REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

MILIMANI LAW COURT

ELC CASE NO. 91 OF 2019

MAKICHER GENERAL CONTRACTORS LIMITED.....PLAINTIFF

VERSUS

COMMUNICATION GRAPHICS LIMITED.....DEFENDANT

JUDGMENT

INTRODUCTION

1. The Plaintiff herein filed and/or commenced the instant suit vide Plaint dated the 11th March 2019, whereby the Plaintiff seeks the following Reliefs;

i. An order of Specific performance compelling the Defendant to procure, execute and supply all documents that are necessary to transfer the property know as L.R NO. 209/7008, Manyani Road East, Lavington, within the City of Nairobi to the Plaintiff as envisaged in the agreement for sale date the 1st August 2002, including the original grant, discharge of charge and KRA cancellation of charge.

ii. A permanent injunction be issued restraining the Defendant either by itself, its agents or employees or otherwise howsoever from interfearing with the Plaintiffs quiet and peaceful possession and occupation of the Property L.R NO. 209/7008, Manyani Road East, Lavington, within the City of Nairobi

iii. In the alternative to the above, an order be issued compelling the Defendant to refund to the Plaintiff the sum of Kenya Shillings 16, 000, 000/= only, with interest at the rate of 22% p.a as provided for in the agreement of sale dated 1st August 2002.

iv. An order that in default of the Defendant executing any document that is necessary to complete the sale within 21 days of the Judgment, the Deputy Registrar of the Environment and Land Court be and is hereby directed to execute such documents as are necessary to complete the transfer of the Property, namely, L.R NO. 209/7008, Manyani Road East, Lavington, within the City of Nairobi, in favor of the Plaintiff.

v. A declaration that the Plaintiff is entitle to ownership and/or occupation of the Property known as L.R NO. 209/7008, Manyani Road East, Lavington, within the City of Nairobi, having resided thereon since the year 2002.

vi. Costs of the suit.

2. Upon the filing and service of the Plaint herein, the Defendant duly entered appearance and thereafter filed a statement of defense and counter claim, the latter which was filed on the 29th May 2019. In terms of the statement of defense, the Defendant has denied the Plaintiffs claim and in particular the Defendant has continued to aver that it is the Plaintiff who was/is responsible for the breach of the agreement entered on the 1st August 2002.

3. On the other hand, the Defendant has also lodged a counter claim and in respect of which the Defendant has sought the following reliefs;

i. An order for specific performance compelling the Defendant in the counter claim to honor the terms of the agreement dated 1st July 2015, and to pay Kenya Shillings 11, 500, 000/= only and interest applicable to be agreed upon at the rate of 22% pa until payment in full.

ii. In the alternative A above an order for immediate vacation of the suit property by the Defendant in the Counter claim having occupied the same unlawfully since 2002.

iii. In any event, general damages for breach of the sale agreement contract dated the 1st August 2002.

iv. General damages for breach of the agreement contract dated 1st July 2015.

v. Costs of the entire suit and the counter claim.

vi. Any other relief the court may deem fit.

4. For completeness, it is important to note that the Plaintiff herein upon being served with the statement of defense and counter claim proceeded to file a Reply to Defenses and Defense to counter claim which was filed 16th October 2019. For clarity, the Plaintiff disputed the allegations and the claims made by the Defendant and in this regard the Plaintiff sought an order that the counterclaim be dismissed with costs.

EVIDENCE BY THE PARTIES

The Plaintiff's case

5. The Plaintiffs case in respect of the subject matter is contained in the Plaint dated the 11th March 2019, the reply to defense and Defence to Counter Claim dated the 8th October 2019, the bundle of documents contained at the foot of the list date 11th March 2019, which documents were adopted as exhibits on behalf of the Plaintiff.

6. On the other hand, the Plaintiff herein also filed a written statement dated the 26th February 2019, as well as another statement, the latter which was filed by one Charles Barchigei and the latter is dated 25th January 2021. It is worthy to note, that the statement by the parties and witnesses, were ordered to be adopted as evidence.

7. It was the evidence of one Dr. Linus Cheruyot, who is a director of the Plaintiff company that the Plaintiff herein and the Defendant entered into and executed a sale agreement on the 1st August 2002, whereby the Defendant covenanted to and indeed sold to the Plaintiff all that parcel of land otherwise known as L.R NO. 209/7008, Manyani Road East, Lavington, within the City of Nairobi.

8. It was the further evidence of the said witness that upon execution of the sale agreement, the Plaintiff company paid out the monies in accordance with the clauses of the sale agreement and that the last tranche, relating to the balance of the purchase price amounting to Kenya Shillings 10, 149, 566/= only, was released and paid to the Defendants Advocate, whose details were duly contained in clause 6 of the sale agreement dated 1st August 2002.

9. It was the witness further position, that upon the payment of the balance of the purchase price, same was duly released to the Defendant herein and that the release of the balance of the purchase price in favor of the Defendant was ventilated by the Defendant Advocates letter dated 6th June 2003.

10. Other than the payment of the entire purchase price the witness, namely, Dr. Linus Cheruyot, indicated that the Plaintiff entered upon and took possession of the suit property and in this regard the witness avers that same has remained in possession and/or occupation thereof through its agents and/or servants.

11. On its part, one Charles Barchigei stated that he was granted the general power of attorney by Dr. Linus Cheruyot, but the power of attorney only mandated him to deal and/or transact on matters personal to Dr. Linus Cheruyot and not on behalf of the Plaintiff Company.

12. Besides, Charles Barchigei further states that same is aware of the agreement entered into and dated the 1st July 2015, but that the agreement was not executed on behalf of the Plaintiff company.

The Defendant's case

13. The Defendant's case is premised at the foot of the statement of defense and counterclaim dated the 24th April 2019, the list of witnesses dated 24th April 2019, the written statement of Fredrick Waweru Karanja dated the 24th April 2019, as well as the supplementary written statement of the same Fredrick Waweru Karanja dated the 7th July 2020.

14. Other than the foregoing, the Defendants case is also predicated upon the list and bundle of documents dated the 24th April 2019, as well as the Defendant's supplementary bundle dated the 7th July 2020, and the further supplementary dated the 2nd December 2020.

15. In short, Fredrick Waweru Karanja contended that though the Plaintiff and the Defendant entered into and executed a sale agreement dated the 1st August 2002, the Plaintiff herein failed to pay the agreed sums in accordance with clauses of the sale agreement. In particular the witness avers, that the final payments as pertains to the last tranche of the balance of the purchase price was paid on the 12th February 2003, contrary to clause 5 of the sale agreement, which had stipulated that the completion date shall be the 30th September 2002.

16. It was further the evidence of Fredrick Waweru Karanja that even though the Plaintiff had paid the initial sum of Kenya Shillings 2, 000, 000/= only, which was paid to commercial carpets Limited, on instruction of the Defendant, the Plaintiff through her director, name Dr. Linus Cheruyot sought for and obtained a refund of the said monies and that same were never paid back. In this regard, the witness avers that the sum of Kenya shillings 2,000,000/= only, which forms part of the purchase price, was never paid.

17. On the other hand, the witness averred that as a result of the failure and/or neglect by the Plaintiff to complete the payment of the purchase price, the transaction was not concluded.

18. Nevertheless, the witness further avers that despite the fact that the sale agreement was not concluded and/or completed, the Plaintiff however entered upon and took possession of the suit property and that the Plaintiff has remained in possession, though illegally, since the year 2002.

19. Other than the foregoing, the witness herein also stated that on or about the 1st July 2015, the Plaintiff and the Defendant, through their respective representatives entered into and/or executed another agreement, whereby the Plaintiff agreed to pay a further Kenya shillings 12,000,000/=, to facilitate the completion of the sale of L.R NO. 209/7008, Manyani Road East, Lavington, within the City of Nairobi.

20. However, the witness further averred that despite the terms of the latter agreement, namely the agreement dated the 1st July 2015, the Plaintiff only paid Kenya shillings 500,000/=, but have since failed and/or refused to pay the balance thereof amounting to Kenya shillings 11,500,000/= only.

21. Owing to the foregoing, the Defendant has therefore sought for orders of specific performance and essentially to compel the Plaintiff to comply with the terms of the agreement dated the 1st July 2015.

22. Before I venture to the next sub topic, it is perhaps appropriate to mention here and now that on the 13th May 2021, the parties herein and their respective advocates recorded a consent whereby same agreed that the subject matter shall be disposed of on the basis of the pleadings, written statement and documents filed by the respective parties. Consequently, the evidence alluded to in the preceding paragraphs and attributed to the various witness have been extracted from the totality on the written statement filed and the bundle of documents produced.

23. Besides, it is also important to note that having adopted the scheme whereby the written statements, were deemed as the evidence in chief and the documents as exhibits, no cross-examination was therefore undertaken and hence it shall be my responsibility to grapple with the statement of facts and the documents as they stand, without the benefit of seeing the witnesses testify and without appreciating the credibility of each witness.

SUBMISSIONS BY THE PARTIES

24. Pursuant to and in line with the consent and/or order made on the 13th May 2021, the parties herein proceeded to and filed their respective submissions. First and foremost, the plaintiff filed her written submissions and bundle of authorities on the 27th May 2021.

25. On the other hand, the Defendant filed her set of written submissions as well as bundle of authorities on the 14th July 2021.

26. I must say, that both sets of submissions and authorities are on record and that I have considered and taken note of the issues alluded to herein, as far as same support the respective cases of the parties.

27. Having reviewed the pleadings and the documents filed, as well as the exhibits produced and relied upon, together with the written submissions on behalf of the respective parties, I am of the humble view that the following issues suffice for determination;

i. Whether the sale agreement dated 1st August 2002, was lawful and whether the Plaintiff complied with the terms thereof.

ii. Whether the Plaintiff sought for and/or refunded the sum of Kes.2, 000, 000/= only,from commercial carpets limited on the basis that same, was to repay the money back within seven (7) days.

iii. Whether the Plaintiff and the Defendant executed the agreement of the 1st July 2015, and whether the said agreement, if any, is enforceable against the Plaintiff company.

iv. Whether the Defendant has breached the terms of the sale agreement dated the 1st day of August 2002, and if so whether the plaintiff is entitled to a claim for an order of specific performance of the contract.

v. Whether the Defendant is entitled to the Reliefs sought at the foot of the counterclaim.

ANALYSIS AND DETERMINATION

Issue Number 1

Whether the sale agreement dated 1st August 2002, was lawful and whether the Plaintiff complied with the terms thereof.

28. It is common ground and that there is no dispute that the Plaintiff and the Defendant entered into and executed the sale agreement dated

the 1st August 2002, pertaining to and/or concerning the property otherwise known as L.R NO. 209/7008, Manyani Road East, Lavington, within the City of Nairobi.

29. According to the terms of the sale agreement, details in terms of the preceding paragraph, the Defendant intimated to the Plaintiff that the same was the registered owner of the suit property and which position was duly authenticated and/or confirmed by the parties, prior to the execution of the sale agreement.

30. Besides, the Plaintiff and the Defendant also agreed on the proposed scheme of payment of the purchase price, which amounted to Kenya shillings 16,000,000/= only. In this regard, it was a term of the sale agreement that the Plaintiff was to release and/or pay out the sum of Kenya shillings 2,000,000/= only to Commercial Carpets Limited, on instruction of the Defendant. For clarity, the said monies were indeed paid out on the 7th August 2002, and same was duly acknowledged.

31. On the other hand, the Plaintiff herein was obliged to pay the sum of Kenya shillings 1,500,000/= to the Defendants advocates, whose details was captured in terms of clause 6 of the sale agreement and evidence abound that the said monies were indeed paid.

32. Subsequently, the plaintiff herein released to and in favor of the Defendants nominated advocates the sum of Kenya shillings 10,149,566/= only, vide cheque number 001105, which was forwarded vide cover letter dated the 12th February 2003. The payments of the said monies was indicated to be in full and final settlement of the balance, that was then due, owing and payable.

33. In any event, the forwarding letter alluded to, namely the letter dated 12th February 2003, from the law firm of m/s Njeri Kariuki Advocates, also provided a breakdown of how the total purchase price had been disbursed and / or utilized.

34. Following the release of the final tranche, relating to the balance of the purchase price the Defendant's nominated advocate wrote back to the Plaintiff's advocate and confirmed receipt of the balance of the purchase price, which was then due, owing and payable. In this regard, it is imperative to take cognizance of the letter dated 6th June 2003, from the law firm of M/s Igeria & Company Advocates.

35. Other than confirming receipt of the balance of the purchase price, in respect of the suit property, the said advocates, who had been retained by the Defendant also signaled that the Balance of the purchase price had similarly been released to the vendor.

36. I must point out, that the release and payment of the balance of the purchase price to the vendors advocates and the onward transmission of same to the vendor, (read the Defendant herein) was dully acknowledged without any protest. Indeed, the Defendant herein did not intimate that the payment had been made contrary to and/or in violation of the terms of the sale agreement.

37. I must similarly add, that up to and including to date, there is no protest that was ever addressed by and/or on behalf of the Defendant, whereby same was raising the issue of the payment of the final balance having been made outside the stipulated date of completion.

38. To the contrary, the Defendant herein equally confirms receipts of the entire Kenya shillings 16,000,000/=, which was paid of on account of sale of the suit property. In this regard, it is imperative to take cognizance of the first limb of paragraph 5 of the statement of defense.

39. It is also important to note, that the Defendant herein was at liberty to rescind the sale agreement, that is if same was of the view that the Plaintiff had not complied with the terms/clauses thereof. However, the Defendant did not exercise that option, but was happy and comfortable same having received the full purchase price in accordance with the figures agreed upon in the sale agreement.

40. Perhaps it is important to state, that the only time the Defendant attempted to rescind the sale agreement was on the 17th January 2018, when the Defendant's advocates, namely M/s W & M Advocates wrote to M/s Njeri Kariuki Advocates and intimated that the Defendant herein was exercising her right to rescind the sale agreement, allegedly on the basis of the Doctrine of laches. However, by the 17th January 2018, the entire purchase price had long been paid and the Defendant had retained and enjoyed the monies for five years and counting. In this regard, the agreement/contract, was beyond rescission.

41. In view of the foregoing observation, it is my finding and holding that the Plaintiff herein duly complied with the terms of the sale agreement and ensured that the monies which were due, owing and payable, were indeed paid out to the Defendant and/or in line with the Defendant's instructions.

42. Besides, the only infraction of the terms of the agreement, related to the release of the final balance of the purchase price on the 12th February 2003, which was outside the date of completion, but it must be recalled that the payment of the final balance of the purchase price, was predicated upon the handing over of the completion documents by the Defendant. In this regard, the lateness herein cannot be relied upon to invalidate the terms of the agreement, which were otherwise fully complied with.

43. Nevertheless, even assuming that the final tranche of the purchase price, was made outside the completion date, it is worthy to note that the monies were received, acknowledged and/or appropriated by the Defendant, without any sort of protest. Clearly, the Defendant waived any issue pertaining to the lateness.

44. In any event, having not raised any protest and/or reservation, as to the lateness of the release of the final balance and by extension by having received and appropriated the monies, the Defendant is Estopped, from challenging the compliance based on the issue of this payment. In short, the doctrine of Estoppel operates against the Defendant

45. In view of the foregoing, it is important to take cognizance of the provisions of **Section 120 of the Evidence Act,** which provides as hereunder;

"When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing."

46. In support of the foregoing holding, I take guidance and find support in the decision in the case of **Carol Construction Engineers Limited & another v National Bank of Kenya [2020] eKLR** whereby it was stated;

"Hence, the Court's first task is to determine if the Applicant has established a prima facie case with a probability of success once the full case is fully ventilated. It is important to recall that at this point the Court can do no more than form a necessarily provisional view of the case. Translated to our specific tasks, the question would be whether the Applicants have placed sufficient material on the table to warrant a provisional finding by the Court that upon full ventilation of the facts in the case they are likely to persuade the Court that all the elements of equitable estoppel are present to support their cause of action against the Respondent."

From a scan of our decisional law, one must show the following five elements in order to establish estoppel by representation or promissory estoppel:

a) . Representation: There must be a representation by the representor in words or by acts or conduct;

b) Reasonableness: The person relying must satisfy the Court that it was reasonable for them to rely on the representation;

c) Reliance: the victim must demonstrate that he was induced by the representation and in such reliance acted on it;

d) Detriment: the victim must show that in acting in reliance of the representation he suffered some detriment or changed his position; and

e) Unconscionability: the victim must demonstrate that it would be unconscionable to permit the representor to resile from the representation.

Where each of these elements is demonstrated, a party will be permitted to raise an estoppel to prevent the opposite side from going back on their word and establishing by evidence any averment which is substantially at variance with his former representation.

47. In conclusion, I venture to answer issue number 1 in the affirmative, that indeed the Plaintiff complied with the terms of the sale agreement and essentially performed her part of the bargain, towards of the completion of the transaction.

Issue Number 2

Whether the Plaintiff sought for and/or obtained refund of the sum of Kes.2, 000, 000/= from commercial carpets limited on the basis that same was to repay the money back within seven (7) days.

48. While addressing and/or dealing with the second issue herein, it is important to take note on the contents of clause 2 of the sale agreement which was entered into and/or executed by the Plaintiff and the Defendant respectively. For clarity, the said clause authorized the Plaintiff to release the sum of Kenya shillings 2,000,000/= to and/or in favor of Commercial Carpets Limited.

49. Pursuant to and in line with the said clause, it was conceded by the Defendant that indeed the said sum of monies were paid out to and were received by M/s commercial Carpets Limited.

50. However, the Defendant herein avers that once the said monies, that is Kenya shillings 2,000,000/= only, was paid out to and/or released in favor of M/s Commercial Carpets Limited, the Plaintiff through her director approached M/s Commercial Carpets Limited to refund the monies, on the promise that same would be paid back with seven (7) days.

51. It must be noted, that the Plaintiff and M/s Commercial Carpets Limited are corporate bodies and therefore their actions cannot be parole. Simply put, the actions by the two companies if any can only be regulated by resolutions, and a seal, confirming that a particular action, has been authorized by the company.

52. In this respect, if the Plaintiff company approached M/s Commercial Carpets Limited to obtain a refund, no doubt there would have been a written communication authorized by the Plaintiff and addressed to M/s Commercial Carpets limited.

53. Nevertheless, in respect of this matter I have examined all the documents which have been produced by the Defendant, but unfortunately I have not seen any such communication from the Plaintiff to M/s Commercial Carpets Ltd, alluding to request and refund of the sum of Kenya shilling 2,000,000/= only.

54. In any event, if there was any such transactional dealings between the Plaintiff and M/s Commercial Carpets Ltd, (which I have not discerned), such a claim can only be undertaken and progressed by M/s Commercial Carpets Ltd, which is a separate and distinct entity from the Defendant herein. However, I must point out that I have not come across a claim for repayment of Kenya shillings 2,000,000/= by M/s Commercial Carpets Ltd.

55. Notwithstanding the foregoing, I must point out that I have come across a letter dated 23rd June 2003, crafted on the letter head of the Plaintiff company, but addressed to M/s Commercial Interiors Ltd, which is signed by one Dr. Linus Cheruyot, *albeit* in his personal capacity. For clarity, the letter speaks to a loan which was given in favor of the undersigned by the company known as M/s Commercial Interiors Ltd.

56. It must be stated, that M/s Commercial Interiors Ltd, which is said to have granted the loan to Dr. Linus Cheruyot, and which the latter was promising to repay, is also a separate and distinct legal entity from the defendant.

57. On the other hand, it is also worthy to note that the sum of Kenya shillings 2,000,000/=, which is said to have been loaned to one Dr. Linus Cheruyot (who is separate and distinct from the Plaintiff company), does not have any relevance and/or implication to the sale transaction involving the suit property.

58. Be that as it may, the bottom line is if the sum of Kenya shillings 2,000,000/= or only, otherwise was paid out to Dr. Linus Cheruyot by M/s Commercial interiors Ltd or better still m/s Commercial Carpet Ltd (the two company], herein having been separate from the Defendant), then it is the said two (2) companies that are the ones that can legally pursue or follow up on the claim of Kenya shillings 2,000,000/=only.

59. As concerns to the Plaintiff and the Defendant herein, there is no agreement where the Plaintiff, *ex post facto* the payment of Kenya shillings 2,000,000/= only, to M/s Commercial Carpets Ltd, sought for and/or obtained back the said monies. Unfortunately for me, there is no foundation and/or basis upon which the Defendant can contend that the Plaintiff herein sought for and was paid a refund of Kenya shillings 2,000,000/=, only, which thus diminished the payment on account of the purchase price.

60. Before I depart from this issue, perhaps it is sufficient to observe that different companies have separate and distinct legal entities / characters from each other and from their own directors, subscribers and/or shareholders. Consequently, it behooves the Defendant herein to appreciate the foregoing and to learn to distinguish that the Defendant is not one and the same with the two (2) sister companies, even if the Directors of the said Companies are the same ones in the Defendant herein.

61. In support of the forgoing observations in the preceding paragraph, I take refuge in the in the decision in the case of **Hannah Maina t/a Taa Flower v Rift Valley Bottlers Limited [2016] eKLR**, where the honourable court held as hereunder;

> *"As regards the issue of privity of contract, it is true the appellant had contracted with Riva and not the respondent. In the circumstances, the respondent could not be held liable for the debts of its subsidiary company, the two being distinct and separate legal entities. We are in agreement with the holding of the learned judge. The authority that she cited,* ***RE: SOUTHARD LIMITED [1979] 3 ALL ER 565*** *is quite apt:*
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> > ***" … a parent company may spawn a number of subsidiary companies, all directly or indirectly controlled by the shareholders of the parent company. If one of the subsidiary companies turns out to be the runt of the litter and declines into insolvency to the dismay of the creditors, the parent company and the subsidiary companies may prosper to the joy of the shareholders without any liability for the debts of the insolvent subsidiary."***

62. In the same vein, it is also important for the Defendant to appreciate or draw a distinction between the Plaintiff as a company and thus legal entity and one, Dr. Linus Cheruyot, in his capacity as a director. Clearly, the individual actions of Dr. Linus Cheruyot, including the loan that the same, obtained from M/s commercial Interiors Ltd, only apply to himself and not the Plaintiff company.

63. In support of the observations in the preceding paragraph, I beg to echo and reiterate the common and elementary principle in company law as captured in the decision in the case of **George W M Omodni & Another v National Bank Kenya Ltd [2001] eKLR**, where the honourable court held as hereunder;

> *It is a basic principle of company law that the company has a distinct and separate personality from its shareholders and directors even when the directors happen to be the sole shareholders (see Salmon v a Salmon & Co Ltd [1897] AC 22). The property of the company is distinct from that of its shareholders and the shareholders have no proprietary rights to the company's property apart from the shares they own. From that basic consequence of incorporation flows another principle: only the company has capacity to take action to enforce its legal rights.*

64. Perhaps if more emphasis were necessary on this well beaten issue, I would hasten to also rely on the decision in the case of **Ardhi Highway Developers Ltd v Westend Butchery Ltd (2015) eKLR**, where the court of appeal whilst referring to Lord Denning observed as hereunder;

> *Lord Denning MR in his characteristic literary style summed up the law in* ***Moir V. Wallersteiner[1975] 1 ALL ER 849at p. 857****, as follows:*
>
> ***"It is a fundamental principle of our law that a company is a legal person with its own corporate identity, separate from the directors or shareholders and with its own property rights and interests to which alone it is entitled. If it is defrauded by a wrong doer, the company itself is the one person to sue for the damage. Such is the rule in Foss V. Harbottle[1843] 2 Hane 461. The rule is easy enough to apply when the company is defrauded by outsiders. The company itself is the only one who can sue. Likewise, when it is defrauded by insiders of the minor kind, once again the company is the only person who can sue".***

65. My unequivocal answer to issue number 2 is that the Plaintiff company did not borrow and/or obtained a Refund of Kenya shillings 2,000,000/= only, from either the Defendant herein or any of the sister companies.

66. Conversely, it is Dr. Linus Cheruyot, a director of the Plaintiff company, who in his personal capacity obtained a loan from M/s Commercial Interiors Ltd, but which is an issue that can only be gone into between the two parties. For clarity, it is an issue that is outside the four corners of the sale agreement dated 1st August 2002 and in any event, cannot be pursued by the Defendant herein.

Issue Number 3

Whether the Plaintiff and the Defendant executed the agreement of the 1st July 2015, and whether the said agreement, if any, is enforceable against the Plaintiff company.

67. As pertains to the third issue herein, it is the Defendant's argument that same entered into and executed a further agreement dated the 1 st July 2015, with the Plaintiff company.

68. In fact, the Defendant further avers that pursuant to the latter agreement, the Plaintiff company agreed to pay to and/or in favor of the Defendant the sum of Kenya shillings 12,000,000/=, towards and/or in respect of the completion of the sale of the suit property.

69. However, I have been able to look at and examined the documents referred to as an agreement between the Plaintiff and the Defendant, but unfortunately I am unable to confirm that the document is such an agreement.

70. First and foremost, the agreement relates to and contains in its preamble the name of one Fredrick Waweru Karanja, who states that he is entering into an agreement on behalf of the co-director and on behalf of the Defendant company. However, if the said agreement was to be deemed to be entered to by the Defendant company on one hand and the Plaintiff company on the other hand, the preamble of the agreement should speak to the company contracting or entering into the agreement, which is not the case.

71. Secondly, an agreement entered into between a company and another, must ordinarily be signed by the directors of the company and same must be under the seal of the said company. In my humble view, the document that is deemed to be an agreement on behalf of the Defendant company is not so sealed.

72. Thirdly, the agreement is said to have been executed by one Charles Barchige, allegedly on behalf of one Linus Lucas Cheruyot and on behalf of the Plaintiff company pursuant to a power of attorney. However, I must observe that Charles Barchige, has not been proven to have been a director of the Plaintiff company, to warrant execution of a document on behalf of the Plaintiff company.

73. Fourthly, Charles Barchige, was only appointed as an attorney for and/or on behalf of Linus Lucas Cheruyot, in his personal capacity and not otherwise. In this regard, Charles Barchige, could not constitute himself, as a director of the Plaintiff company. In any event, any such action would be *ultra vires* the scope of the power of attorney and hence would be a nullity.

74. Fifthly, even assuming that indeed Charles Barchige, was constituted as an attorney to act on behalf of Linus Lucas Cheruyot and by extension the Plaintiff company (which I have found to be in the negative) the power of attorney could only confer mandate on Charles Barchige to act and/or such things as donated by the power of attorney, upon its registration.

75. However, I have examined the power of attorney which have been produced at pages 115 to 117 of the trial bundle, but I have noted that same was never and has never been registered. In this regard, the document alluded to as a power of attorney is a mere sheet of paper and cannot therefore be relied upon by the Defendant company to catapult the purported agreement to a legal standing and/or pedestal. Simply put, a document that requires registration, but which is not registered cannot anchor any legal transaction, enforceable under law, save for the known exceptions stipulated in the well known case of Bachelor's Bakery Limited.

76. Notwithstanding the foregoing, the purported agreement which is alluded to by the Defendant to have been entered to with the Plaintiff company, pertaining to and/or concerning the suit property, does not however address the suit property, let alone touch on the terms contained in the previous agreement dated the 1st August 2002.

77. In my humble view, if the document signed on the 1st July 2015, was to be considered as an agreement superseding the previous agreement, nothing would have been easier for the latter document to say as much. Unfortunately, it did not, and therefore it would be beyond the stretch of imagination for any one, the Defendant not excepted, to say that the said document was made in furtherance of the transaction in respect of the suit property or better still as addendum thereto.

78. In terms of the construction and/or interpretation, I must say that the document dated the 1st July 2015, can only be construed on the face thereof and such construction does not bring same to have any bearing on the said suit property, whatsoever.

79. In support of the foregoing findings, I find favor in the decision in the case of **Speaker of the Kisii County Assembly & Others v James Omariba Nyaoga Court of Appeal,** where the Honourable Court observed as hereunder;

> *The 1st appellant's attempt to vary the terms of the letters of appointment, in our view, offends the provisions of Sections 97 and 98 of the Evidence Act, Chapter 80 Laws of Kenya, which attempt we must reject. . This is not the first time we are doing so. In the case of* ***John Onyancha Zurwe v Oreti Atinda alias Olethi Atinda [Kisumu Civil Appeal No. 217 of 2003] (UR),*** *we cited, with approval, Halsbury's Laws of England 4th Edition vol. 12, on interpretation of deeds and non-Testamentary Instruments paragragh,1478 as follows:-*
>
> ***'' Extrinsic evidence generally excluded:***

Where the intention of parties has been reduced to writing it is in general not permissible to adduce extrinsic evidence whether oral or contained in writing such as instructions ,drafts, articles, conditions of sale or preliminary agreements either to show that intention or to contradict, vary or add to the trms of the document.

Extrinsic evidence cannot be received in order to prove the object with which a document was executed or that the intention of the parties was other than that appearing on the face of the document."

80. Taking cognizance of the decision referred to in the preceding paragraph, I must say that the Defendant herein is seeking to vary, alter and/or otherwise review the terms of the sale agreement dated 1st August 2002, by relying on foreign document (read extrinsic evidence), which has no relevance to the previous agreement whatsoever. Such an action, must not gain legal traction.

Issue Number 4

Whether the Defendant has breached the terms of the sale agreement and if so, whether the plaintiff is entitled to a Order for of specific performance of the contract.

81. The terms of the sale agreement between the Plaintiff and the Defendant were clearly embodied and contained in the sale agreement dated the 1st August 2002. For clarity, the said agreement was not subject to any subsequent event or at all and in fact, none is alluded to therein.

82. At any rate, the terms of the sale agreement under reference could only be varied and/or otherwise be reviewed by another mutual agreement, duly executed and engrossed by the said parties and/or their lawfully authorized agents. In this case, there was no such mutual alteration and/or addendum.

83. In the premises, the parties to sale agreement dated 1st August 2002, were obliged to perform their part of the bargain and in this regard, I hasten to say that the Plaintiff indeed performed her part of the sale agreement and ensured that the entire purchase price, namely, Kenya shillings 16,000,000/= only was paid to and in favor of the Defendant.

84. In my humble view, having paid the entire purchase price, which payment was dully acknowledged by the Defendant, there was no outstanding obligation on the part of the Plaintiff.

85. Conversely, having received and appropriated the entire purchase price, it was incumbent upon the Defendant to avail and/or surrender all the completion documents, to facilitate the completion of the transaction. However, the Defendant has not done so and there is no scintilla of evidence that the Defendant is keen to do so.

86. Be that as it may, I must observe that where parties enter into a contract voluntary and arms-length, it must be taken that same are bound by the terms of the agreement/contract ,unless certain legal exceptions can be established and / or shown to vitiate the agreement

87. In support of the foregoing observation, I take guidance in the decision in the case of **National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another [2001] eKLR**, where the Honourable Court held as hereunder;

As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):

"It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

88. In my humble view, the Defendant herein having entered to and having executed the sale agreement dated the 1st August 2002, and having appropriated the entire purchase price, same must be prepared to complete the contract. However, in the event of failure and/or neglect then equity must intervene by way of an order of specific performance.

89. To fortify the observation, that equity would be prepared to intervene vide an order of specific performance, I invoke and adopt the decision in the case of **Reliable Electrical Engineers (K) Ltd v Mantrac Kenya Limited [2006] eKLR,** where the Honourable Court held as hereunder;

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. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant.

90. Other than the foregoing case that spoke to specific performance and when same can issue and/or be granted, it is also important to refer to the decision in the case of **Sisto Wambugu v Kamau Njuguna (1983) eKLR,** where the honourable court observed as hereunder;

In my judgment the respondent cannot come to the court and obtain an order of the transfer of the land, as he sought in his counterclaim, which is in effect an order of specific performance of the agreement, unless he had performed his part of the bargain or can show that he was at all times ready and willing to do so.

91. In my humble view, the circumstances of the subject matter, in particular, where the Plaintiff herein paid to and in favor of the Defendant the entire purchase price, would entitle the Plaintiff to an order of specific performance. Clearly, damages would not suffice, because the Plaintiff had done all that within her part, to conclude/complete the transaction.

92. In this regard, I further take guidance from the decision in the case of **Thomas Openda v Peter Martin Ahn [1984] eKLR**, where the court observed as hereunder;

> *Accordingly, in my judgment, the purchaser was entitled to treat the contract as still in existence and to sue for the remedy of specific performance. As Lord Diplock said in the recent case of Sudbrook v Eggleton, The Times July 15, 1982, the normal remedy in such a case is an action for specific performance, because damages are frequently an inadequate and unjust remedy for a refusal to convey the property concerned.*

Issue Number 5

Whether the Defendant is entitled to the Reliefs sought at the foot of the counterclaim

93. Other than filing the Statement of Defence, the Defendant herein also mounted a Counterclaim, in respect of which same has sought for substantive prayers. First and foremost, the Defendant herein has sought an Order for specific performance over and in respect of the agreement, allegedly entered and executed on the 1st of July 2015, whereby it is contended that the Plaintiff herein agreed to pay a further sum of Kshs. 12,000,000 only, towards completion of the sale agreement in respect of the suit property.

94. As pertains to the said agreement, I have been able to examine same and I made various observations touching on and/or concerning its validity as well as legality.

95. Without repeating myself, it is worthy to note that the said agreement was not executed by the Plaintiff and the Defendant herein, and as pertains to the Plaintiff, the person who allegedly executed same was neither, a director of the Plaintiff's company, nor was same legally authorized to do so on behalf of the Plaintiff's company.

96. In my humble view, the document dated the 1st of July 2015, upon which the Defendant is seeking specific performance, is replete with various inconsistencies, improprieties and illegalities and same cannot thus found a claim for specific performance.

97. At any rate, even assuming that the said document dated the 1st of July 2015, (was capable of implementation), which I have found in the negative, it suffices to note that the said agreement is not time bound and hence the implementation and enforcement of same, cannot attract the force of law, whatsoever. For clarity, when time is not of essence, the innocent would be required to issue and serve a Notice to make to be of essence and no such notice, if any, was issued herein.

98. Notwithstanding the foregoing, as concerns the sale of the suit property, the only valid and lawful agreement is the one dated the 1st of August 2002, which I have found to be the one capable of being specifically performed.

99. In the premises, I am afraid that the document dated 1st July 2015, which in my humble view does not bind the Plaintiff company is incapable of enforcement and on this account the Order for Specific Performance sought thereon, are not legally tenable.

100. Other than the claim for specific performance of the said agreement, which is wrought with illegalities, the Defendant has also sought for payment of general damages for breach of not only the agreement dated 1st of August 2002, but also the document dated 1st of July 2015. As pertains to the latter, I have already found that same is not binding on the Plaintiff company and hence was incapable of being breached by the Plaintiff.

100. Nevertheless, even assuming that the said document, (which I am unable to refer to as an agreement) could be breached, the breach of a contract cannot culminate into an award of general damages. Suffice it to say, that where a contract is breached and/or violated, the loss that accrue from same is quantifiable and/or ascertainable from the onset and in this regard such loss is special in nature as opposed to being General in nature .In this regard, a claim foe General Damages in the manner sought for is inconceivable and unrealistic.

101. In my humble view, the breach and/or violation of the document dated 1st July 2015 and agreement dated 1st August 2002 cannot found aa basis for a claim of general damages, either as claimed or at all.

102. In the case of **Kenya Tourist Development Corporation v Sundowner Lodge Limited [2018] eKLR** the Court stated that,

> *"With the greatest respect to the learned Judge, we think that the reasoning is quite flawed. We are not persuaded that the authorities cited by the learned Judge support the proposition that in cases of breach of contract there does exist a large and wide-open discretion to the court to award any amount of damages. The opposite is in fact the case: as a general rule general damages are not recoverable in cases of alleged breach of contract and that has been the settled position of law in our jurisdiction, and with good reason."*

103. Before I depart from the issue of breach of contract, I must observe that as pertains to the agreement dated the 1st of August 2002, the Plaintiff herein, performed all the clauses of the contract and essentially paid the entire purchase price amounting to Kshs. 16,000,000, which was received, acknowledged and appropriated by the Defendant.

104. However, on her part, the Defendant herein failed and/or neglected to handover and/or surrender the completion documents, either as at the completion date, that is 30th September 2002 or even after receipt of the full purchase price. In this regard, it is the Defendant that was guilty of breach of the agreement and not otherwise.

105. The other prayer sought by the Defendant herein relates to vacancy and possession over and in respect of the suit property. For clarity, it must be recalled that the Plaintiff entered upon and took possession in 2002, following the execution of the sale agreement and same has remained therein to date.

106. Before addressing the legality of this claim, it is imperative to take cognizance of the provisions of **Section 7 of the Limitation of Actions Act, Chapter 22 Laws of Kenya,** which provides as hereunder;

> *"7. Actions to recover land*
>
> *An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."*

107. In my humble view, by the time the Defendant herein filed and/or lodged the counterclaim on the 29th of May 2019, the 12-year period for recovery of vacant possession, had long lapsed and the Defendant's title thereto stood extinguished.

108. Notwithstanding the foregoing, I would still not have granted an order for vacant possession, noting that the Plaintiff proceeded to and paid the entire purchase price, over and in respect of the suit property. In this regard the assumption of possession was an actualization of the intentment of the terms of the agreement which was entered into between the parties.

109. Other than the foregoing, I would still not have granted the Order for vacant possession as such an Order would be tantamount to sanctioning the inequity perpetuated by the Defendant, in a bid to defraud the Plaintiff of a legitimate entitlement.

In support of the foregoing position, I would adopt and apply the provisions of **Article 10(2)(b) of the Constitution** and particularly amplify the aspect of equity and social justice, which provides as hereunder;

> *"National values and principles of governance*
>
> *(2) The national values and principles of governance include—*
>
> *(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;*
>
> *(b) human dignity, **equity, social justice,** inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;*
>
> *(c) good governance, integrity, transparency and accountability; and*
>
> *(d) sustainable development.*

FINAL DISPOSITION

110. Having addressed all the issues that I had enumerated herein before, I come to the conclusion that the Plaintiff has proved her case on a balance of probabilities and same is therefore entitled to Judgment as follows;

i. An order of specific performance be and is hereby issued compelling the Defendant to procure, execute and supply all documents that are necessary to transfer the property know as L.R NO. 209/7008, Manyani Road East, Lavington, within the City of Nairobi to the Plaintiff as envisaged in the agreement for sale date the 1st August 2002, including the original grant, discharge of charge and KRA cancellation of charge.

ii. A permanent injunction be and is hereby issued restraining the Defendant either by itself, its agents or employees or otherwise howsoever from inter fearing with the Plaintiffs quiet and peaceful possession and occupation of the Property L.R NO. 209/7008, Manyani Road East, Lavington, within the City of Nairobi

iii. The Defendant herein shall execute all the transfer instruments and/or documents relative to the transfer of the suit property to and/or in favor of the Plaintiff and shall also handover all the requisite approvals, clearance certificates, PIN certificates, certificate of incorporation as well as the passport size photographs of the directors of the Defendant's company within 21 days from the date

hereof and in default of the Defendant executing any document that is necessary to complete the sale within 21 days of the Judgment, the Deputy Registrar of the Environment and Land Court be and is hereby directed to execute such documents as are necessary to complete the transfer of the Property, namely, L.R NO. 209/7008, Manyani Road East, Lavington, within the City of Nairobi, in favor of the Plaintiff.

iv. A declaration be and is hereby issued that the Plaintiff is entitled to ownership and/or occupation of the Property known as L.R NO. 209/7008, Manyani Road East, Lavington, within the City of Nairobi, having resided thereon since the year 2002.

v. The counterclaim by the Defendant is devoid of merit and same is hereby dismissed.

vi. The Plaintiff shall have thee costs of the suit as well as the Counterclaim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER 2021.

HON. JUSTICE OGUTTU MBOYA,

JUDGE,

ENVIROMENT AND LAND COURT,

MILIMANI.

IN THE PRESENCE OF;

JUNE NAFULA COURT ASSISTANT

MR. RAPANDO ADVOCATE FOR PLAINTIFF.

MR.SITUMA ADVOCATE FOR THE DEFENDANT