Foremost Limited & another v First Community Bank & another (Civil Case 101 of 2018) [2024] KEHC 12519 (KLR) (16 October 2024) (Judgment)

Neutral citation: [2024] KEHC 12519 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 101 OF 2018

DKN MAGARE, J

OCTOBER 16, 2024

BETWEEN

FOREMOST LIMITED .... 1ST PLAINTIFF

KASSAM ABDULKADER DADA .... 2ND PLAINTIFF

AND

FIRST COMMUNITY BANK .... 1ST DEFENDANT

GARAM INVESTMENTS AUCTIONEERS .... 2ND DEFENDANT

JUDGMENT

1. Once again we are faced with a prolixious 29 page 59 paragraph and 155 subparagraphs of a further amended plaint. The plaint is a study on the opposite of concise. Unfortunately, most of the contents are totally unnecessary. Some paragraphs like paragraph *5* are hanging while others are incomplete. 95% of the material in the amended plaint were unnecessary. A plaint should be concise and not argumentative. In that regard order 2 rule 3 provides as follows; -

> “(1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.
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> (2) Without prejudice to subrule (1), the effect of any document or the purport of any conversation referred to in the pleading shall, if material, be briefly stated, and the precise words of the document or conversation shall not be stated, except in so far as those words are themselves material.

(3) A party need not plead any fact if it is presumed by law to be true or the burden of disproving it lies on the other party, unless the other party has specifically denied it in his pleading.

(4) A statement that a thing has been done or that an event has occurred, being a thing or an event the doing or occurrence of which constitutes a condition precedent necessary for the case of a party shall be implied in his pleading.

2. In the process of writing a labyrinth of unnecessary material, the case by the parties is obfuscated and mired in diatribe and mirk. The parties filed suit in 2018 to stop an auction which was to be carried out by the 2nd defendant. The plaint was amended and further amended on 20/7/2022. I shall endeavor to summarize the pleadings as I decipher them while excluding verbiage which inundate the plaint.

3. The 2nd Plaintiff is a customer of the 1st defendant. Though filed in 2018, most of the complaint relate to the 1st Plaintiff's 2020 Business Development in the plaint. The 1st Plaintiff is said to have requested for 1st, 2nd, 3rd and 4th facilities worth USD 618,433.18 (Roughly Kshs. 79,777,880.2 at today's rate of USD = 128.89).

4. The Plaintiffs averred that the first facility was taken on 14/3/2014 and was cleared in time. The defendant is said to have deducted funds and paid itself off before due maturity date. It is not clear when the deduction happened.

5. The second facility of 14/3/2014 was for USD 172,811.06 and is said to have been cleared in good time with the 1st defendant earning USD 30,730.60 with security being C.R. 22701, joint and several guarantees by 1st Plaintiff's directors. The assignment of payment was from UNSOA to the defendant.

6. The third facility was for USD 172,811.06 on 19/6/2015, assigning the same security as second facility. This was for same project in Amisom (UNSOA in Somalia) being No. CON/13/024.

7. The fourth facility was on 6/2/2014 for two months which was secured with a log book for KCB 739M Mercedes Actros. The facility was said to have been cleared.

8. The other loan was said to be No. 234 for USD 88,000 which was collected on 24/3/2016 and was to mature on 24/9/2016 with a profit margin of USD 2,724.30 deducted on 15/7/2016, two months before maturity date, reportedly without the will and consent of the Plaintiff. This is said to have caused a series of ripples through changes in cash flow for a project they were carrying out.

9. Deal No. 236 was for 4/4/2016 for USD 34,000/= and was deducted on 15/7/2016. The Plaintiff pleaded that the said actions were in breach of trust, unethical, illegal, unlawful, high handed, arbitrary, in breach of trust, Sharia and contract and in breach of Banking Covenants. They stated that the actions breached Sharia by going against the very principle of Sharia by changing pre-agreed terms and conditions between the parties.

10. Particulars of breach were not set out in the Further Amended Plaint. The Plaintiffs further pleaded special damages, a sum of USD 68,744.14, for causing losses of profit should be returned. They also claimed general damages.

11. The Plaintiff pleaded that the 1st defendant was earning vast profits which were to be expounded. This was not done vide any subsequent pleading. It is lamentable that paragraph 13.1 to 13.11 deals with certain meetings whose tenure is unnecessary to set out, as they relate to evidence and not facts. It is unclear from the pleadings as to what happened to the 3rd facility. The facilities were secured with same security as the 2nd and 4th Facility.

12. The Plaintiffs averred that after clearing the facilities the defendant refused to return the logbook, which were security for the facility. It was their case that there were discussions in vain. They lamented on breach of financial partnership. The said logbook was alleged to have been tangible security for the facility taken on 6/8/2016. This facility is not pleaded in the preceding paragraphs.

13. The Plaintiffs pleaded that possession of the said logbook was illegal. They stated Motor Vehicle Registration. No. KCM 739M was purchased for 6,000,000/= and could have fetched 6,000,000/= as at February 2016. The company was unable to sell as they had no logbook. The Plaintiff was forced to place the vehicle in transport business. They stated that the logbook was illegally held.

14. The plaintiffs filed plaint claiming loss of Kshs. 6,000,000/=, loss of revenue Kshs. 1,066.800/= per term (Kshs. 3,867,150) all totaling to Kshs. 9,867,150. They prayed for general damages.

15. The security motor vehicle was pleaded to have been waylaid by the 2nd defendant while the vehicle was carrying cargo from Mombasa to Thika. The Defendants' agents are said to have taken control of the vehicle thenceforth. The said vehicle was said to earn Kshs. 13,000/= per day inclusive of expenses of Kshs. 22,000/= leaving an average of 17,500/= per day (the math does not add up).

16. The Plaintiff averred that a fifth facility was taken on 5/8/2016 for 36 months expiring on 4/8/2019, for USD 470,000/= and profit of USD 12,600 to the Defendant for project CON/16/006. It was their case that the security was said to be for title number C.R. 22701, assignment of payment from UNSOS and joint and several deeds of guarantee.

17. It was the Plaintiffs case that the facility were for a specific concrete and reinforced concrete in Somalia on 5/4/2016 for USD 9,215,603.86 for 3 years which was later amended to 2 years with option for 1 year extension. The Plaintiff was charged Kshs. 500,000/= and insurance of USD 4,300.

18. The facility was open line of credit as a pool of funds fully available at the discretion of the Plaintiff for specific amounts needed. This facility was said to be reneged due to differences between CEOs.

19. The Plaintiffs pleaded that they sought to restructure the facility. This was amended to state that there were normal delays. The Plaintiff lamented that funds were not disbursed leading to a stalemate. The Plaintiff sought special damages amounting to millions in a twenty-nine-page winding Further Amended Plaint dated 12/7/2022 and filed on 20/7/2022, where they claimed, inter alia, the following.

    a. A declaration that the defendant's action to cause the advertisement and or sale of plot no. LR MN/IV/368/22701/Mwingo Area, Portreitz Mainland North Mombasa registered in the name of Kassam Abdulkader Dada without proper cause is unlawful.

    b. A permanent injunction restraining the defendant, either by itself its agents or employees and any other person whomsoever and howsoever from entering, trespassing unto, advertising, offering for sale, selling transferring and or dealing or in any way whatsoever interfering with the Plaintiff title (sic) quiet possession, and enjoyment of the matrimonial house on Plot LR MN/IV/368/22701/MWINGO AREA, PORTREITZ Mainland North Mombasa registered in the name of KASSAM ABDULKADER DADA.

    c. A declaration that the purported exercise of the power of sale by way statutory notice under Shariah law is in the circumstances unlawful and a further declaration that until expiry of the agreed term of 3 years of the Musharakah loan, no such statutory power of sale can and should be exercised by the respondent.

d. An unconditional release of the logbook held by the 1st Defendant for Mercedes Benz Actros KCB 739M. Unconditional release of the motor vehicle KCB739M/Trailer No.2E 6018 as irregularly seized on 10/11/2018,

e. Costs of and incidental to this suit.

20. The plaint was amended on 19/11/2018 adding words, "Unconditional release of the Motor Vehicle KCB739M/Trailer No.2E 6018 as irregularly seized on 10/11/2018."

21. The amended plaint was further amended substantially on 17/10/2022, this amendment changed several paragraphs to the amended plaint.

22. The Defendants filed defence and further amended defence. In it they stated the following -

a. The loans were disbursed as agreed. However the facility was cleared in good time.

b. They denied trust or Sharia contracts were in situ.

c. There was no profit as claimed.

d. Funds were specifically available. From where the Plaintiffs could draw as often as they needed.

e. The Plaintiffs defaulted in their financial obligations.

f. They denied actions to recover their debts arbitrarily.

g. They specifically denied breach of trust, Sharia or contract.

Submissions

23. The Plaintiff filed submissions indicated to be dated 12/3/2022, which, I think the intended date is 12/3/2024. It was submitted that there did not exist any Documented Islamic Banking Standards within all the five existing contracts between the parties, AAOIFI Standards would thus be the most legitimate option to bring on board an Islamic Banking Standard to interpret the dispute at hand for application and judgment.

24. It was submitted that the Defendants had done a willful material and anticipatory breach of contract, and has not denied the same but claiming that the contract was not binding. Reliance was placed on Charles Mwirigi Miriti v Thananga Tea Growers Sacco Ltd & Another [2014] eKLR to canvas the point that that was self-induced frustration.

25. They also relied on the speech of Lord Salmon in the case of Woodar Investment Development Ltd v Wimpey Construction UK Ltd. (1980) 1 ALL ER 571 where reference is made to what Lord Write said in Heyman v Darwins Ltd (1942) AC 356 as follows:

> "There is a form of repudiation, however, where the party who repudiates does not deny that a contract was intended between the parties, but claims that it is not binding because of the failure of some condition or the infringement of some duty fundamental to the enforceability of the contract, it being expressly provided by the contract that the failure of condition of the breach of duty should invalidate the contract....But perhaps the common sense application of the word repudiation is to what is called the anticipatory breach of contract where the party by words or conduct evinces an intention no longer to be bound, and the other party accepts the repudiation and rescinds the contract. In such a case, if the repudiation is wrongful and the rescission is rightful, the contract is ended by rescission but

only as far as concerns future performance. It remains alive for the awarding of damages .... for the breach which constitutes the repudiation."

26. On their part, the 1st and 2nd Defendants filed submissions dated 29/4/2024. It was submitted that all agreements executed by the parties show that the relationship created between the 1st Plaintiff and the Bank was that of a borrower and lender and not that of a joint partnership as contended by the Plaintiffs.

27. It was further submitted that having financed the project, the bank had a beneficial interest only limited to recovering its amount disbursed at the financing rates together with the expected profits, and such beneficial interest would reduce with each payment made by the Plaintiffs which were not tantamount to ownership of the project.

28. The Defendants then relied on the Court of Appeal in National Bank of Kenya Limited v Pipeplastic Samkolit (K) Limited and Another NRB CA Civil Appeal No. 95 of 1999 [2001] eKLR as follows;

> " A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved... it is ordinarily no part of equity function to allow a party to escape from a bad bargain."

29. They also relied inter alia on Prudential Assurance Company of Kenya Limited v Sukhwender Singh Jutney and Another, Civil Appeal No. 23 of 2005 to submit that no parole evidence is admissible to contradict, vary or alter the terms of the deed or any written instrument.

30. It was therefore submitted that Plaintiffs were in total and complete breach of the terms of the letters of offer, the facility is still in arrears on the facility to the tune of USD 354,529.95 as confirmed by the 2nd Plaintiff during cross-examination. Reliance was also placed on the case of Caliph Properties Limited vs Barbel Sharma & Another [2015] eKLR to submit that the Plaintiffs cannot benefit from the equitable remedy of an injunction because they have not done equity and have come with unclean hands by failing to disclose to the Court that they had routinely breached the letter of offer by failing to pay the contractual installments on time or at all.

31. The Plaintiffs submitted that premised on the above, the contract between the 1st Plaintiff and the defendant is an Investment Musharakah and valid under Shariah rules. They relied on Mohammad Iftikhar Vs. Ms. First Dawood Investment Bank Ltd & others.

Analysis

32. The matter involves various facilities. However, within the facilities the Plaintiff prays that they had fully paid within time. However they admit delays. There were no particulars of breach of contract or at all.

33. The position fronted by the Plaintiffs appears to be based on the analogy that it was the intention of the parties to enter into Islamic banking and therefore perform their obligations under the contracts based on the Islamic Banking Systems. It was their case that that since the 5 contracts were not based on the said Islamic Banking Systems, the contracts could not be used to resolve the dispute between the parties.

34. The intention of the parties to a contract can be discerned from the contract itself. As was held by the court in *SBI International Holdings AG v Kenya National Highways Authority (Civil Case E968 of 2022*) [2023] KEHC 20793 (KLR) (Commercial and Tax) (28 July 2023) (Ruling):

> “ From the contestations in this application, the issue falls on the interpretation of the contractual clauses. Where the court is called upon to interpret contractual clauses, the general principle is that contractual expressions must be understood as intended by the parties to the contract and the court in its interpretive approach, must look for the intention of the parties and give effect to it. In doing so, the court has to consider the contract as a whole in order to determine the parties' intention and purpose in agreeing to the dispute resolution mode and the DAB process.
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> In Arnold v Britton [2015] UKSC 36, Lord Neuberger stated:
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> When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean." And it does so, by focusing on the meaning of the relevant words."

35. A court must read a contract within the four corners of the contract without reference to anything outside of the document, extrinsic or reversed as held in Fidelity & Commercial Bank Ltd V Kenya Grange Vehicle Industries Ltd (2017) eKLR, the Court of Appeal, Ouko, Kiage and Murgor JJA held as doth;-

> “ Courts adopt the objective theory of contract interpretation and profess to have overriding view sometimes called Four Corners of an Instrument, which insists that a documents meaning should be derived from the document itself, without reference to anything outside of the document, extrinsic reversed..."

36. A contract must be read as a whole within its provisions as they are in the context. It is not the duty of the court to save parties from their own actions as enunciated in the case of Barclays Bank of Kenya Ltd v Kepha Nyabera & 191 others & another [2013] eKLR., where the Court of Appeal held as doth: -

> “
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> “ 47. It is trite law that parties are bound by their commercial agreements and must keep their part of the bargain. It is not the true province of the courts to rewrite contracts for parties. In National Bank of Kenya Ltd Vs Pipeplastic Samkolit (K) Ltd & Another (2001) KLR 112 the Court of Appeal at page 118 held:-
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> "...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 or undue influence are pleaded and proved."
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> 48. See Morris & Company Vs Kenya Commercial Bank [2003] 2 E A 605. Needless to point out, the 2nd respondent did understand the purport of the provisions of the entire charge document after which it willingly accepted their application and invocation which it appended its signature thereon and hence was bound by the same. (not necessarily the part referred by the appellant."

37. In this case, there was no breach of contract or trust pleaded or particulars thereof. Even the breach of Sharia was not set out. The clauses of the Sharia that were breached ought to have been set out. Order 2 Rule 10 of the civil procedure rules provide as follows: -

> “ (1) Subject to subrule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing –
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> a. particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
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> b. where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.
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> (2) The court may order a party to serve on any other party particulars of any claim, defence or other matter stated in his pleading, or a statement of the nature of the case on which he relies, and the order may be made on such terms as the court thinks just.
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> (3) Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of subrule (2), the court may, on such terms as it thinks just, order that party to serve on any other party-
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> a. where he alleges knowledge, particulars of the facts on which he relies; and
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> b. where he alleges notice, particulars of the notice.
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> (4) An order under this rule shall not be made before the filing of the defence unless the order is necessary or desirable to enable the defendant to plead or for some other special reason.
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> (5) No order for costs shall be made in favour of a party applying for an order who has not first applied by notice in Form No. 2 of Appendix B which shall be served in duplicate.
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> (6) Particulars delivered shall be in Form No. 3 of Appendix A which shall be filed by the party delivering it together with the original notice and shall form part of the pleadings.”

38. The linchpin of litigation is to understand the rules of practice. It is only those issues left to the court through pleadings that should be contained in Pleadings. Parties are bound to plead their cases fully. In the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated as doth: -

> “
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> “ 11. It is by now well settled by precedent 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. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -

"…..it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded……

…In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation."

39. The court proceeded in the case of Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] to refer to the case of Malawi Railways Ltd vs Nyasulu [1998] MWSC 3, where the Malawi Supreme Court stated as doth when the learned judges cited with approval an article by Sir Jack Jacob entitled "The Present Importance of Pleadings" published in [1960] Current Legal Problems at p 174 whereof the learned author posited that: -

As the parties are adversaries, it is left to each one of them to formulate his case in his own way subject to the basic rules of pleadings …….for the sake of certainty and finality; each party is bound by his own pleadings and cannot be allowed to raise a different fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice….

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

40. In respect to the essence of pleadings, the Supreme Court of Kenya in its ruling on inter alia scrutiny in the case of Raila Amolo Odinga & Another vs. IEBC & 2 others (2017) eKLR found and held as follows in an election petition: -

" In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case

set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings......'"

41. The court cannot act on evidence, even where it is established, in the absence of pleadings. In the recent presidential Election Petition, the Court of Appeal of Nigeria sitting as the election court, in Peter Gregory Obi & another versus Senator Bola Ahmed Tinubu &INEC & 3 others consolidated with petitions no. 4 and 5 both of 2023, stated as doth: -

> " In Belgore Versus Ahmed (2013) 8 Nwlr (Pt.1355) 60 the complaint against averments in the petition that were unspecific, generic, speculative, vague, unreferable(sic), omnibus and general in terms. The Apex court specifically held as follows: -
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> "Pleadings in an action are written statements of the parties wherein they set forth the summary of material facts on which they rely on in proof of this claim or his defence as the case may be, and by means of which real matters [in] controversy between the parties are to be adjudicated are pleaded in a summary form. They must nevertheless be sufficiently specific and comprehensive to elicit the necessary answers from the opponent.

42. Looking at pleadings, I see no basis for holding that the defendant breached any contract. I find and hold that there was no breach of contract. In Republic v Commissioner of Domestic Taxes Exparte Sony Holdings Limited [2019] eKLR, the court stated as follows: -

> " The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court[22] on the principles of good pleading:-
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> "In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything. ... Elegance is the simplicity found on the far side of complexity.
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> While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.
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> ... Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.
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> Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination."
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> 88. The function of a pleading in civil proceedings is to alert the other party to the case they need to meet, (and hence satisfy basic requirements of procedural fairness) and further, to define the precise issues for determination so that

the court may conduct a fair trial. The cardinal rule is that a pleading must state all the material facts to establish a reasonable cause of action (or defence). The expression "material facts" is not synonymous with providing all the circumstances. Material facts are only those relied on to establish the essential elements of the cause of action.

43. It is of course, a basic principle that particulars of claim should be so phrased that a defendant may reasonably and fairly be required to plead thereto. This must be seen against the background of the further requirement that the object of pleadings is to enable each side to come to trial prepared to meet the case of the other and not be taken by surprise. Pleadings must therefore be lucid and logical and in an intelligible form; the cause of action or defence must appear clearly from the factual allegations made. The Court of Appeal in Dakianga Distributors (K) Ltd vs. Kenya Seed Company Limited posited as doth:-

> " A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-
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> "The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial."

44. Therefore, the court finds that the question relating to which Sharia applies is not open to discussion as it is not pleaded. Parties must first plead their cases before proceeding to prove them. In the case of David Bagine Vs Martin Bundi [1997] eKLR, the court of appeal stated as follows: -

> " It has been held time and again by this Court that special damages must be pleaded and strictly proved. We refer to the remarks by this Court in the case of Mariam Maghema Ali v. Jackson M. Nyambu t/a sisera store, Civil Appeal No. 5 of 1990 (unreported) and Idi Ayub Sahbani v. City Council of Nairobi (1982-88) IKAR 681 at page 684: "....special damages in addition to being pleaded, must be strictly proved as was stated by Lord Goddard C.J. in Bonham Carter vs. Hyde Park Hotel Limited [1948] 64 TLR 177 thus:
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> "Plaintiffs must understand that if they bring actions for damages it is for them to prove damage, it is not enough to write down the particulars and, so to speak, throw them at the head of the court, saying, 'this is what I have lost, I ask you to give me these damages.' They have to prove it"

45. On special damages or action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible. It also follows that the Plaintiffs must also prove their case specifically, and set out their case to enable a Respondent answer. It cannot be a moving target. In the case of Raghbir Singh Chatte v National Bank of Kenya Limited [1996] eKLR, the Court of Appeal stated as doth: -

> " The main object of this rule and r.14 is to bring the parties by their pleadings to an issue, and indeed to narrow them down to definite issues, and so diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing (per Jessel M. R.

in Thorp v 2Holdworth (1876) 3 Ch. D. 637). This object is secured by requiring that each party in turn should fully admit or clearly deny every material allegation made against him. Thus, in an action for a debt or liquidated demand in money, a mere denial of the debt is wholly inadmissible."

46. It should be recalled that special damages must be both pleaded and proved, before they can be awarded by the Court. In the case of Swalleh C. Kariuki & another v Viloet Owiso Okuyu [2021] eKLR, the court, Justice Luka Kimaru, as he was then, stated as doth; -

> " In regard to special damages the law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. Suffice it to quote from the decision of the Court of Appeal in Hahn V. Singh, Civil Appeal No. 42 of 1983 [1985] KLR 716, at P. 717, and 721 where the Learned Judges of Appeal - Kneller, Nyarangi JJA, and Chesoni Ag. J.A. - held:
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> "Special damages must not only be specifically claimed (pleaded) but also strictly proved.... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves."

47. Finally, the next question is whether, the court can issue a permanent injunction. To do so, it must be shown that the defendant has no claim to the suit property, the rights between the parties have been settled, and the Respondent's claim is tenuous. Finally, that there is no other non-coercive way to effect the same effect.

48. On a permanent order of injunction, in the case of Kenya Power & Lighting Co. Limited v Sheriff Molana Habib [2018] eKLR the High Court sitting on appeal held that:

> " It is apparent from the pleadings that the Respondent was seeking a permanent injunction against disconnection of his electricity by the Appellant. A permanent injunction which is also known as perpetual injunction is granted upon the hearing of the suit. It fully determines the rights of the parties before the court and is thus a decree of the court. The injunction is granted upon the merits of the case after evidence in support of and against the claim has been tendered. A permanent injunction perpetually restrains the commission of an act by the defendant in order for the rights of the plaintiff to be protected.
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> A permanent injunction is different from a temporary/interim injunction since a temporary injunction is only meant to be in force for a specified time or until the issuance of further orders from the court. Interim injunctions are normally meant to protect the subject matter of the suit as the court hears the parties..."

49. The injunction sought by the Plaintiff was in the nature of a permanent injunction against the Defendants from selling what is described as matrimonial house registered in the name of the 2nd Plaintiff. Based on the findings herein above, I do not think that the Plaintiff has succeeded in satisfying the conditions for granting a permanent injunction and the claim is bound to fail.

50. Having so found, it is the court's duty to make determination. There was no breach of contract. As such without breach, the Plaintiff's claim is untenable. The suit is concomitantly dismissed for lack of merit. The next question is costs. The Supreme Court set forth guiding principles applicable in the

exercise of that discretion in the case of Jasbir Singh *Rai & 3 others v. Tarlochan Singh Rai & 4 others, SC Petition No. 4 of 2012*; [2014] eKLR, as follows: -

> "(18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

51. It follows that this court should exercise its discretion on costs. Section 27 of the *Civil Procedure Act* provides for discretion as follows: -

    (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.

    (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such.

52. In the end the suit is dismissed for lack of merit with costs of USD 5545.

Determination

53. In the end the plaintiff's case was not proved and I make the following orders:

    a. The suit herein is dismissed with costs of USD 5545.

    b. There be stay of execution for 30 days.

    c. The file is closed.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 16TH DAY OF OCTOBER, 2024. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Akanga for the Plaintiffs

Makori for the Defendants

Court Assistant – Ms. Jedidah