**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND OURT**

**AT NAIROBI**

**MILIMANI LAW COURTS**

**ELC CASE NO. 277 OF 2011**

**JIM'S FRESH VEGETABLE GROWERS & EXPORTERS LIMITED.....PLAINTIFF**

**=VERSUS=**

**LOCLAND LIMITED.....1ST DEFENDANT**

**AJIT PATEL.....2ND DEFENDANT**

**JUDGEMENT**

1. The Plaintiff is a Limited Liability Company incorporated under the provisions of the Companies Act and it is engaged in the business of growing vegetables for export. The 1st Defendant is also a Limited Liability Company incorporated under the provisions of the Companies Act. The Company was initially engaged in the business of flower farming for export and was later engaged in the business of growing vegetables for export. The 2nd Defendant is a Director of the 1st Defendant Company.

2. The 1st Defendant is the registered owner of LR No. Kajiado/Kitengela/5110 and Kajiado/Kitengela/8125 which measure 20.3 hectares and 10.12 hectares respectively. It is on these two properties that the 1st Defendant was initially carrying on business of growing flowers before it switched to growing of vegetables. The 1st Defendant's business started going down in or around 2008/2009 partly because the 2nd Defendant's wife had passed on and the children were not keen on vegetable growing. The 2nd Defendant informed his employees that he was keen on selling some of the company assets such as the wooden green houses as he was no longer keen on proceeding with the business of vegetable growing. Things had become hard to an extent that Kenya Power and lighting Company was demanding payment of electricity bills which was running to about Kshs.800,000/=.The 2nd Defendant tried to negotiate with the power company to allow him to pay in installments but this did not work. The power supply was eventually disconnected.

3. In or around June/July 2009, a friend of Daniel Agawo called Anthony Gichohi visited him at the Plaintiffs farms at Isinya . Daniel Agawo is the General Manager of the Plaintiff. His friend told him that there was a company ( 1st Defendant) which was selling its assets. He told Daniel Agawo to inform his employer to go and view the assets. Daniel Agawo visited the 1st Defendant's farm and later managed to connect the Managing Director of the Plaintiff Company with the 2nd Defendant. Once the two directors of the companies met, they started negotiations which were initially based on purchase of the 1st Defendant's assets such as motor vehicles and green houses. The negotiations later changed to purchase of shares in the 1st Defendant company before finally ending in the possibility of purchasing the two properties at a cost of Kshs.90,000,000/=.

4. In the meantime, the Plaintiff was put in possession of the suit properties as the negotiations went on. The Plaintiff and the Defendants engaged in negotiations through correspondence. There were draft agreements which were exchanged but there was no agreement executed. In or around 2010, the Defendants indicated that they were no longer interested in pursuing the transaction. This is what prompted the Plaintiff to file a suit against the Defendants in which through a re-amended plaint, the following prayers are sought:-

> ***a) A permanent injunction restraining the 1st Defendant by itself , its servants and/or agents or otherwise howsoever from selling , alienating, disposing of and/or dealing with the two parcels of land known as LR No. Kajiado/Kitengela/5110 and Kajiado/Kitengela/8125 respectively.***
>
> ***b) Specific performance of the said agreement or damages in lieu thereof.***
>
> ***c) An order that the 1st Defendant transfer the title to the said properties to the Plaintiff.***

***d) In the alternative judgment against the Defendants in the sum of Kshs.32,500,000/= plus interests thereon at 16% per annum by way of restitution from the date of payment of the same until the same is repaid to the Plaintiff.***

***e) All necessary and consequential accounts and directions and enquiries.***

***f) Special damages in the amount of Kshs.35,000,000/=***

***g) Damages***

***h) Interest***

***i) Costs of this suit.***

5. The Defendants filed a defence to the Plaintiffs claim and raised a counter-claim. In their re-amended defence and counter claim, they sought the following reliefs:-

***i. The Plaintiffs suit be dismissed***

***ii. A permanent injunction restraining the Plaintiff, itself, its servants and/or agents or otherwise howsoever from planting crops or in any manner whatsoever dealing with land parcels Kajiado/ Kitengela/5110 and Kajiado/ Kitengela/8125.***

***iii. An order for eviction of the Plainiff from lands parcels Kajiado/Kitengela/5110 and Kajiado/Kitengela/8125.***

***iv. Mesne profits accrued to the Plaintiff from July 2009 till eviction of the Plaintiff from the suit property at the rate of Kshs.500,000/= per month.***

***v. Kshs.9.57 million being the balance of the purchase price of the Defendants' items and stock taken by the Plaintiff .***

***vi. General damages***

***vii. Interest on (i) –(vi) above at the prevailing court rates.***

***viii. An order compelling the Plaintiff to remove the caution over land parcels Nos. Kajiado/Kitengela/5110 and Kajiado/Kitengela/8125.***

***ix. Costs***

***x. Any other relief that this Honorable court may deem fit and just to grant.***

6. It is the Plaintiff's case that it paid Kshs.32,500,000/= towards the purchase of the suit properties. The initial payment was Kshs.2,500,000/=. The second payment of Kshs.20,000,000/= was made in cash. A cheque of the said amount was drawn by Mboga Tuu Limited and was cashed by Jagdish Chowdhary who then gave the cash to the 2nd Defendant's son, Nirav Ajit Patel. The third payment of kshs.5,000,000/= was made in a similar fashion and again given to the 2nd Defendant's son. The fourth payment of Kshs.5000000/= was made by issuing nine postdated cheques in favour of the 2nd Defendant.

7. The Plaintiff once in possession paid the outstanding electricity bill which was around kshs.800,000/=. It then embarked on revamping the irrigation system which had broken down, graded the roads in the farm before it started growing the vegetables. The Plaintiff absorbed some of the 1st defendant's employees and retained the 2nd Defendant for consultancy purposes at a pay of Kshs.200,000/= per month. There was also repair of the green houses, painting of all structures, renovation of the grading hall and repair and service of the cold stores.

8. The Plaintiff stated that what informed it not to purchase the shares in the 1st Defendant Company is that the audit showed that the 1st Defendant had made huge losses and it was therefore not viable to purchase the shares. This is the time the Plaintiff decided to purchase the two properties. As at the time the 2nd Defendant informed the director of the Plaintiff that he was no-longer interested in going on with the transaction, the Plaintiff had incurred a lot of money in improving the two properties. This is the basis for the kshs.35,000,000/= special damages being sought.

9. It is the Defendant's case that once the 2nd Defendant was connected with the director of the Plaintiff, Mr Shudhir Kent, the two started negotiations based on purchase of the 1st Defendant's wooden greenhouses by a company called Mboga Tuu Limited. The negotiations escalated to sell of the 1st Defendant's motor vehicles and a tractor. It was also agreed that the other items shown in the stock list were to be purchased for Kshs.13.57 million. It was then agreed that the Plaintiff was to purchase the two suit properties at Kshs.90,000,000/= . The 2nd Defendant and Mr Sudhir Kent agreed that the Plaintiff was to pay the electricity bills of about 750,000/= and the Plaintiff would move in as the negotiations went on.

10. The two agreed on sale of the 1st Defendant's Toyota Pick –Up Registration No.KAj 139 N, Mitsubishi Canter Reg No.KAM 641 L and Tractor No. KWD 772 at Ksh 3.5 million shillings. The 2nd Defendant signed transfer of the two motor vehicles and one tractor on 13th July 2009. The Defendants then prepared draft lease agreement and later on agreement for lease with an option to purchase. This later changed to

agreement for sale but when the 2nd Defendant took the draft to Mr. Sudhir Kent, Mr. Kent declined the same. The Plaintiff's director then gave a cheque of Kshs.2,500,000/=towards payment of the purchase price for the vehicles and tractor. Mr Kent said he was arranging with his banker to get a loan for purchase of the suit properties.

11. As the plaintiff delayed in concluding the sale which had been sent to it in draft, the 2nd defendant insisted on being paid for the balance of the purchase price of the vehicles and tractor. The 2nd Defendant also threatened to cancel the sale. It is at this time that Mr. Kent asked the 2nd Defendant to utilize the kshs.5,000,000/= paid to him for the balance of the purchase price of vehicles and tractor and the remaining four million shillings towards the stocks which had been taken by the Plaintiff. The 2nd Defendant had been paid 2.5 million shillings towards purchase of the motor vehicles. The balance was Kshs.1,000,000/=. Mr Kent asked him to appropriate the Kshs.4,000,000/= towards the stock which the Plaintiff had taken.

12. The Defendants denied that the plaintiff paid kshs.32,500,000/= towards the purchase price as alleged. The Defendants stated that the Plaintiff had asked for one of the titles to the suit properties in order to show its bankers that there was a security for a loan but the title was later returned to the Defendants after much haggling. The Defendants deny that Kshs.25,000,000/= was paid to the 2nd Defendant's son in cash as alleged. The Defendants contend that it is the Plaintiff which refused to pay for the agreed purchase price and should therefore move out of the suit property.

13. I have carefully considered the evidence adduced by the Plaintiff as well as that of the Defendants. I have also considered the submissions which were filed by the parties herein. The Plaintiff had filed its list of issues on 15th July 2014 which list contained 23 issues for determination. The Plaintiff however condensed these issues to seven issues for determination. The Defendants in their submissions agreed that these are the issues for determination. The issues are as follows:-

***1) Whether the Plaintiff and the defendants entered into an agreement for the disposition of the suit properties.***

***2) Whether, pursuant to the said agreement, the Plaintiff paid to the Defendants a total sum of kshs.32,500,000/= towards the purchase price of the suit properties , or whether the only sum paid is that admitted as having been received by the Defendants and which was for the purchase of various named moveable assets.***

***3) Whether in entering into vacant possession of the suit premises in or about June/July 2009 with the express knowledge and consent of the Defendants, the Plaintiff did so in part performance of the agreement mentioned in (1) hereof or as lesee thereof.***

***4) Whether the Plaintiff undertook improvements and farming activities on the suit premises.***

***5) Whether the agreement alleged in (1) hereof complied with section 3 (3) of the Law of Contract Act ( Cap 23) and therefore whether the suit is sustainable.***

***6) Whether in the absence of Land Control Board consent for the transfer of the suit properties within six months of the agreement the Plaintiff's only claim is only for the refund of the monies paid to the Defendants.***

***7) What, if any, remedies are due to the parties?.***

***Whether the Plaintiff and the Defendants entered into an agreement for the disposition of the suit properties***.

14. I have already captured herein above how the directors of the plaintiff and the 1st Defendant came to be connected. Once the two directors met, they started off with the idea of purchasing assets of the 1st Defendant especially the wooden green houses. This was because the Plaintiff was dealing in similar business of growing vegetables as the 1st Defendant was doing. The Plaintiff later changed when it was discovered that dismantling the wooden greenhouses was not going to be viable. The parties then considered the idea of purchase and sale of shares of the 1st Defendant Company. This did not work as it turned out that the audit which was carried out showed that the 1st Defendant had made huge losses.

15. The parties then considered the option of leasing. Draft agreements to this effect were exchanged through correspondence. The lease was escalated to a lease with an option to purchase which did not materialize. The parties then went to the last option of purchase. A draft agreement was prepared which was not executed. Having set out the brief facts on how the parties begun their relationship, then the issue to be determined is whether there was an agreement reached.

16. The Defendants argue that there was no agreement reached as recognized in law and more particularly provided for in the Law of contract Act ( cap 23) which provides as follows under section 3 (3) :-

" ***No suit shall be brought upon a contract for the disposition of an interest in land unless***

***a) The contact upon which the suit is founded.***

***i. Is in writing;***

***ii. Is signed by all the parties thereto; and***

***b) The signature of each party, signing has been attested by a witness who is present when the contract was signed by such party".***

17. There is no contention that the last draft agreement which was exchanged in or around November 2010 was not signed. The parties also did not agree on the terms thereof. The question which then falls for determination is whether this draft agreement met the requirements of the Law of Contract Act.

18. The Plaintiff in submissions has submitted extensively on this aspect. The Plaintiff has asked the court to consider the objective as opposed to the subjective theory of contract formation. In this regard, the Plaintiff relied on the case of In. **G Perey Trentham Limited Vs Archital Luxfer Limited ( 1993) Lioyds Rep 25, where Lord Steyn** stated as follows:-

***" It is important to consider the issue of contract formation ….It seems to me that four matters are of importance . The first is that …law generally adopts an objective theory that in practice our law generally ignores the subjective expectations and unexpressed reservations of the parties. Instead the governing criterion is the reasonable expectations of honest men…that means that the yardstick is the reasonable expectations of sensible businessmen. Secondly, it is true that the coincidence of offer and acceptance will in the vast majority of cases represent the mechanisms of contract formation. It is so in the case of a contract alleged to have been made by an exchange of correspondence. But it is not necessarily so in the case of a contact alleged to have come into existence during and as a result of performance …the third matter is the impact of the fact that the transaction is executed rather than executory. It is a consideration of the first importance on a number of levels….the fact that the transaction was performed on both sides will often make it unrealistic to argue that there was no intention to enter into legal relations. It will often make it difficult to submit that the contract is void for vagueness or uncertainty.***

***Specifically, the fact that the transaction is executed makes it easier to term resolving any certainty, or alternatively, it may make it possible to treat a matter not finalized in negotiations as inessential. In this case fully executed transactions are under consideration. Clearly, similar considerations may sometimes be relevant in partly executed transactions. Fourthly, if a contract only come into existence during and as a result of performance of the transaction it will frequently be possible to hold that the contract impliedly and retrospectively covers Pre- contractual performance….".***

19. The Plaintiff also relied on a decision from the supreme Court of the United Kingdom in the case of **RTS Flexible Systems Limited ('RTS') and Molkerei Alois Müller GmbH & Co KG ( UK Production) (2010) UKSC 14(45)** where it was stated as follows:-

***"The general principles are not in doubt. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind, but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement".***

20. The Plaintiff also relied on the case of **Reville Independent LLC Vs Anotech International (UK) Ltd (2016) EWCA Civ 443** where the Court held as follows:-

***" ….a draft agreement can have contractual force, although the parties do not comply with a requirement that to be binding it must be signed, if essentially all the terms have been agreed and their subsequent conduct indicates this, albeit a court will not reach this conclusion lightly".***

21. The Defendants in their submissions relied on the case of **Ol Loita Road Limited Vs Kenya Commercial bank limited (2011) eJLR** where Justice Muchelule held as follows:-

***" If a party is seeking to enforce a contract in relation to land, the contract has to be in writing and signed by the parties to it and witnessed as required by the section".***

22. The Defendants also relied on the case of **Patrick Tarzan Matu & another Vs Nassim Sharrif Nassir Abdulla & 2 others (2009) eKLR** where Justice Azangalala ( as he then was) stated as follows:-

***"The plaintiffs' claim arises from a failed agreement of sale of the suit property. It is therefore founded upon a contract for the disposition of an interest in land. The plaintiffs admit that the agreement was not executed by the applicant. The agreement did not therefore meet the requirements of sub-section 3 (a) (ii) of section 3 of the Law of Contract Act. The plaintiffs contend that correspondence exchanged between their advocates and the applicant's advocates constitute a memorandum upon which they base their action. I have perused the correspondence exhibited by the plaintiffs. The same does not support the plaintiff's stand-point. In any event such correspondence is contra sub-section 3 (b) of section 3 of the said Act. The plaintiffs' suit therefore contravenes the express provisions of the Law of Contract Act aforesaid".***

23. Justice Azangalala ( as he then was ) in the case of **Patrick Tarzan Matu (supra**) went on to state as follows:-

***"The Court of Appeal considered a similar scenario in Machakos District Co-operative Union Limited – v – Philip Nzuki Limited Kiilu [C.A. No. 112 of 1997]. In that case, the Respondent was alleging an agreement of sale between himself and the appellant in respect of the suit property which had been breached by the appellant. He therefore claimed a declaration that he***

***was entitled to a transfer of the said property to himself and an order for specific performance of the sale agreement. The court found that there was no agreement between the parties which satisfied the provisions of section 3 (3) of the Law of Contract Act aforesaid. The Respondent had relied on a letter of offer which was not signed by the respondent but a representative of the appellant. The Court held that the letter of offer could not qualify as a contract because it was not signed by the Respondent. The Court further found as irrelevant the fact that the total purchase price had been paid".***

24. The Defendants further relied on the case of **Silverbird keny Limited Vs Junction Limited and 3 others (2013) eKLR** where Justice Mutungi held as follows;

***"In my view it matters not that the plaintiff had been let into possession of the premises if the contract pursuant to which the plaintiff was granted possession was not validated in accordance with the law. The letter of 19th August 2009 in my view does not satisfy the requirements of Section 3(3) of the law of Contract Act to be the foundation of the Plaintiff's claim against the defendants. Section 3(3) of the Law of contract Act is indeed couched in mandatory terms and does infact divest the court of jurisdiction in instances where there is no compliance as in the instant case. In the circumstances and by reason of the Law of Contract Act, the plaintiff's suit must fail for being in contravention of Section 3(3) of the Law of Contract Cap 23 Laws of Kenya".***

25. A reading of the decisions cited by the Plaintiff shows that a draft agreement can only be taken as binding if it is shown that the parties to the draft agreement had agreed on all the terms which they regarded as biding on them or the law requires as essential for the formation of a legally binding contract. In the instant case, the parties had not agreed on the terms. A look at the drafts which were exchanged show that the terms kept on changing. The amount of the purchase price had not been settled on. In some drafts, the purchase price was shown as 62.50 million. In other drafts, it was shown that it was Kshs.90,000,000/= yet in other correspondences , the Defendant were suggesting that the amount was more than one hundred million shillings.

26. It is therefore clear that there is no basis upon which this court can make a finding that the final draft which was sent constituted a legally binding contract between the parties. This is why the court in the case of **Reville Independent LLC ( Supra**) cautioned that a court should not reach such a conclusion lightly. The agreement for purchase of assets was abandoned. The agreement for lease did not work. This was the case with the agreement to purchase paid up shares of the 1st Defendant which was also shelved on grounds of viability. When the parties started exploring the issue of sale, this was only in draft and the terms had not been agreed upon.

27. As the Court has found that there is no basis upon which the draft agreement can be said to be biding upon the parties , the question which remains to be answered is whether there is a valid contract as known in law. The answer to this question is simply no. There is no valid contract which can meet the requirements of section 3(3) of the Law of Contract Act Cap 23 Laws of Kenya.

***Whether pursuant to the said agreement, the plaintiff paid to the Defendants a total sum of Kshs.32,500,000/= towards the purchase price of the suit properties , or whether the only sum paid is that admitted as having been received by the Defendants and which was for purchase of the various named movable assets.***

28. The Plaintiff's evidence is that it paid a total of Kshs.32,500,000/= to the Defendants as part of the purchase price which it states was agreed at Ksh.90,000,000/= . The Defendants on the other hand state that the Plaintiff never paid any amount towards the purchase price and that the amount of kshs.7,500,000/= which they admit was paid was appropriated towards the sale of the movable assets of the 1st Defendant. Of the admitted sum of Kshs 7,500,000/ , KShs.2,500,000/= was paid by cheque on 20th August 2009. The remaining Kshs.5,000,000 was paid by post-dated cheques between 10th April 2010 and 6th July 2010.

29. There are a number of draft agreements which were exchanged between the parties herein. What is clear from a perusal of the documents filed by the parties herein is that not all the drafts have been provided. It is also not easy to know when each of the drafts was sent from one party to the other. It is therefore not possible to say with precision when the drafts were made. There is a draft which put the purchase price at Kshs.120,000,000/= . There is another one which put the purchase price at 62,500,000/= . There is yet another one which put the purchase price at Kshs.90,000,000/=. For the purpose of this case, the draft which indicates the purchase price as Kshs.90,000,000/= will be used. According to this draft whose precise date is not ascertainable, the 1st instalment of Kshs.20,000,000/= was to be paid upon signing of the agreement . The second payment of Kshs.45,000,000/= was to be paid in six equal instalments of Kshs.9,000,000and the final payment of Kshs.25,000,000 was to be paid before the expiry of seven months from the date of the agreement.

30. As at 2010, the terms of the draft agreement had not been agreed upon. The draft had stated how the amount was to be paid. There is evidence that 1st Defendant had agreed to purchase the movable assets of the 1st Defendant. The items which were to be sold included two motor vehicles and a tractor. According to the evidence of the Defendants, the two vehicles and tractor were delivered with signed transfers in favour of the Plaintiff. There are delivery notes dated 13th July 2009 which were duly signed. The Defendants stated that the agreed purchase price was Ksh.3,500,000/= . A cheque of Kshs.2,500,000/= was issued by the Plaintiff's sister company on 20th August 2009. As at the time this cheque was being issued, the issue of sale of the suit property had not arisen. The parties were still negotiating on the issue of sale of shares of the 1st Defendant as can be confirmed by the executed memorandum of understanding dated 7th April 2010. The issue of sale however aborted when it turned out that the 1st Defendant was heavily indebted. It cannot therefore be said that the Kshs.2,500,000/= was paid as part of the purchase price of Kshs.90,000,000/=.

31. The Defendants testified that when the 2nd Defendant became impatient at the delay in concluding the agreement, the director of the Plaintiff Company Mr. Kent told the 2nd Defendant to appropriate the money already paid to him towards the purchase of the movable assets. The 2nd Defendant testified that out of the 5,000,000/= which he had been paid, khs.1,000,000/= went to offset the balance out of the 3,500,000/= for the motor vehicles and tractor and the balance of 4,000,000/= went towards offsetting the outstanding amount for other assets . I do not have any reason to doubt this as the plaintiff has listed two motor vehicles as having been purchased in its schedule filed on 15th September 2015.

32. The Plaintiffs argue that they paid Kshs.25,000,000/= in cash to the son of the 2nd Defendant as part payment of the Kshs.90,000,000/= purchase price. Kshs.20,000,000/=is said to have been paid on 25th September 2009 and Kshs.5,000,000/= on 9th November 2009. The two cash payments were said to have been paid to the 2nd Defendant's son. It is said that the two cheques were drawn by Mboga Tuu Limited, a sister company of the Plaintiff in the favour of Jaydish Chordhari who cashed them and handed over the money to the 2nd Defendant's son. There is no evidence that any amount in the sum of kshs.25,000,000/= was withdrawn and handed over to the son of the 2nd Defendant . The son of the 2nd Defendant did not sign anywhere that he had received any such colossal sums of money in cash. The Plaintiff has only stated that the Kshs.20,000,000= was withdrawn vide cheque No. 87 and the Kshs.5,000,000 was withdrawn vide cheque No.115 . I did not see any evidence by way of bank statement to prove that there was a debit in the account of Mboga Tuu Ltd and in any case, even if there was to be such evidence, there is no evidence that such money was given to the 2nd Defendant's son. If there was such payment made as alleged, it would have at least been acknowledged in the draft agreement as having been paid. I therefore find that apart from Kshs.7,500,000/= which the Defendants acknowledged , there is no evidence that there was payment of Kshs.25,000,000/= towards the purchase price.

***Whether in entering into vacant possession of the suit, premises in or about June/July 2009, with the express knowledge and consent of the Defendants, the Plaintiff did so in part performance of the agreement mentioned in (1) hereof or as lesee thereof.***

33. There is no contention that the Plaintiff entered into the suit premises on or about June/July 2009. There is no contention that the entry was with the express permission of the Defendants. The issue for determination is in which capacity did the Plaintiff enter the suit premises. The answer to this is simple. There is evidence that the electricity connection to the suit premises had been disconnected. The Defendants had tried to engage Kenya Power & Lighting Company to allow them to liquidate the outstanding bill by monthly installments but the power firm would hear none of this. When the power was disconnected, it crippled the operations of the Defendants. Therefore when the plaintiff came in, it wanted to purchase the assets of the 1st Defendant. There was agreement to purchase assets which later turned to consideration of lease. The first draft agreement was for lease before it was changed to lease with option to purchase. The plaintiff was allowed immediate possessions once it settled the issue of the outstanding electricity bills. The entry was not on the basis of part performance of the contract of sale. The evidence clearly shows that the initial intention was to enter as lessee after it was found that purchase of assets and shares was not possible. The issue of sale came up later on.

***Whether the Plaintiff undertook improvements and farming activities on the suit premises***.

34. The Plaintiff testified that since it took possession of the suit premises it has undertaken improvements and farming activities on the suit premises. It is on the basis of this that the Plaintiff claims special damages of Kshs.35,000,000/= which is broken down as Kshs.12,000,000/= being cost of installation and laying of irrigation pipelines , kshs.11,000,000/= being cost of machinery and equipment, kshs.4,000,000 being cost of constructing a large rain water dam and kshs.8,000,000/= being labour cost.

35. It is important to note that before the Plaintiff took possession of the suit premises at Kitengela, it was operating business of vegetable growing at its farms in Isinya in Kajiado County. In proof of what it incurred, the Plaintiff prepared a schedule of costs incurred which was filed in the Plaintiff's supplementary bundle of documents filed on 15th September 2015. The total cost is shown as Kshs.44,281,098.35 . The notes accompanying the schedule indicates that half of the motor vehicles were purchased for the Kitengela farm and half for the Isinya farms. All the accompanying invoices and receipts are directed to Mboga Tuu Limited.

36. There is no single invoice or receipt issued by the Plaintiff. Some of the motor vehicles amounting to Ksh.10,506,122 /= were purchased before the Plaintiff took possession of the suit premises. There is therefore no way the Plaintiff can claim this as a special loss attributable to the Defendants. Kshs.4,500,000 was for a Mercedes benz lorry bought in June 2009, kshs.2,703,061/= for a Landini Tractor Reg.No. KAM 912J bought in June 2009, kshs.2,7,03,061/= was for a Landini Tractor Reg.No.422 J bought in June 2009 and Kshs.600,000/= was for a Same tractor bought in May 2009. This being the case, there is no basis for the Plaintiff's claim of kshs.11,000,000/= for purchase of motor vehicles.

37. The law regarding special damages is that the same has to be pleaded and proved. In the case of **Capital Fish Kenya Limited Vs Kenya Power & Lightening Company Limited (2016) eKLR** the Court stated as follows:-

> "***Starting with the first issue, it is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit. See National Social Security Fund Board of Trustees vs Sifa International Limited (2016) eKLR***, ***Macharia & Waiguru vs Muranga Municipal Council & Another (2014) eKLR*** and ***Provincial Insurance Co. EA Ltd vs Mordekai Mwanga Nandwa, KSM CACA 179 of 1995 (ur)***. In the latter case this Court was emphatic that
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> ***"… It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead. It is equally clear that no general damages may be awarded for breach of contract …".***

38. What the Plaintiff did was to throw figures at the court and say that " this is what I have lost. I pray that I be awarded" This is not the kind of pleading and as I have said hereinabove that the plaintiff has itself stated that some motor vehicles were purchased for the Kitengela farm and some for Isinya Farms without specifying which. The same applies to cost of labor and installation of water pipes and dam construction which are not shown where they were incurred or developed. In any case all the invoices and receipts were on account of Mboga Tuu Limited and not for the Plaintiff. I therefore find that the plaintiff has failed to prove that it incurred any expenses on the alleged improvements carried out on the suit premises.

***Whether the agreement alleged in (i) hereof complied with section 3(3) of the Law of Contract Act Cap 23 and therefore whether the suit is sustainable.***

39. This issue has been substantially dealt with while dealing with the first issue hereinabove. I will only add that the contract does not come

under any of the exceptions to section 3(3) of the Law of Contract Act and neither the common law doctrines nor the doctrines of equity can salvage the same. There was no contract at all which would have sustained the suit herein.

***Whether the absence of land control board consent for the transfer of the suit properties within six months of the agreement, the Plaintiffs claim is only for the refund of the monies paid to the Defendants***.

40. I have already found hereinabove that there was no contract signed by the parties. It will really be an academic exercise to consider whether such a non-existent contract was void for lack of consent of the Land Control Board . If any contract would have been in existence which is not the case, then the same would have been null and void if consent of the Board was not obtained within six months of the date of agreement or as may have been extended by court on application. The doctrine of equity as submitted by the plaintiff would not help.

41. The cases by the Plaintiff like **Macharia Mwangi Maina & 87 Othes Vs Davidson Mwangi Kagiri (2014) eKLR** and **W illy Kimutai Kitilit Vs Michael Kibet** would not have assisted the Plaintiff. This is because in the two cases, the courts were dealing with issues of sale agreements which had been executed properly, the purchasers were put in possession only for the vendors to wake up after several years to try to kick out the purchasers on the ground that no consent of the Land Control Board was obtained. This is why the courts in the two cases applied the doctrine of constructive trust to stop the vendors from seeking to unfairly take advantage of lack of consent of the Land Control Board to deprive the purchasers of their properties.

42. The Law on Constructive Trust was well settled in the case of **Twalib Hatayan & Anothers Vs Said Saggar Ahmed Al-Heidy & 5 Others ( 2015**) where the Court of Appeal stated as follows:-

> "***A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ( See Black's Law Dictionary ) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. In the present case, a constructive trust cannot be imposed or inferred since the suit premises were yet to be transferred to the third party. Therefore there is no unjust enrichment to be forestalled'.***

43. The circumstances of this case do not call for imposition of a constructive trust as there is no existence of any elements to justify its imposition. It is the Plaintiff who was not keen on carrying on with the contract and cannot turn around and claim that the Defendants are trying to unjustly enrich themselves.

***What if any remedies are available to the parties?.***

44. The Plaintiff is seeking a permanent injunction against the 1st Defendant in respect of the two suit properties. As has been analyzed above, it is clear that the 1st Defendant has not wronged the plaintiff as to call for an injunction. The remedy of specific performance is only available to a party who shows that he/she has met all that was expected of him or that he/she is ready and willing to complete his/her part of the bargain. This remedy which is discretionary is based on existence of a valid contract. In the case of **Reliable Electrical Engineers Ltd Vs Mantrcat Kenya Limited (2006) eKLR** it was stated as follows:-

> "***Specific performance, like any other equitable remedy, is discretionary and the court will only grant it on the well settled principles. The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable".***

45. In the instant case, there was no contract signed and therefore the remedy of specific performance is not available. There is therefore no basis for an order that title be transferred from the 1st defendant to the plaintiff. The Plaintiff failed to prove that it paid kshs.25,000,000 /= to the Defendants. The 7,500,000/= which was acknowledged as having been received was appropriated towards the motor vehicles which the plaintiff purchased from the 1st Defendant and other items.The Plaintiff has expressly acknowledged in the scheduled filed on 15th September 2015 that it purchased motor vehicle Reg.No.KAM 641L, a canter for kshs.1,500,000/= and a Tractor Reg.No.KWD 772 which it purchased for Kshs.150,000/= . It has however failed to account for the Toyota Pick-Up Reg No. KAJ 139N which was duly delivered to it and was acknowledged in a delivery note. The rest of the money was appropriated for the 1st Defendants goods which were indicated in the stock list which is not doubted.

46. There was no prove of any special damages. The Plaintiff had tabulated its loss which was in form of special damages which it failed to prove. The law is clear that a party cannot claim general damages in addition to special damages. It therefore follows that the Plaintiffs claim for specific performance fails. Its alternative claim for special damages also fails for the reasons given hereinabove. The same is hereby dismissed in its entirety with costs to the Defendants.

47. The Defendants prayed for an injunction and order of eviction as well as an order compelling the plaintiff to remove the cautions registered over title to the suit property. The Defendants also pray for general damages. The Defendants have failed to prove that the Plaintiff owes them a balance of Kshs.9,570,000/= for the movable assets taken. The Defendants have simply referred to a list of items in the stock list. There was no valuation of the items. What has been assigned to each item has been done so at the discretion of the Defendants without any basis for the same. I therefore find no basis for grant of the Kshs.9,570,000/=.

48. The Plaintiff entered the suit premises with the permission of the Defendants. The Defendants are claiming mesne profits at the rate of Kshs.500,000/- per month from July 2009. The plaintiff having entered the suit premises with permission of the Defendants, there is no basis

for claiming mesne profits from July 2009. The Plaintiff was on the suit premises pending conclusion of the agreement between the parties which unfortunately did not materialize. When this happened, the Defendants lawyers wrote a demand letter on 17th January 2011 asking the Plaintiff to move out of the suit premises as there was no legal basis for remaining on the same. If any mesne profits were to be computed, then the same would have been computed from this date.

49. Mesne profits are like special damages which are payable by a person who is in wrongful occupation of one's land. In the instant case, the defendants just threw a figure of 500,000/= at the court and asked to be granted the same. There is no basis laid for this amount. The Defendants did not adduce any evidence of what they were earning from the farm to be the basis of any grant of mesne profits. I therefore find that there is no basis upon which mesne profits can be granted.

50. There is however no doubt that the 1st defendant's properties are about 75 acres. The plaintiff has been in possession of the 75 acres for now a decade since the Plaintiff was asked to move out. The Defendants are entitled to general damages. The Defendants have been kept out of their properties for a decade. The properties are in Kitengela area which is one of the fastest growing towns outside the Nairobi metropolis. There is no doubt that the suit properties are prime. The plaintiff has been reaping profits from the properties since January 2010 when it was formally asked to move out.

52. When it comes to general damages, there is no need for proof of any damage to enable the court to assess damages. Once illegal occupation is established, assessment follows and the amount of damages depends on circumstances of each case. As I have already said, the suit properties are in a prime area which is fast growing. Taking into account all the circumstances of this case, I will assess general damages at Ksh.10,000,000/= ( Ten Million shillings).

53. The Plaintiff became a trespasser in January 2010. As a trespasser, the Defendants are entitled to an injunction against the trespasser who should give way and the only way to give way is by grant of eviction orders. There is evidence that the Plaintiff has caused cautions to be registered against titles to the suit properties. These cautions ought to be removed by granting an order compelling the Plaintiff to remove the cautions.

54. In summary thereof, I find that the Plaintiff has failed to prove its case against the Defendants. The Plaintiff's suit is hereby dismissed in its entirety with costs to the Defendants. On the other hand, I find that save for mesne profits and special damages, the Defendants have proved the rest of their claims in the counter claim against the Plaintiff on a balance of probabilities. I therefore enter Judgment for the Defendants (Plaintiffs in counter-claim) against the Plaintiff (Defendant in the counter-claim) as follows;-

***1. A permanent injunction restraining the Plaintiff by itself, servants and/or agents or otherwise howsoever from planting crops or in any manner whatsoever dealing with land parcel Nos. Kajiado/ Kitengela/ 5110 and Kajiado/ Kitengela/8125.***

***2. An Order of eviction against the Plaintiff from land parcels Nos.Kajiado/Kitengela/5110 and Kajiado/Kitengela/8125.***

***3. An order compelling the plaintiff to remove the cautions over land parcels Nos. Nos.Kajiado/Kitengela/5110 and Kajiado/Kitengela/8125.***

***4. General damages of Kshs.10,000,000/=***

***5. Interest on (4) above at the rate of 14% from the date of this Judgment.***

***6. Three quarters (3/4 ) of the costs of the counter-claim.***

**Dated, signed and delivered at Nairobi on this 5th day of May 2020**

**E.O.OBAGA**

**JUDGE**

In the virtual presence of :-

M/s Muma for Dr Ojiambo for Plaintiff

Court Assistant: Hilda

**E.O. OBAGA**

**JUDGE**