It also follows that such averments must be specifically proved by cogent evidence. We appreciate that the respondents indeed specifically pleaded those allegations. However, did they specifically not made those allegations as the basis of annulling the transaction. However, after they had testified, they successfully made an application to amend the plaint to bring on board the above causes of action. It is instructive to note that upon such an amendment no evidence was called in support thereof. One would have expected that the respondents or any witness would be recalled to testify in support of the averments. But this was not to be. In the absence of such evidence and as correctly observed by counsel for the appellants, those pleadings merely remained mere statements with no probative value. See Daniel Toroitich Arap Moi Vs. Mwangi Mureithi & Another (supra). The argument by the respondents that those fresh causes of action were augmented by way of written witness statements and written submissions filed in court does not advance their case at all. Further evidence cannot be substituted by either averments in pleadings or submissions be they oral or written. It should also be appreciated that apart from specifically pleading undue influence, coercion and fraud, the same has to specifically proved by cogent evidence and not on the balance of probabilities as wrongly held by the trial court. Prove has



to be higher than on the balance of probabilities but slightly lower than prove beyond reasonable doubt.

41. In the penultimate, we do not discern any element of undue influence, coercion or fraud in the manner in which the appellants transacted with P contrary to the finding by the trial court. Having returned the verdict that P was in good stead of mental health, and that no undue influence, coercion or fraud was perpetrated on her by the appellants at the time of sale and transfer of the suit property, the transaction cannot be voided on those grounds.
95. The Learned Counsel asserted that it was a settled principle of law that whoever alleges must prove, just as was held in the binding decision of the Court of Appeal in “Mohamed Guyo Boru – Versus - Richard Mwilaria Aritho [2022]eKLR”, that:
- “ 14. Section 107 of the *Evidence Act* provides that whoever desires any Court to give Judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Section 108 is also to the effect that the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side, while Section 109 states that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.
 15. It is not in dispute that the facts pleaded in the plaint differed from what the supporting documents showed what happened. Further at a closer perusal of the Appellant’s documents
 16. It is trite law that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must be in consonance with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded.
96. It was the Learned Counsel’s averment that the 1st Defendant negotiated and agreed with the landowners, and all of them were paid in accordance with the agreements made. The Plaintiff’s claim for undue influence and alleged underpayment were therefore unfounded, unsubstantiated and should be dismissed forthwith.
97. It was the Learned Counsel’s humble submission that the determination of quantum of purchase price for sale of land was solely for the parties to make, as was done in this case. The Agreement for Sale prescribed all the terms and conditions for the parties. On the other hand, valuation by a Government Valuer in accordance with the provisions of the *Stamp Duty Act* was for the sole purpose of ascertaining the taxes due and payable to the Government in respect of the parties’ transaction at the time of the transfer. So much so, that a party may sell their parcel of land at peppercorn or whatever value as agreed, but such value does not translate to the value for purposes of taxation. The purpose of valuation was explicitly outlined by the provision of Section 10A (1) of the *Stamp Duty Act*, Chapter 480, Laws of Kenya which states that:
- “The collector of stamp duties shall refer to the Chief Government Valuer or an any conveyance or transfer on sale of any immovable property before or open market value



of such property as at the date of the conveyance or transfer for purposes of ascertaining whether any additional stamp duty is payable.”

98. In the instant case, parties had mutual negotiations culminating in their agreement for the purchase price of a sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000.00/=) which was paid to the Plaintiff and whose receipt he confirmed. At no point in the transaction did the 1st Defendant act arbitrarily as the Plaintiff alleged in his submissions, nor was the Plaintiff ever compelled to agree to any of the terms signed by both parties. The Learned Counsel urged the Court to draw guidance from its decision in “Were & another – Versus - Ongaro (Deceased) & 7 others (Land Case 13 of 2013) [2022] KEELC 3829 (KLR) (11th August 2022) (Judgment)”, where it was correctly held that:

“ 54. Concerning the allegation of impropriety in the registration of the transfer occasioned by alleged shortchanging of the government in the payment of registration charges, stamp duty and other fees, this court notes that there is truth in the claim by the plaintiffs that the amount of consideration quoted in the transfer on which the computation of the stamp duty was based differed from that in the agreement. However, the Land Registrar explained in his evidence that sale agreements are normally not lodged in the land registry in land transactions and so he had no way of knowing its contents; he added that the transfer is assessed for stamp duty by the government valuer, rendering it unlikely in his opinion that any monies were lost;.....

57. I find persuasive the Land Registrar's explanation, and I therefore find that the irregularity alleged is not of the kind that would invalidate the agreement or the transfer between the 1st and 2nd Defendants and the 4th and 5th Defendants. In the light of the foregoing this court finds no legal basis upon which the transfer of title to the names of the 4th and 5th defendants can be cancelled.....”

99. The Learned Counsel submitted that to buttress his allegations for underpayment, the Plaintiff called Samwel Musyoki whose purported valuation report dated 28th September 2018 was filed on 30th October, 2018 as the Plaintiff's supplementary documents. It was a purported valuation report because the alleged valuation was conducted in the year 2018 long after and developed into the road leading to the Second Container Terminal of the Port purchased, unless he supposedly conducted a valuation on the Kipevu West road, an exercise in futility.

100. The impugned valuation report of Samuel Musyoki dated 28th September 2018 was flawed because, among other things:

- a. No instruction letter is attached to the Report nor was any ever filed.
- b. The Valuer states that his instructions were to “visit the site where the above property used to stand”..... “try and show in figures the price difference of properties in this part of Mombasa between 2007 and 2011/12”
- c. The source of values indicated in page 3 of the impugned report has not been disclosed, if at all.
- d. The valuer admitted that his was an analysis done long after construction of the road. In any event, the formula or any empirical methodology for such analysis is not provided, if at all.
- e. The valuer admitted that he did not conduct a valuation, that there were no beacons, no building and ultimately no land, other than a road.



f. In his general remarks made in page 4 of the impugned report, the valuer, in lack of objectivity, remarks that “it is shocking how individuals covering themselves in a mask of an institution could disinherit the dependants and benefactors.” It would appear that these were the only instructions which are ultimately unfounded and irrational.

101. Having been upheld by the Court of Appeal, the Learned Counsel urged the Honourable Court to be bound by the decision of the High Court in “Christopher Ndaru Kagina – Versus - Esther Mbandi Kagina & another [2016] eKLR”, where it was correctly held that:

“It is a trite principle of evidence that the opinion of an expert, whatever the field of expertise, is worthless unless founded upon a sub-stratum of facts which are proved, exclusive of the evidence of the expert, to the satisfaction of the court according to the appropriate standard of proof. The importance of proving the facts underlying an opinion is that the absence of such evidence deprives the court ‘of an important opportunity of testing the validity of process by which the opinion was formed, and substantially reduces the value and cogency of the opinion evidence.’ An expert report is therefore only as good as the assumptions on which it is based.

An expert gives an opinion based on facts. Because of that, the expert must either prove by admissible means the facts on which the opinion is based, my opinion, the factors which the court may take into account in determining the reliability of expert opinion, include:-

- a. the extent and quality of the data on which the expert’s opinion is based, and the validity of the methods by which they were obtained;
- b. if the expert’s opinion relies on an inference from any findings, whether the opinion properly explains how safe or unsafe the inference is (whether by reference to statistical significance or in other appropriate terms);
- c. if the expert’s opinion relies on the results of the use of any method (for instance, a test, measurement or survey), whether the opinion takes proper account of matters, such as the degree of precision or margin of uncertainty, affecting the accuracy or reliability of those results;
- d. the extent to which any material upon which the expert’s opinion is based has been reviewed by others with relevant expertise (for instance, in peer-reviewed publications), and the views of those others on that material;
- e. the extent to which the expert’s opinion is based on material falling outside the expert’s own field of expertise;
- f. the completeness of the information which was available to the expert, and whether the expert took account of all relevant information in arriving at the opinion (including information as to the context of any facts to which the opinion relates);
- g. if there is a range of expert opinion on the matter in question, where in the range the expert’s own opinion lies and whether the expert’s preference has been properly explained; and



- h. whether the expert's methods followed established practice in the field and, if they did not, whether the reason for the divergence has been properly explained.

102. In totality, the Learned Counsel urged the Honourable Court to find that parties mutually agreed on the purchase price, which was paid, in consideration for the sale of the land. No other valuation could alter the parties' mutual agreement inked on their Agreement for Sale. The Learned Counsel's contention that the purchase price for the land could not be altered at this stage as pleaded by the Plaintiff. He urged the Court to be bound by the decision of the Court of Appeal in the case of "Housing Company of East Africa Limited – Versus - Board of Trustees National Social Security Fund & 2 others [2018] eKLR", where it was held that:

“It is settled law, as correctly submitted by the 1st respondent, that contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the court does not have the right or ability to substitute its judgment for that of the parties. Indeed, when a contract is clear and unambiguous, a court's with the agreement of both parties and not unilaterally, and the learned judge's ultimate findings cannot by any stretch of imagination be faulted.

103. In conclusion, and in totality that as depicted in its filings and the testimony of its witness, it purchased the parcel of land from the Plaintiff in good faith, just like it did from all other landowners whose parcels were purchased. The suit invited the Court only to descend on the agreement of the parties, alter its very nature, converted it into a compulsory acquisition and finally, rewrite the terms and impose them upon parties. The Learned Counsel urged the Court to decline this invitation and he prayed for the suit to be dismissed forthwith with costs to the 1st Defendant.

VIII. Analysis And Determination

104. I have keenly assessed the filed pleadings by all the Plaintiff herein, the evidence adduced by the witnesses summoned by all the parties herein, the written submissions and the myriad of cited authorities, the relevant and appropriate provisions of [the Constitution](#) of Kenya, 2010 and the statutes.
105. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following three (3) issues for its determination. These are: -
- a. Whether the suit filed by the Plaintiff herein through the Amended Plaint dated 5th July, 2017 against the 1st and 2nd Defendants herein has any merit.
 - b. Whether the Plaintiff is entitled to the prayers sought.
 - c. Who bears the costs of the suit?

ISSUE No. a). Whether The Suit Filed By The Plaintiff Herein Through The Amended Plaint Dated 5Th July, 2017 Against The 1St And 2Nd Defendants Herein Has Any Merit.

106. Under this sub heading, the Honorable Courts, as already agreed by all the Learned Counsels in this matter, to begin with observes that it is trite law that in any suit of this nature, the party who seeks to rely on the existence of a fact or a set of facts must provide evidence that those facts exist. This is what in law is termed as the "Burden of Proof" and is encapsulated for by the provision of Section 107 of the [Evidence Act](#) Cap 80 laws of Kenya which provides as follows:-

“ 107 Burden of Proof



- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

107. Furthermore, the main substrata of this matter is rather straight forward and to the point so to speak. It is three – fold. These are:-

- a). the efficacy and validity of legal contract;
- b). the breach of a legal contract and its consequences: and finally,
- c). the reliefs entitled to the parties herein.

108. Based on the facts of this case, It has not been disputed that the Plaintiff at all material times to this suit was the registered owner of land parcel No. 2823/VI/M.N as the duly appointed Legal Administrator of the estate of his mother, SUSAN MWIHAKI [Now deceased]. Ideally, the Plaintiff attained the indefeasible rights, title and interest on the land well vested him under the provisions of Sections 24, 25 and 26 of the Land Registration Act, No. 3 of 2012. Furthermore, its is instructive that the 1st Defendant admits that it entered into a contract with the Plaintiff over the suit property.

109. I believe taking that the facts of this case have been elaborately stated and hence the Honourable Court will not want to belabor the point. However, for clarity sake, I will only touch on the brief facts. According to the Plaintiff that sometime on or about the 18th May, 2007, the Defendant through his employee and/or representative invited the Plaintiff and others for a consultative Public meeting at Bandari College, Mombasa whose purpose was to address issues related to land acquisition, resettlement and compensation of land owners to give way for the construction of the proposed Kipevu West Container Terminal project which was to be funded jointly by the Government of Kenya and the Government of Japan [JIKA]. The Plaintiff property, LR.No.2823/VI/M.N was located within the area to be covered by the proposed project as it was lying just next to the path of the access road where a new port access road was to be constructed connecting the new terminal with the existing Port Reitz road.

110. The Plaintiff and other plot owners in the area were made to understand at the said meeting of 18th May, 2007, that the construction of the project was to begin during the year 2007 and they were informed not to carry out any new improvements or developments in that area and to prepare to vacate the place upon being paid compensation. Following such representations as stated herein above in paragraph 6, the Plaintiff terminated the lease of a school they had granted to one of their tenants and caused their plot L.R. No. 2823/VI/M.N to be valued by one Mr. W.J. Mukhongo, Registered Valuation Surveyor of Wyco Valuers Company and the same was duly valued as per the Report and Valuation dated 20th June, 2007 at Kshs.13,400,000/-. Despite the fact that the Plaintiff had terminated the tenancy of his tenants on the suit property in the year 2007 in readiness for the takeover of the property by the Defendant in the cause of that year nothing materialized in the cause of that year and in the subsequent years, 2008, 2009 and 2010 and the Plaintiff he lost the income from that property till the 18th July, 2011 when a Sale Agreement was duly signed between him and the Defendant to facilitate the payment of compensation for the land.

111. The Plaintiff paid inadequate compensation for his property L.R.2823/VI/M.N based on the 2007 valuation and report by his valuer Mr. W.J.- Mukhongo who valued the property at Kshs.13,400,000/- which was later slightly adjusted by the Defendant by an additional 10% following his presentations



to make a total sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs.14,850,000/-) which was finally paid to him on the 8th March, 2012. It is the contention of the Plaintiff that there was material non-disclosure and concealment on the part of the Defendant at the time he was being paid compensation for the said property based on the 2007 Valuation Report which gave him a low figure for compensation not based on the market value of the property at the time payment was made and yet there was another Valuation Report by a Government Valuer dated 9th January, 2012 in possession of the Defendant who had valued the said property at a higher figure of Kenya Shillings Twenty Million (Kshs.20,000,000/-).

112. In all fairness, the Defendant ought to have paid him compensation based on the valuation by the Government Valuer at a sum of Kenya Shillings Twenty Million (Kshs. 20,000,000/-) for the suit property at the then prevailing market price instead of basing such compensation payment on the year 2007 valuation report at a sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs.14,850,000/-). It appears to the Plaintiff that the value of his plot had appreciated by the year 2012 when payment was made and the Plaintiff avers that he ought to have been paid compensation based on the market value as at the time of payment and not based on the 2007 valuation. The Plaintiff's immediate neighbor a Mr. Khatib whose property was lying right behind his property L.R. No. 2823/V/MN which was on the road frontage was paid compensation by the Defendant in the sum of Kshs. 30Million and yet he was paid less by the same Defendant.
113. The Plaintiff averred that he was duped by the Defendant into accepting a lower sum for compensation for his property through material non-disclosure and concealment of the prevailing market price for his property to the extent that he became a laughing stock within the neighborhood for accepting such a low figure for his property which was quite prime. The Plaintiff was short-changed during the compensation process for his property L.R.No.2823/VI/M.N by the Defendant who ought to have paid him an additional sum of Kenya Shillings Fifteen Million Four Fifty Seven and three Thousand (Kshs.15,457,003/-) for his property based on the valuation by the Government valuer thereby making a total sum of Kenya Shillings Thirty Million Three Hundred and Seven and Three Thousand (Kshs.30,307,003/-) which ought to have been paid to him as reasonable compensation in the circumstances.The Plaintiff now claims from the Defendant an additional payment of compensation for his property L.R. No. 2823/VI/M.N in the sum of Kenya Shillings Fifteen Million Four Fifty Seven Thousand (Kshs.15,457,00/-) made up as follows-Land and existing improvements/buildings - Kshs.9,600,000/-15% statutory compensation - Kshs. 1,455,154/-10% injurious affection – Kshs. 1,067,122/-25% severance for absolute loss of whole property and rental income – Kshs 3,334,727/-
114. Despite demands being made to the Defendant to pay the additional compensation demanded, the Defendant has declined and or ignored the claim thereby making this suit necessary.
115. Ideally, both the 1st and the 2nd Defendants are State Corporations. Though *the Constitution* gives a person under Article 40, the right to own property , the said Article further limits those rights. Article 40 (3) of *the Constitution* provides as follows on the issue of compulsory acquisition;
‘The State shall not deprive a person of property of a description or of any interest in, or right over, property of any description, unless the deprivation: -
 - a) Results from an acquisition of land or an interest in land, or title to land, in accordance with Chapter five; or;
 - b) Is for a public purpose or in the public interest and is carried out in accordance with this Constitution and any Act of Parliament that: -
 - i. Requires prompt payment in full of just compensation to the person; and



- ii. Allows any person who has an interest in, or right over, that property a right of access to a Court of law.
116. PW - 1 further argued that by this agreement, he ought to have been paid a sum of Kenya Shillings Thirty Million (Kshs. 30,000,000/-) as his estimate. His assertion was that KPA asked them to either take the offered sum of Kenya Shillings Fourteen Million Eight Hundred and fifty Thousand (Kshs 14,850,000/-) or KPA invokes compulsory acquisition or the Plaintiff seeks legal action. I believe the Plaintiff took the option of seeking for legal redress by instituting this suit. Fundamentally, it is instructive to note that the Plaintiff is an employee of the 2nd Defendant. As an employee of KPA he felt oppressed and intimidated and as he stated had he been independent he would have engaged his valuer. His Learned Counsel has extensively submitted through cited cases in particular and authored materials by respectable writers on the concept of “Undue influence” To that effect.
 117. Primarily, the agreement, as it is in good and conventional conveyancing practice, was to last for 90 days - i.e. they would be paid within the year 2007. But that never happened for no justifiable cause nor good reason whatsoever offered by the 1st Defendant. they were paid after 8 months. By this time, of five years, They terminated the lease with the school and they looked for a separate premises to take the children who were street children. The Plaintiff had to vacate the land and even the business they had on it. They were stopped and indeed would not undertake any development on the land at all. It was only after the lapse of the five years that he was paid a total of a sum of Kenya Shillings Fifteen Million Eight Hundred and Fifty Thousand (Kshs 14,850,000/- allegedly enhanced by 10% from the previous offer due to the delay and not land appreciation as stated by DW – 1 and the 1st Defendant’s Counsel in his submissions. The witness told the court that he was not satisfied on the payments made by KPA. Clearly, the difference of time from the promise from the year 2007 to 2012, the land had appreciated. He asked the court to increase the amount payable to them in 2007 to 2012 stating that between 2007 and 2012 the land remained underutilized and they had already issued the notice to vacate the land. They never had any attempt on getting a KPA valuation. When cross examined he stated that the acquisition was a private treaty between KPA and the owners of the land; it was compulsory acquisition.
 118. A Private treaty is a method of selling a property where the seller sets a price or a price range and negotiates with buyers in private. The seller or their agent can list the property for sale at a set asking price or a suggested price range. The buyer and the seller are free to negotiate until both parties agree.
 119. In my own view, the validity of a contract is provided for in law. The provision of Section 3(3) of the Law of Contract Act read together with Section 38 of the Land Act, 2012 provide that no suit shall be brought upon a contract for the disposition of an interest in land unless; the contract upon which the suit is founded is in writing, signed by all the parties, and the signature of each party signing has been attested by a witness who is present when the contract was signed. This was the decision of the Court in the cases of “Machakos District Co - operative Union – Versus - Philip Nzuki Kiilu CA No 112 of 1997” and ELC (Mombasa) No. 428 of 2017 “Kaoyeni Enterprises Limited – Versus – Unifresh Exotics”.
 120. Specifically, the provision of Section 38 of the Land Act provides as follows:-
 - (1) Other than as provided by this Act or by any other written law, no suit shall be brought upon a contract for the disposition of an interest in land—
 - (a) the contract upon which the suit is founded—
 - (i) is in writing;



- (ii) is signed by all the parties thereto; and
 - (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 (I) shall not apply to-
- (a) a contract made in the course of a public action;
 - (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 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.

121. The Court has had the opportunity to go through the sale agreement dated 18th July, 2011 between the Plaintiff and the 1st Defendant. Paragraph 14 carried the penalty in case of default and/or breach of the agreement. Therefore, it is this Courts' holding that there was existence of a valid agreement of sale under the terms of Section 3(3) of the [Law of Contract Act](#) as read together with Section 38 of the [Land Act](#) 2012.

122. The other issue then would be, was there any breach of the legal agreement. The term “Breach of Contract” has been defined in the Black Laws Dictionary to mean:-

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

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

123. The other issue raised was on time from the execution of the agreement and actual payment. According to Halsbury Laws of England (4th Edition) Vol. 9 Para. 481 Page 338 holds:-

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



124. Undoubtedly, in the instant case, and from surrounding facts and inferences in the matter, this Honourable Court will not hesitate to conclude that the 1st Defendant is in utter breach of the terms from the duly executed agreements for the sale of the suit land. I dare say that, it has been adequately proved that there was failure to make the payment on time, there was breach of contract.
125. The case for the Plaintiff is that he entered into an agreement of sale with the Defendant in respect to the purchase and sale of the suit land. That the agreement of the parties was duly reduced into writing and duly executed but the 1st Defendant has willfully breached the agreement and refused to complete the transaction.
126. According to the agreement, the parties agreed that the consideration would be a sum of Kenya Shillings Fifteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000/-) which the Plaintiff duly signed and the sum was finally paid to the Plaintiff on 8th March, 2012. According to the agreement the completion date was in ninety (90) days from the date of execution of the agreement. The Plaintiff through PW - 1 has told the court that they engaged the services of a Land Surveyor/Valuer who gave it a value of Kenya Shillings Thirteen Million Four Hundred (Kshs. 13,400,000/-) for the suit property. The KPA waited until the year 2011 and gave them a valuation four years after the value they gave them. They valued the property at a sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs 14,850,000/-). They said it was an increase of 10% of what the Plaintiff and the other members of the public had given them. They wrote a letter dated 24th June, 2010 complaining to KPA on their valuation which was on the lower side and that the sum had appreciated. They proposed to be paid a sum of Kenya Shillings Eighteen Million (Kshs. 18,000,000/-). The government valuer gave the sum of Kenya shillings Twenty Million (Kshs 20,000,000/-). It was until 18th March, 2012 they were paid a sum of Kenya Shillings Fourteen Million Eight Hundred and Fifty Thousand (Kshs. 14,850,000/-). The government valuer gave a higher and more reasonable value. The more accurate valuation was to have been paid the current valuation. There was an agreement by their advocate dated 16th July, 2011 which he signed and also signed by the KPA General Manager.
127. The Completion date under paragraph 3 of the sale agreement for the payment of the consideration of the agreement was to be on 18th October, 2011 and the 1st Defendant ended up paying the purchase price on 18th March, 2012, five months after the completion date. According to the payment of the purchase price under paragraph 2 the entire purchase price was to be effected within 14 days of registration of the transfer in favour of the purchaser. The transfer was done on 30th December, 2011; as I previously stated 18th March, 2012 was not within 14 days of the registration of the transfer.
128. Be that as it may, this Honourable Court finds that contract however had become null and void wherein pursuant to clause Paragraph 14 of the said agreement, the Agreement herein provides for remedy for the breach.

ISSUE No. c). Whether The Plaintiff Is Entitled To The Prayers Sought

129. Under this sub title, the Honourable Court discusses the remedied available to the Plaintiff. According to Paragraph 14 on remedied cumulative, the agreement stated as follows:

“Any remedy or right conferred upon the Vendor of the purchaser for breach of this Agreement including the right of rescission shall be in addition to and without prejudice to all other right and remedies available to them.”

130. It cannot be denied that relationship between the parties in this case is governed by the contract in question. To that end, this Honourable Court places reliance on the Court of Appeal decision



in “Civil Appeal No. 330 of 2003, Hussamudin Gulamhussein Pothiwalla administrator, Trustee and Executor of the Estate of Gulamhussein Ebrahim Pothiwalla -Versus - Kidogo Basi Housing Cooperative Society Limited and 31 Others” where it was held;

“A court of law cannot re-write a contract between the parties. ... it is clear beyond peradventure that save for those special cases where equity may be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity’s function to allow a party to escape from a bad bargain.”

131. In exercise of jurisdiction under *the Constitution*, this Court cannot rewrite binding contracts voluntarily entered into between parties. This position is informed by the concept of freedom of contract. Contracts are voluntary undertakings and contracting parties are free to specify the terms and conditions of their agreement, and that when parties do contract, the Court does not have the right nor ability to substitute its judgment for that of the parties. When a contract is clear and unambiguous, a Court’s role is to apply the parties’ contract as written and not rewrite the contract.
132. Therefore this Honourable Court cannot make orders that were not guided by the sale agreement between the parties. For this reason the additional payment of a sum of Kenya Shillings Fifteen Million Four Fifty Seven and three Thousand (Kshs.15,457,003/-) cannot be sustained by this Honourable Court as it was not part of the agreement.
133. Be that as it may, this Honourable Court has established that there was breach of contract by the 1st Defendant and the agreement provided for such an instance Defendant. But despite this effort, they willfully failed to embrace that olive branch. Further, this Court has taken cognizance that the said the Directors to record and file witness statements. They only send an Employee who had no authority to represent the Defendant; The employee rendered very sketchy evidence and confessed the
134. Defendants were facing dire financial constraints; Non payment of the outstanding balance.
135. One of the remedies was rescission of the contract. This court is reminded that the law on rescission of a contract for sale of land is to the effect that if the contract contains a condition entitling the vendor to rescind on the happening of certain events, and those events happen, then the vendor may rescind. In the absence of such a condition, the vendor may rescind only if the purchaser’s conduct is such as to amount to a repudiation of the contract, and the parties can be restored to their former position. This position of law is provided in Halsbury’s Law of England Volume 42, 4th Edition at paragraph 242. This Honourable Court takes note that although rescission is a term both parties agreed on it has been overtaken by events as it is being that it is 12 years since the agreement was entered into.
136. From the evidence on record and the testimony PW1, I find that the plaintiff has proved its case on a balance of probability that the 1st Defendant was in breach of the contract dated 18th July, 2011.
137. The Plaintiff has pleaded specific figure of a sum of Kenya Shillings Fifteen Million Four Fifty Seven and three Thousand (Kshs.15,457,003/-). It is trite law that special damages must not only be specifically pleaded but must be specifically proved before they can be awarded by the court (“Hahn – Versus - Singh (1985) KLR 716”). For these reasons therefore, I am fully satisfied that the Plaintiff has proved the claim of a sum of Kenya Shillings Fifteen Million Four Fifty Seven and three Thousand Kshs. 15,457,003/-. Thus, proceed to award him the same.

ISSUE No. d). Who Bears The Costs Of The Suit?

138. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation.



The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of “Harun Mutwiri v Nairobi City County Government [2018] eKLR and “Kenya Union of Commercial, Food and Allied Workers v Bidco Africa Limited & Another [2015] eKLR, the court reaffirmed that the successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of “Hussein Muhumed Sirat v Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

139. In the present case, the Plaintiff has been able to establish its case as pleaded from the filed pleadings. Therefore, they are entitled to be awarded costs of the suit to be borne by the 1st Defendant accordingly. The 2nd Defendant was not a party to the agreement entered on 18th July, 2011. Therefore, it has been forthwith discharged from the suit.

IX. Conclusion And Disposition

140. 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 has established his case against the 1st Defendant herein as the 2nd Defendant was not privy to the agreement of sale. Thus, the Court proceeds to make the following specific orders:

- a. That Judgement be and is hereby entered in favour of the Plaintiff against only the 1st Defendant.
- b. That a declaration that the Plaintiff was not paid adequate compensation by the Defendant for his property L.R. No. 2823/VI/MN in the process of acquisition of the same.
- c. That a declaration be and is hereby made that the 2nd Defendant is hereby discharged of any liability in this suit.
- d. That an order hereby do issue that the 1st Defendant shall pay the Plaintiff the sum of Kenya Shillings Fifteen Million Four Fifty Seven and three Thousand (Kshs 15,457,003/-with interest at court’s rate from the date of filing suit until payment in full.
- e. That the Plaintiff shall have the costs of the suit to be paid by the 1st Defendant only.

It Is So Ordered Accordingly.

**JUDGMENT IS DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED,
DATED AT MOMBASA THIS 6TH DAY OF NOVEMBER 2023.**

.....

HON. JUSTICE L.L NAIKUNI (MR.)

ENVIRONMENT AND LAND COURT, MOMBASA

Judgement in the presence of:-

- a. M/s. Yumna – the Court Assistant
- b. Mr. Oyas Advocate for the Plaintiff
- c. Mr. Cheruiyot Advocate for the 1st Defendant
- d. No appearance Advocates for the 2nd Defendant

