



REPUBLIC OF KENYA



KENYA LAW
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Nguvu Construction and Mining Limited v Mbuvi & 3 others (Civil Suit 6 of 2016) [2025] KEHC 11115 (KLR) (14 July 2025) (Judgment)

Neutral citation: [2025] KEHC 11115 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL SUIT 6 OF 2016
MW MUIGAI, J
JULY 14, 2025**

BETWEEN

NGUVU CONSTRUCTION AND MINING LIMITED PLAINTIFF

AND

AARON KITUNG’U MBUVI 1ST DEFENDANT

CRISPIN MUSEMBI MULIKA 2ND DEFENDANT

SEIKE INDUSTRIES LIMITED 3RD DEFENDANT

CFC STANBIC BANK LIMITED 4TH DEFENDANT

JUDGMENT

Background

1. This suit commenced in 2016 between Plaintiff and 1st Defendant. The proceedings halted during the Corvid 19 period and resumed. Thereafter various applications, the Plaintiff was amended in 2017 to include 2nd & 3rd Defendants respectively. By Rulings delivered by Hon. Mureithi J on 18/5/2016 and Hon. E.Ogola of 15/2/2017, the Plaintiff was amended as hereunder as follows;

Further Amended Plaintiff

2. Vide further amended plaintiff dated 20th December,2018 and filed in court on 21st December,2018, wherein the Plaintiff averred that at all material times this suit, the Plaintiff has been involved in the business of mining and excavation throughout the Republic and is a customer of the 4th Defendant which relationship begun when the Plaintiff was advanced several facilities to purchase the machineries and equipment as set out hereunder:



- a. The sum of Kshs. 19,900,000.00 was financed to the Plaintiff by the 4th Defendant for the purchase of a unit Crusher Volvo Dumper, caterpillar Dumper, IH Bulldozer volvo, Wheel Loader and bucket Kobelco Excavator.
 - b. The 4th Defendant further financed the Plaintiff the sum of USD 117,666.00 for the purchase of a crushing plant.
 - c. The 4th Defendant further availed to the Plaintiff an invoice discounting facility to the limit of Kshs. 30,000,000.
3. It is averred that facilities were secured in favour of the 4th Defendant as follows:
- a. The facility for the sum of Kshs. 19,000,000 was secured inter alia an all assets debenture created by over the Plaintiff's assets in favour of the 4th Defendant.
 - b. The facility of the sum of USD 117,666.00 was in addition the debenture, further secured by hire purchase agreement which designate the 4th Defendant as the owner of the machinery and equipment until such time when the facility advanced the Plaintiff shall be paid in full where after the ownership shall pass to the Plaintiff as a hirer.
4. It is adverted that the 2nd Defendant is a director with shares of the 3rd Defendant herein.
5. Averring that the Plaintiff entered into an agreement with the 1st Defendant for mining and excavating for pozzolana on L.R No. 9775 situate at Lukenya at a consideration of Kshs. 250,000 per month for the first four months and thereafter Kshs. 300,000/= per month.
6. It is contended and averred that the 2nd Defendant was a director of the Plaintiff with no shares and during his directorship at the Plaintiff he witnessed the execution of financing agreements as well as executed the guarantees on the hire purchase in favour of the 4th Defendant.
7. It is averred by the Plaintiff that the 2nd Defendant was dismissed from the Plaintiff's Company for gross violation of trust bestowed upon by registering a competing company in the name and style of Nguvu Industrials & Construction Limited which company the 2nd Defendant used to solicit business from the Plaintiff's clients.
8. That it is so evident that sacking of the 2nd Defendant as the Plaintiff's Director on 31st December,2015 had an avalanche of set downs followed by the 1st Defendant frustrating the operation leading to total breakdown of Plaintiff's project.
9. It is contended by the Plaintiff that on the strength of the agreement, it installed electricity erected the requisite machinery on the site and incurred huge costs in the undertaking. Upon payment of a deposit of Kshs. 620,000/= the Plaintiff moved its equipment on site ready to carry out the excavation.
10. It averred that immediately the Plaintiff moved the equipment to the site the 1st and 2nd Defendants began harassing the workers and it became apparent that the mining as envisaged was not going to take place.
11. Opining that without any lawful justification the defendant on 25/01/2016 denied its workers access to the site and to date some of its equipment lies idle at the site which act has subjected the Plaintiff to loss and damage.
12. It was averred that the Plaintiff sent its workers to get the equipment from the site but the Defendant's agents attacked officers of the Plaintiff and their workers armed with bows and arrows and violently chased them from the site in a clear breach of peace and a threat to their life on 27/1/2016.



13. Adverting that there is no outstanding rent owed to the 1st Defendant and in any case the mining did not take place as the 1st and 2nd Defendant disrupted the operation and if rent is owed which is denied, the same cannot be more than Kshs. 620,000/= already paid to the 1st Defendant.
14. Opining that it is the public preview that generally all mining agreements usually sets out grace period allowing for settling up the equipment and its royalties premised on the compensation that includes but not limited to forfeited rent at the feasibility and installation stage.
15. It is contended that the Plaintiff had put on site the following machinery namely IH bulldozer- KHMA 321 G Caterpillar dump truck, Volvo dump truck, Caterpillar truck shovel, KOBELCO excavator – KHMA 993 G and a Crushing plant.
16. That the Machinery are now in possession of Defendant, the Plaintiff is afraid that the machinery may be subject to waste damage or be lost or moved away without his knowledge.
17. It is averred that the Plaintiff has been servicing the said facilities to the tune of Kshs. 1,060,538.80 per month using funds sourced from use of the aforementioned equipment and machineries amongst other sources.
18. The Plaintiff avers that the amount currently outstanding and due to the 4th Defendant are the total sum of Kshs. 31,919,857.96 outstanding on the two term loans and the hire purchase facility the same very substantial amount. That it is evidently seen from the record that the agreements were executed between the 4th Defendant and the Plaintiff, further, it is the Plaintiff who has been servicing the loan.
19. Adverting that having sought finances from the 4th Defendant to purchase the machineries and equipment the Plaintiff was to utilize the equipment to generate income to pay the loan facility advanced and denial of the Plaintiff to use the machineries jeopardizes the Plaintiff by exposing the 4th Defendant to possible losses arising from possible default. That as a matter of fact the Plaintiff has already defaulted in the payment of revolving facility and as a result of which the bank has issued a notice to that effect.
20. It is contended that the Plaintiff has been out of the business and continues to be out of the business to date as the machinery and equipment are lying idle in the 1st Defendant's premises who has denied access to the Plaintiff.
21. It is further contended that the Plaintiff has lost very lucrative and profitable business from customer and the Plaintiff is prevented from carrying on business and meeting its commitment as planned and expected.
22. Averring that as a result of the foregoing, the Plaintiff has suffered special and general as well as loss of business as particularized hereunder:
 - a. Sum of Kshs. 1,979,334.55 being the amount used for hiring machinery plant and equipment from October 2016.
 - b. General damages for loss of business.
 - c. Special damages for 36,000,000 being loss of use of machinery and equipment installed by the Plaintiff from March 2016.
 - d. Refund of the rent paid Kshs. 620,000/=
23. The Plaintiffs prayed for judgment against the 1st and 2nd Defendants jointly and severally for:



1. A declaration that the Plaintiff is entitled to possession of all equipment namely IH bulldozer, Caterpillar Dump truck, Volvo dump truck, caterpillar truck shovel, KOBELCO excavator and a crushing plant currently in LR 8775.
2. Costs of this suit and damages
3. General damages for loss of business
4. A sum of Kshs. 1,979,334.55 being the amount used for hiring machinery plant and equipment from October, 2016.
5. Special damages of Kshs. 36,000,000 being loss of use of machinery and equipment installed by the Plaintiff from March, 2016
6. Refund of the rent paid Kshs. 620,000/=

1st Defendant's Statement of Defence And Counterclaim Defence to Further Amended Plaintiff

24. The 1st Defendant in his Statement of Defense and Counterclaim Defense to Further Amended Plaintiff dated 15th October, 2019 and filed in court on 19th November, 2019 wherein, contents of paragraph 4, 6, 6A, 7, 8 and 9 of the Further Amended Plaintiff are denied averring that:
 - a. That the 1st Defendant never entered into any mining and excavation agreement with Plaintiff and a photocopy of a lease agreement exhibited by the Plaintiff at interlocutory stage is a forgery and the 1st Defendant putting the Plaintiff to strict proof thereof.
 - b. On the contrary, the 1st Defendant entered into lease agreement with the 2nd and 3rd Defendants for mining and excavating of Pozollana on his property known as L.R No. 9775 situate at Lukenya for monthly rental income in the sum of Kshs. 250,000/= for the first four months commencing January 2015 and thereafter at the rate of Kshs. 300,000/= monthly.
 - c. The 1st Defendant never received any money from the Plaintiff as alleged or at all. Instead, the 1st Defendant received money from the 2nd and 3rd Defendants, sums of which he signed petty cash vouchers for the same.
 - d. With respect to electricity on the 1st Defendant's parcel of land, the same was installed by the 1st and 2nd Defendants.
 - e. The alleged denial of access and chasing of the Plaintiff's workers from the site is spurious.
 - f. The contents of paragraph 9 are false and gross misrepresentation of facts and as pleaded the machinery on the 1st Defendant's land was brought on by the 2nd and 3rd Defendants.
 - g. The 1st Defendant in relation to the foregoing further avers that he is holding onto the machinery on his parcel of land as lien for the unpaid rent owed to him.
25. The Defendant while denying the contents of paragraph 8, 8A and 8B contended that:
 - a. It is owed rents in arrears by the 2nd and 3rd Defendants.
 - b. There is no general binding lease agreement for mining, each agreement is distinct to the respective parties and therefore the contents are not in public purview as alleged by the Plaintiff.



26. The 1st Defendant denied that the Plaintiff has suffered damages and loss of business as pleaded in paragraph 20 (a) to (d) both inclusive. The 1st Defendant denies being liable for the reliefs sought in the Further Amended Plaint at Paragraphs 20(1) to (6) both inclusive. The Defendant prayed that the Plaintiff's suit against it be dismissed with costs to the 1st Defendant.

The Counterclaim

27. The 1st Defendant avers that claim that he claims by way of lien over the Machinery and equipment herein and that the 2nd and 3rd Defendants claim of ownership over the same and this Court's order of 18th May, 2016.

28. Contending that the reliefs on declarations and injunctions are thereby denied. It is contended that due to the initial mining on his said property, and excavation activities by the 2nd and 3rd Defendants as aforesaid, he has suffered loss and damage.

29. Averring that the 2nd and 3rd Defendants have neglected, failed or/and refused to pay the rent owed to the 1st Defendant and/or make good the 1st Defendant's Claim on the damage to his property.

30. The 1st Defendant counterclaims and prays for judgment against the 2nd and 3rd Defendants herein jointly and severally for:

1. Rent arrears owed to be assessed by this Honorable Court.
2. Mesne profit for mining of pozzolana on the 1st Defendant's parcel of land.
3. Costs of this suit
4. Interest on (1) and (3) above at courts rate.
5. Such further and/or other reliefs as this Honorable Court deems fit.

4th Defendant Statement of Defense & Counterclaim

31. By Agreement 'The Term Loan Facility' dated 4th August 2015; the 4th Defendant financed 1st Defendant for purchase of IH Bulldozer- KHMA 321 G Caterpillar dump truck, Volvo Dumper 860T truck, Caterpillar Dumper 66B, I, KOBELCO excavator – KHMA 993 G, Volvo Wheel loader to the tune of Ksh 19,951,590.00

The 4th Defendant avers by Agreement dated 19/6/2015 'Hire Purchase Agreement' financed the Plaintiff for Purchasing Crushing Plant at Ksh 11,569,766.00

32. The 4th Defendant by facility letter dated 2nd January, 2015 and subsequently amended on 4th August 2015, the 4th Defendant extended to the Plaintiff an Invoice discounting facility up to the limit of Ksh 30,000,000/-

The 4th Defendant deposed that the facility of Ksh 19,900,000/-was secured by 1st ranking all assets debenture of Ksh61,000,000/-

33. The 4th Defendant avers that the facility by way of letter dated 19/7/2015 was in addition by way of debenture, further secured by Hire Purchase Agreement which constitutes the Plaintiff as the owner of the goods until such time the facility is paid in full.

34. The 4th Defendant states that the Invoice discounting Facility was similarly secured by inter alia, a 1st ranking all assets debenture for Ksh 61,000,000.00; Joint & Personal Guarantees of Directors as well as through HP Agreements.



35. The 4th Defendant deposed that the said securities grant the 4th Defendant the rights to amalgamate and set off recovery of any such sums as may be outstanding and/or subsist to date to secure interests of 4th Defendant until repayment of facilities and thereby securities discharged.
36. The 4th Defendant intimated that at the time [2016] there was currently outstanding on account of the Plaintiff sum of Ksh 41,390,726.47 due from various facilities set out hereinabove.
37. The 4th Defendant sought declaration that its [legal] interest as Debenture -holder and Hirer, arising from the 1st Registration of the 1st ranking Debenture dated 10/2/2015 as shown by Certificate of Registration of Mortgage dated 5/3/2015 as well as Hirer Purchase Agreement dated 19/6/2015 rank in priority to any claims by the 1st -3rd Defendants for any such time that the said securities remain undischarged.
38. The 4th Defendant further sought order of permanent injunction to restrain 1st-3rd Defendants their agents, servants or employees from interfering, taking possession wasting alienating or disposing of leasing or in any manner whatsoever with the IH bulldozer- KHMA 321 G Caterpillar dump truck, Volvo dump truck, Caterpillar truck shovel, KOBELCO excavator – KHMA 993 G and a Crushing plant until such time the 4th defendant's interest shall be discharged.

Hearing

39. This Court took over the matter on 20/9/2022 the Advocates representing parties were present save for Counsel for 2nd & 3rd Defendants who passed on. The matter was adjourned to allow alternative legal representation.
40. On 7/11/2022, parties; Plaintiff and 2nd & 3rd Defendants through respective Counsel were ready to proceed with 1 witness. The Court adjourned as another hearing was proceeding. On 7/2/2023, the Court was overwhelmed resuming from leave and attended to 3 Cause-Lists. On 6/3/2023 the Court was not sitting attending official duties.
41. On 17/4/2023, hearing commenced PW1 Christopher Wanyoike Ndungu testified and outlined content of his pleadings; among them the Further Amended Plaintiff List of Documents annexed and filed on 7/11/2022 and Witness Statement filed and List of Documents filed and produced as exhibits.
42. PW1 stated that when this case started, the Company, Plaintiff; Nguvu Construction & Mining Ltd, through Court orders granted in 2016 obtained part of equipment namely, IH bulldozer- KHMA 321 G Caterpillar dump truck, Volvo dump truck, Caterpillar truck shovel, KOBELCO excavator – KHMA 993 G and a Crushing plant. Thereafter, 1st Respondent obtained Court orders to stop clearing of the goods.
43. PW1 filed importation documents of the equipment/Bill of Lading & CFC Stanbic Bank Document approving facility to obtain the equipment. He testified that him and 1st Defendant Aaron Kitungu Mbuvi entered into an Agreement to lease land for mining signed on 1/1/2016 and business was to start on 25/1/2016 and the equipment was taken to the said site/property. He stopped any of the persons entering on the land and used gang of men with bows and arrows and his men were chased away. He reported to the Police Station and file the matter in Court and were allowed to remove the equipment only later to have orders of status quo.
44. PW1, Plaintiff's claim was/is Ksh 1,979,334.55 the amount used to hire equipment to do mining work and presented Payment Vouchers & Service Received Notes at Pg 96-Pg 111 of Plaintiff's bundle.



45. Plaintiff claimed Ksh 36 million of loss of business as it took time to get land to mine as shown at Pg 112-121 Mombasa Cement & Bamburi Plant LPO where he supplied material and lost the business
46. The Plaintiff claimed Ksh 620,000/- Rent paid for land hired from 1st Defendant and he presented the Petty Cash Voucher dated 24/10/2015 in the name of Aaron Kitungu Mbuvi and he sought refund.
47. The Plaintiff sought general damages for loss of business and credit history that adversely affected the Company's name to the Banks. The Plaintiff sought the Counterclaim by 1st Defendant to be dismissed with costs.
48. In cross-examination, by 1st Defendant's Advocate, the Plaintiff confirmed Lease Agreement between Plaintiff and 1st Defendant and presented original copy in Court upon request and confirmed Advocates on record who executed the Agreement for Lease; Ms Ann W. Thoronjo Advocate. The Plaintiff reiterated that the Lease was not altered from the Draft that indicated Seike Industries Ltd to Nguvu Construction & Mining Ltd. The Plaintiff stated upon setting to work on site there was resistance and he reported the matter to the Athi River Police Station under OB54/25/1/2016 & OB54/26/1/2016 and he attached the Affidavits to his Witness Statement.
49. The Plaintiff confirmed that 2nd Defendant Chrispin Musembi Mulika was a Director of Plaintiff Company Nguvu Construction & Mining Ltd and they both jointly owned Seike Industries Ltd. The Plaintiff, PW1 sued 1st Defendant but later 2nd 3rd & 4th Defendants joined the proceedings.
50. In cross examination by 4th Accused's Advocate, the Plaintiff, PW1 admitted to the 4th Defendant's List of Documents and that CFC Stanbic Bank provided various facilities to the Plaintiff Company more specifically to purchase the mining equipment. PW1 confirmed the Facility Documents; at Pg 1 at Pg 10 at Pg at 52 Pg at 66 Pg 34 of all Loan and Credit facility Agreements drawn with the Bank; & Pg 79 of the bundle Account holder was/is Nguvu Construction & Mining Ltd and at Pg 89 of 4th Defendant's bundle the letter of demand to the Plaintiff, through PW1.
51. The plaintiff's Advocate confirmed that the 2nd & 3rd Defendant's were served with hearing date copies of Affidavits of Service filed and they did not appear or attend they were not represented and no information was relayed to Court to consider.
52. The 4th Defendant waived the right to present any evidence.
53. On 28/9/2023, DW1 Aaron/Harun Kitungu Mbuvi testified and relied on the Witness Statement and List of Documents filed on 15/10/2019. DW1 stated that he was in Court as owner of the land but he had no claim to the machines/equipment. The Advocate for 1st Defendant sought adjournment to have the hearing proceed when all parties were present. The matter was adjourned to 18/10/2023 and none of the parties/Counsel appeared. In the Registry a date of 4/3/2024 was obtained but the matter was listed on 5/3/2024 when parties agreed to 15/3/2024 when the Court was bereaved and away. Several mentions were before the Deputy Registrar until 20/11/2024 when Plaintiff's Counsel confirmed service of hearing on the day. The Affidavits of Service were uploaded on CTS. In the absence of attendance or explanation or any information for the Court to consider, the Court closed the case. Written submissions were to be filed and served by 5/12/2024. Written submissions were filed on CTS and parties/Counsel were to give physical copies to the Court. The same were not availed



Analysis & Determination

54. This Court considered pleadings filed and evidence on record and issues for determination are as follows;

Are the claims by the Plaintiff proved on a balance of probabilities against the 1st 2nd & 3rd Defendants?

Is the 4th Defendant bank's legal interest/claim established against the parties to the various contracts?

What remedies are available to be granted?

55. This has been a convoluted matter spanning almost 10 years now since 2015-2016 and the court will piece together the evidence available on record in an effort to establish each party's rights, obligation and/or remedy.
56. The Plaintiff Company through PW1 attached Certificate of Incorporation of Nguvu Construction & Mining Ltd of 22/9/2008 and PW1 intimated that they were Co directors with 2nd Defendant before he was dismissed for gross violation of trust as he registered a competing Company in the name & style of Nguvu Industrial & Construction Ltd and solicited business from Plaintiff's clients.
57. PW1 annexed Lease Agreement between Plaintiff Company Nguvu Construction & Mining Ltd and Aaron Kitungu Mbuvi on 10th December 2015 for area of mining Plot No R 9775 measuring 12 acres and the Agreement was drawn by Ocharo & Co Advocates. Rent payment was to be paid as agreed in terms of Lease to 1st Defendant's Account No 0100338941300 Standard Chartered Bank. The lease is stamped by Anne Thoronjo Advocate.
58. During proceedings, the 1st Defendant through Counsel raised Preliminary Objection that this Court lacked jurisdiction as the substance of the claim mainly dwelt on land and hence ought to be before the Environment & Land Court.
59. This Court recognizes the jurisdiction of ELC Article 162(2) of the *Constitution* 2010 and Section 13 of ELC Act to hear and determine disputes relating to the environment and use and occupation of, and title to land.
60. In the case of Suzanne Achieng Butler & 4 Others vs Redhill Heights Investments Ltd & Anor [2016] eKLR, the Court faced with similar 'mixed grill' situation and similar preliminary question raised the Hon J.Ngugi J (as he then was) considered;
- “When faced with controversy whether a particular case is a dispute about land (which should be litigated by the ELC Court) or not, the Courts utilize the Predominant Purpose Test. In a transaction involving both a sale of land and other services or goods; jurisdiction lies at the ELC Court if the transaction is predominantly land, but the High Court has jurisdiction if the transaction is predominantly for provision of goods, services, construction, works.....”
61. In the instant case, the claim for refund of rent paid by the Plaintiff to 1st Defendant is based on a lease contract by the Plaintiff and there is dispute on the machinery/equipment ownership that was to be used for mining on the said premises. Coupled with these disputes are others regarding who was to lease and pay rent and thereafter mine on the property as there is also a lease through 2nd & 3rd Defendants.



62. Overall is the priority interest of the machinery/equipment owned jointly by Plaintiff and 4th Defendant /Bank over facilities provided for purchase of machinery held in the premises to date by virtue of status quo orders granted pending resolution of the claims and counterclaims by parties.
63. From the disputes above the case is also mixed grill and subject to predominant Purpose test a commercial dispute. The Preliminary Objection is dismissed.
64. The 1st Defendant's Replying Affidavit filed on 16/9/2016 to an application deposed that the Plaintiff was not candid, the machinery was brought onto his property by 2nd & 3rd Defendants who signed a lease with him to mine pozzolana on agreed outlined terms. The 3rd Defendant installed 3 phase power supply from KPLC and carried out a National Environmental & management (NEMA) Assessment report for the pozzolana quarry mining and 3rd Defendant applied for and was issued with a single business permit to mine pozzolana by Machakos County Government. In March 2015, 2 Officers from the 4th Defendant Bank visited his property with 2nd Defendant and inspected the machinery. For the entire 1year 2015, the 2nd & 3rd Defendants. 1st Defendant attached copies of the said documents as AKM-1.
65. The 2nd & 3rd Defendants in Submissions filed on 19/October 2016 with regard to the pending Application dated 31/5/ 2016 deposed that 2nd Respondent is beneficial owner of the machinery and motor vehicles at the center of the suit. The 2nd Defendant had an agreement with PW1 Mr. Christopher Ndungu to purchase the machinery through Nguvu Construction & Mining Company which had been in business for a while and had credit facilities. Thereafter, the purchase of machinery equipment and vehicles they would be transferred to the 3rd Defendant, Sieke Industrials Limited where they were both 50% each shareholders PW1 & 2nd Defendant.
66. From the above outline and evidence on record from pleadings, clearly PW1 & 2nd Defendant were directors of Plaintiff Company Nguvu Construction & Mining Company incorporated 2008 and in 2014 both PW1 & 2nd Defendant incorporated Sieke Industrials Limited. Both companies Plaintiff and 3rd Defendant were/are separate legal persons but operate through Board of Directors who are PW1 and 2nd Defendant jointly and severally.
67. In the case of Jones vs. Lipman & Another [1962] 1 All ER 442) and H. L. Bolton (Engineering Co. Ltd vs. T. J. Graham & Sons Ltd [1956] 3 ALL ER, it was held;
- “A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work, and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. The state of mind of these managers is the state of mind of the company and is treated by law as such”
68. The Court in Kolaba Enterprises Ltd –v- Shamsudin Hussein Varvani & Another (2014) eKLR, observed that:
- “It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceedings where a company is involved. Needless to say, that separate legal personality



of a company can never be departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities”.

69. It is not in dispute that Nguvu Construction & Mining Company Sieke Industrials Limited were incorporated by PW1 & 2nd Respondent as special purpose vehicles for mining business. However, mistrust and grudge set in upon the 2nd Defendant incorporating a similar company as the Plaintiff Company and diverted business. Naturally, PW1 & 2nd Respondent broke ranks and each pursued individual business interest and forgot they operated under business entity a Company under the law. Any transaction or business by the Company bound both Directors at the time.
70. From documents annexed by each party, the 1st Defendant entered into a lease Agreement with Plaintiff Company and later with 2nd Defendant as per the Agreement each party attached. For the 1st Defendant to agree to lease his property for mining to PW1 and at the same time 2nd Respondent was fraudulent and amounted to unjust enrichment. The 1st Defendant was paid through Mpesa and Payment Voucher attached by PW1 Ksh 620,000/- part of rent and used gang of men to evict him and his team as was reported to Athi river Police Station and OB numbers given to PW1, but curiously leaving the machinery and equipment on site and claimed that he engaged with 2nd Respondent and 3rd Respondent Company where PW1 he evicted was 50% shareholder and Co Director of 3rd Defendant. 1st Defendant decided to be embroiled with PW1 and 2nd Respondent's dispute and took sides ousted PW1 but received rent proceeds retained machinery on his premises but supported 2nd Respondent who formed separate but similar Company to PW1 Nguvu Industrials & Construction Limited and took business away. The law will not sanction unjust enrichment. In the case of Kenyatta International Conference Centre versus Greenstar Systems Limited [2018] eKLR Hon Olga Sewe LJ. Stated; -
- “...it would lead to unjust enrichment if the Respondent were allowed to keep the benefit and user of the refurbished premises without having them pay for their value...the Claimant has performed its obligations under an invalid contract. The counter-performance expected of the Respondent, being payment for those works has not materialized. The Respondent has thereby been unjustly enriched. It should be noted that it is immaterial whether the counter-performance is based on a valid contract or not...It is therefore my conclusion on this issue that there ought to be restitution and the parties be taken back to where they were as if the Contract had not been entered into...”
71. Therefore, Plaintiff's claim against 1st Defendant for refund of Ksh 620,000/- is granted.
72. With regard to the machinery and equipment/vehicles, PW 1 testified that after signing Contract of Lease with 1st Defendant on 10/12/2015 as shown by attached Agreement, PW1 moved machinery and equipment on site and 1st & 2nd Defendants harassed workers on site.
73. The 1st Defendant conceded that mining was conducted by 2nd Defendant on the property the whole of 2015. The 2nd Defendant being a Director of Plaintiff Company when they purchased equipment and machinery with PW1 through his Company with PW1 3rd Defendant Sieke Industrial Limited did not share profits for business conducted under the agreement with 3rd defendant in 2015. The 2nd Defendant withheld profits from mining on the 1st Respondent's property and PW1's share remains due and owing from 2nd Respondent.
74. The Lease Agreement of 10/12/2015 between PW1 for Plaintiff Company and 1st Defendant Aaron Kitungu Mbuvi was/is a binding contract.



75. In the case of Caleb Onyango Adongo v Bernard Ouma Ogur [2020] eKLR which cited RTS Flexible Systems Ltd v Molkerel Alois Muller GmbH & Co, KG (UK Production) (2010) UKSC14, [45] the Supreme Court of India held 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 precondition to a concluded and legally binding agreement.....

The essential terms of an agreement must at all times be present and must be clear and unequivocal. The court cannot impose a binding contract on the parties upon which they had not agreed. It cannot read into an agreement terms and conditions which in effect would support its validity and enforceability.”

76. This Court finds that the 1 Agreement between Plaintiff and 1st Defendant is the genuine and legal document mainly due to material non -disclosure by 1st Defendant that he had signed an agreement on 10/12/2015 with PW1 and yet signed another Agreement of Pozzolana Mining Lease Agreement with Seike Industrials Limited aka Crispin Musembi Mulika. So 1st Defendant contrary to his pleadings that he only signed Lease with 2nd Defendant and 3rd Defendant Company is not true at all. He had no legal basis to oust and harass Pw1’s workers instead should have asked PW1 and 2nd Defendant to resolve their dispute over the Company/Companies Registered and then decide the way forward in terms of purchase of equipment, leasing land and mining.

77. Dormakaba Limited v Architectural Supplies Kenya Limited (Civil Suit 136 of 2020) [2021] KEHC 210 (KLR) Mativo J (as he then was) observed thus:

“By now its trite that a contract is the source of primary legal obligations upon each party to it procures that whatever he has promised will be done is done. Leaving aside the comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to “substituted or secondary obligations” on the part of the party in default. Those secondary obligations of the contract breaker arise by implication of law.

In a recent decision of this court, I stated that to successfully claim damages, a Plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the Plaintiff suffered damage (loss) as a result of the defendant’s breach. The Plaintiff ‘is not required to establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics. ‘A Plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability. The test to be applied is whether there



is evidence upon which a court, applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the Plaintiff. This implies that the Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff.

...In civil cases the measure of proof is a preponderance of probabilities. Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence as well as all the surrounding circumstances of the case.”

78. The claim by 4th Defendant CFC Stanbic Bank deposed and established claim as follows;
- By Agreement ‘The Term Loan Facility’ dated 4th August 2015; the 4th Defendant financed the Plaintiff Ksh 19,951,590.00 for purchase of equipment/machinery
79. By Agreement dated 19/6/2015 ‘Hire Purchase Agreement’ financed the Plaintiff Ksh 11,569,766.00 for Purchasing Crushing Plant.
80. By facility letter dated 2nd January, 2015 and subsequently amended on 4th August 2015, the 4th Defendant extended to the Plaintiff an Invoice discounting facility up to the limit of Ksh 30,000,000/- The facility of Ksh 19,900,000/-was secured by 1st ranking all assets debenture of Ksh61,000,000/-
80. The facility by way of letter dated 19/7/2015 was in addition by way of debenture, further secured by Hire Purchase Agreement which constitutes the Plaintiff as the owner of the goods until such time the facility is paid in full.
82. Invoice discounting Facility was similarly secured by inter alia, a 1st ranking all assets debenture for Ksh 61,000,000.00; Joint & Personal Guarantees of Directors as well as through HP Agreements.
83. The 4th Defendant deposed that the said securities grant the 4th Defendant the rights to amalgamate and set off recovery of any such sums as may be outstanding and/or subsist to date to secure interests of 4th Defendant until repayment of facilities and thereby securities discharged. As at the time [2016] outstanding on account of the Plaintiff sum of Ksh 41,390,726.47 due from various facilities.
84. All the referred documents letters and Agreements are duly executed by Plaintiff and annexed to Plaintiff’s bundle. There is no claim of fraud misrepresentation or illegality and hence these Agreements are legal and binding enforceable contracts.
85. Under each of these Agreements upon default, the 4th Defendant has right of recovery of loaned funds as Co- owner of the machinery and equipment outlined in the letter of offer of 4/8/2015.
86. The 4th Defendant submitted that the 2nd Defendant was fully aware of the 4th Defendant’s legal right of priority over the machinery/equipment and the 4th Defendant’s extent of interest.
87. In Cooperative Bank of Kenya Ltd Vs Dinesh Construction Co. Ltd& Moi University Cooperative Savings & Credit Society (MUSCO) Misc 301 of 2018 Nbi Commercial & Tax Division NBI HCT
9. In Re Hi Plast supra, this Court considered rights of secured Creditor vis a vis Creditors and it found based on the law that a Secured Creditor ranked in priority to other Creditors over the secured property released as collateral to the facility rendered to the debtor.



88. In the case of Kenya National Capital Corporation Ltd vs Albert Mario Cordeiro & Anor [2014] eKLR the Court of Appeal held;

“The Appellant by virtue of being a debenture holder ranked in priority to all other creditors claiming against the 2nd Respondent and this included 1st Respondent...Subsequently, and in light of the privileged position of a secured creditor, this Court cannot interfere with the suit property by upholding the decision to grant specific performance against Appellant in favor of the 1st Respondent, an unsecured Creditor in this case.”

89. The 4th defendant was as a matter of fact witnessed the execution of financing Agreements as well as [he]executed the guarantees on the Hire Purchase in favor of 4th Defendant and is aware of 4th Defendant’s claim.

90. The 1st Defendant took possession of the machinery and equipment claiming distress for rent for Ksh 4,000,000/-from 3rd Defendant, lease signed by 2nd defendant, and not the Plaintiff [whom he ejected at the inception of Plaintiff mining despite the Agreement/Lease]

91. The 4th Defendant deposed the Plaintiff obtained mandatory injunction on 3/3/2016. The 1st Defendant went to Court to stay the orders and on 17/5/2026 the Court maintained status quo and the equipment remained with 1st Defendant.

92. From the evidence on record 1st Defendant’s claim for rent arrears is from and against 2nd Defendant who signed on behalf of 3rd Defendant Company and he allowed to conduct mining the whole of 2015 exclusively and not from the Plaintiff. He has no legal claim against the Plaintiff Company and/or PW1 whom he ejected his workers even before they commenced works.

93. The machinery and equipment belong to the Plaintiff Company and 4th Defendant Bank until the facilities granted are paid up. Currently the amount due and owing is Ksh 41,390,727 ought to be paid by PW1 and 2nd Respondent jointly and severally as Directors of Plaintiff Company and as admittedly confirmed by 4th Defendant that 2nd witnessed the agreements and gave personal guarantees of Loan facilities.

94. The Claims by the Plaintiff against Defendants and Counterclaims are considered alongside the following guidelines;

95. In *Consolata Anyango Ouma vs South Nyanza Sugar Company Ltd* [2015] eKLR justified the need to award damages when it said:-

“As a general principle the purpose of damages for breach of contract is, subject to mitigation of loss, that the claimant is to be put as far as possible in the same position he would have been had the breach not occurred. This principle is encapsulated in the Latin maxim/phrase, *restitutio integram*”.

96. Anson’s Law of Contract, 28th Edition at pages 589 and 590 states:-

“Every breach of a contract entitles the injured party to damages for the loss he or she has suffered. Damages for breach of contract are designed to compensate for the damage, loss or injury the claimant has suffered through that breach. A claimant, who has not, in fact, suffered any loss by reason of that breach, is nevertheless entitled to a verdict but the damages recoverable will be purely nominal”.



97. In the case of *Strows Broks Aktie Bolog vs. Hutchison* [1905] AC 515 the court while distinguishing the character and nature of general damages from special damages for breach of contract said:-

“General damages are such as the law will presume to be direct, natural or probable consequences of the action complained of. Special damages on the other hand are such as the law will infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character; they must be claimed specially and proved strictly.”

Special damages must be specifically pleaded and specifically proved. ‘He who alleges must prove’ as encapsulated by Section 107- 112 of the *Evidence Act*.

Disposition

98. The 4th Defendant CFC Stanbic Bank loaned and financed purchase of IH bulldozer- KHMA 321 G Caterpillar dump truck, Volvo dump truck, Caterpillar truck shovel, KOBELCO excavator – KHMA 993 G and a Crushing plant and as Debenture -holder and Hirer, arising from the 1st Registration of the 1st ranking Debenture dated 10/2/2015 as shown by Certificate of Registration of Mortgage dated 5/3/2015 as well as Hirer Purchase Agreement dated 19/6/2015 rank in priority and are to take over the said machinery and equipment forthwith from 1st Defendant to settle and recover the balance of the loan Ksh 41,390,727/- from the Plaintiff Company whose Directors at the time were PW1 Christopher W. Ndungu and 2nd Defendant Chrispin Musembi Mulika.
99. The 1st Defendant, Aaron Kitungu Mbuvi to refund Ksh 620,000 paid to him by PW1 Christopher W. Ndungu after execution of a Lease Agreement on 10/12/2015 and PW1 bringing the machinery and equipment for mining his workers were chased away by 1st & 2nd Defendants.
100. The Arrears of rent of Ksh 4,000,000/- claimed by 1st Defendant against 2nd & 3rd Defendant shall be pursued in another forum case or Court as it was not pleaded in the Counterclaim and proved by evidence in this Court.
101. The Plaintiff's claim of Ksh 1,979,334.55 pleaded and proved by oral evidence and receipts of hiring of alternative machinery and equipment as shown in Plaintiff's bundle shall be paid to PW1 Christopher W. Ndungu by 1st Defendant Aaron Kitungu Mbuvi and 2nd Defendant Chrispin Musembi Mulika who hired gang to eject PW's workers on site.
102. The claim for Ksh 36,000,000/- for loss of machinery and equipment installed from March 2016 is not recoverable under principles of general damages and special damages. The Plaintiff attached LPO to prove that the Plaintiff obtained business but could not supply material due to non- access and use of the machinery and equipment. The payment would have been made upon performance of delivery of services of goods. In this case service was not rendered hence no payment would be forthcoming and certainly it is not given that circumstances would have remained constant and if paid expenses and statutory deductions would have been made. For these reasons the award of Ksh 36,000,000/- is denied.
103. Instead this Court grants nominal damages to Plaintiff of Ksh 1,000,000/- to be paid by 1st & 2nd defendants respectively who refused him access and use of machinery and equipment on site and yet 2nd Defendant continued mining for 1 year with no sharing of profits with PW1.
104. The amounts granted shall be paid with interest and costs of the suit.
105. Any further Application be filed and heard in CT No1 Machakos High Court.

JUDGMENT DELIVERED DATED & SIGNED IN OPEN COURT IN MACHAKOS HIGH COURT ONLINE VIRTUALLY ON 14/7/2025.



M.W. MUIGAI
JUDGE

