



**Davetronics Limited v Spire Bank Limited; Ali & another (Third party) (Civil Suit E582 of 2021) [2023] KEHC 3115 (KLR) (Commercial and Tax) (6 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 3115 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT E582 OF 2021  
DAS MAJANJA, J  
APRIL 6, 2023**

**BETWEEN**

**DAVETRONICS LIMITED ..... PLAINTIFF**

**AND**

**SPIRE BANK LIMITED ..... DEFENDANT**

**AND**

**SHAROK KHER MOHAMMED ALI ..... THIRD PARTY**

**SAID MUHIDDIN GATIBARU ..... THIRD PARTY**

**RULING**

**Introduction and Background**

1. The court is called upon to resolve two applications. The Plaintiff's application dated 22<sup>nd</sup> April 2022 seeking judgment for Kshs. 12,500,000.00 and an order directing the Defendant to deposit Kshs. 67,167,946.00 in a joint account in the names of the parties' advocates within 30 days from the date of the order pending the hearing and determination of the suit. The application is supported by the affidavit of its director, David Muthami Muthee, sworn on 22<sup>nd</sup> April 2022. It is opposed by the Defendant through the replying affidavit of its Legal officer, David Wageche sworn on 30<sup>th</sup> May 2022.
2. The Defendant's application dated 21<sup>st</sup> March 2022 seeks an order that the suit be discontinued on the ground that the court lacks jurisdiction to entertain the suit. It also seeks an order that the suit be struck out on the grounds that it is *res judicata* as it raises the same issues as those determined in NRB HCCC No. 659 of 2009; *Sharok Kher Mohammed Ali and 2 Others v Southern Credit Banking Limited and another* ("HCCC No. 659 of 2009") and that the suit is barred under the *Limitation of Action Act* (Chapter 22 of the Laws of Kenya). The application is supported by the affidavit and further affidavit



of John Wageche sworn on 21<sup>st</sup> March 2022 and 30<sup>th</sup> May 2022 respectively and opposed through the replying affidavit of David Muthami Muthee sworn on 22<sup>nd</sup> April 2022.

3. Both applications were canvassed through written submissions.
4. In order to determine the application an appreciation of the cause of action as reflected in the pleadings is necessary. The suit was commenced by the plaint dated 17<sup>th</sup> May 2021. The Plaintiff's case is that it purchased LR No. 7785/259 Runda, Nairobi ("the suit property") at a public auction on 21<sup>st</sup> August 2007 when the Defendant exercised its statutory power of sale. The Defendant accepted its bid for Kshs. 12,500,000.00 which the Plaintiff paid in two instalments; an initial payment of Kshs. 12,000,000.00 and Kshs. 500,000.00 on 17<sup>th</sup> October 2007. The Defendant transferred the suit property to it on 19<sup>th</sup> November 2007 whereupon it took possession.
5. In January 2008, the Defendant was sued by the third parties in HCCC No. 659 of 2009. The suit was determined by a judgment delivered on 19<sup>th</sup> December 2018 ("the Judgment"). The court cancelled and declared the charge over the suit property null and void and on that basis declared the sale and transfer of the suit property to the Plaintiff by the Defendant null and void.
6. The Plaintiff claims the during the hearing of the suit and the resultant judgment, it learnt that the Defendant in exercising its statutory power of sale failed to follow the due legal process and knowingly and by means of fraud misled the Plaintiff to purchase the suit property. As a result of the fraud, it now seeks Kshs. 79,667,946.00 being the refund of the purchase price and interest thereon for 12 years duly compounded at a rate of 12% p.a. Kshs. 1,947,988.00 being stamp duty and registration fees with interest thereon at 12% p.a. Land Rates over the same period with interest at 12% p.a. amounting to Kshs. 3,974,389.51. Renovation expenses amounting to Kshs. 4,635,000.00. Legal fees incurred in the conveyancing transaction amounting to Kshs. 6,500,000.00. Loss of user of the property, general damages, aggravated damages for loss of investment opportunity and or loss of business opportunity, costs and interest of the suit.
7. In its Statement of Defence dated 23<sup>rd</sup> June 2021, the Defendant admits that it sold and transferred the suit property to the Plaintiff as pleaded but denies the allegations of fraud pleaded against it or that the Plaintiff suffered the losses its claims as a result of the alleged fraud. It also admits that the suit was heard and determined by the court but the court lacked jurisdiction as HCCC No. 659 of 2009 ought to have been determined by the Environment and Land Court ("ELC") as it concerned occupation, use and ownership of the land hence the judgment therein is a nullity.
8. The Defendant further avers that this suit is time barred as it has been brought 13 years after the cause of action arose. It also adds that this suit is res judicata in light of HCCC No. 659 of 2009 as the suit involved the same parties, related to the same subject matter and that the Plaintiff herein did not raise a counter-claim in that suit against the Defendant making this suit res judicata. The Plaintiff also avers that this court lacks jurisdiction to entertain this suit as it falls within the jurisdiction of the ELC as it related to the sale of the suit property by the Defendant in exercise of its statutory power of sale.
9. The Defendant has raised issues that go to the jurisdiction of this court to determine the issue hence I propose to first deal with the Defendant's application. The Defendant's Statement of Defence and application raised three broad issues; First, whether the High Court has jurisdiction to determine this suit. Second, whether the suit is res-judicata and third, whether the suit is statute barred.

### **Whether the court has jurisdiction**

10. Both parties agree that jurisdiction is an important issue which must be determined in the first instance. This is underlined by the well-known dictum by Nyarangi JA., in *Owners of the Motor Vessel "Lillian*



*S” v Caltex Oil (Kenya) Limited* [1989] KLR 1 that, “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction” (see also [Samuel Kamau Macharia and Another v Kenya Commercial Bank Limited and 2 Others](#) SCK Application No. 2 of 2011 [2012]eKLR).

11. The point of contention in this matter is whether the suit should be heard by this court, the High Court or the ELC. The court must therefore consider whether the cause of action falls within the exclusive jurisdiction of the ELC under article 162(2)(b) of the [Constitution](#) which empowers Parliament to create courts with the status of the High court to hear and determine disputes relating to, “the environment and the use and occupation of, and title to, land.” This provision is given effect and translated in the [Environment and Land Court Act](#), 2011 (“the ELC Act”) particularly section 13(2) thereof which outlines the jurisdiction of the ELC as follows:
  - (2) In exercise of its jurisdiction under article 162(2)(b) of the [Constitution](#), the Court shall have power to hear and determine disputes—
    - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
    - (b) relating to compulsory acquisition of land;
    - (c) relating to land administration and management;
    - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
    - (e) any other dispute relating to environment and land.
12. The Defendant submits that the Plaintiff raises the following issues which clearly fall within the jurisdiction of the ELC. Whether there was fraud in the registration of the Charge over the suit property, whether the Defendant prepared a defective charge and gave a wrong description of the suit property, whether the Defendant passed a good title to the Plaintiff upon the transfer of the suit property to the Defendant and whether the Defendant misrepresented to the Plaintiff it had capacity to sell the suit property by way of private treaty.
13. The Defendant relied on the decision in [Philip Jalang’o v Ryan Properties Limited](#) NRB ELC No. 1252 of 2013 [2020] eKLR where the learned Judge held that the ELC has jurisdiction in a dispute relating to a contract granting the Plaintiff an enforceable interest in the land which falls under section 13(2)(b) of the [ELC Act](#). It submits that the Plaintiff’s suit relates to the Agreement of Sale entered into by the parties herein as well as the transfer by chargee executed by the parties herein by which the suit property was sold and transferred to the Plaintiff by the Defendant.
14. The Defendant further submits that the question whether or not the Plaintiff should be refunded and/or compensated is intricately linked to the question whether or not the Defendant passed a good title to the Plaintiff. It points out the Plaintiff has averred in that its use and enjoyment of the Suit Property was curtailed when the Plaintiff and the Defendant were sued in HCCC No. 659 of 2007 hence the suit relates to the ownership, enjoyment and use of the land. That the suit relates to the Sale Agreement and Transfer by Chargee by which the Suit Property was sold and transferred to the Plaintiff and that these instruments thrust the matter into the specialised jurisdiction of the ELC as envisaged under



section 13 of the ELC Act. The Defendant therefore urges that the proper forum for this suit is the ELC and that this court should decline jurisdiction.

15. The Plaintiff rebuffs the Defendant's contention that this court lacks jurisdiction. It contends that the claim is commercial in nature as it deals with refund of money arising out of a commercial transaction wherein the Defendant's predecessor in title was purporting to exercise its statutory power of sale and not land ownership. The Plaintiff cited the decision in Thomas Mutuku Kasue v Housing Finance Company Ltd (HFC) and another MKS ELC No. 40 of 2020 [2021] eKLR where the court, in holding that ELC lacked jurisdiction, held that, "the jurisdiction of the ELC to deal with disputes relating to contracts under section 13 of the Environment and Land Court Act ought to be understood within the context of the Court's jurisdiction to deal with disputes connected to 'use' of land hence Such contracts, ought to be incidental to the 'use' of land; they did not include mortgages, charges, collection of dues and rents which fell within the civil jurisdiction of the High Court. Thus the court reasoned, the dominant issue in that was the settlement of amounts owing from the Respondents to the Appellant on account of a contractual relationship of a banker and lender."
16. The Plaintiff further submits this court is clothed with jurisdiction to hear and determine the case and that it is not with regards to ownership of land but refund which is commercial in nature as the court is to determine whether the Defendant is to refund the said amount or not.
17. Whether this court has jurisdiction to determine the suit depends on the nature of the cause of action. The undisputed fact is that that the relationship between the Plaintiff and the Defendant was consummated when the Defendant sold to the Plaintiff the suit property at a public auction. That is the basis of their relationship and the claim. The resultant claim follows the nullification by the court of the sale in HCCC No. 659 of 2009. The court having nullified the sale, the only issue for determination is whether the Plaintiff is entitled to a refund and consequential loss in the form of pleaded special damages. I hold that the issue of adjudication of title and or use of the suit property does not arise at all. In Co-operative Bank Kenya Limited v Patrick Kangethe Njuguna and 5 Others MSA CA Civil Appeal No. 83 of 2016 [2017] eKLR, the Court of Appeal emphasized that a cause of action relating to contracts, choses in action or other instruments granting any enforceable interests in land as set out in section 13(2)(d) of the ELC Act must be incidental to the use of land. In this case, the agreement of sale and the transfer by charge related to the exercise of the statutory power of sale and not to the use of the suit property. Further, the High Court having adjudicated on the validity of the sale and the judgment not having been set aside, what remains in issue is the resulting loss which is within the competence of this court. The issue of the proprietary interest in the suit property is not in issue anymore. I therefore find and hold that this court has jurisdiction to adjudicate over the Plaintiff's claim.

#### **Whether the suit is res-judicata**

18. The basis of the Defendant's argument that the suit is res judicata arises from the suit and judgment in HCCC No. 659 of 2009.
19. The parties are agreed that the doctrine of res judicata is anchored in section 7 of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which provides:

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.



20. The Court of Appeal in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* NRB CA Civil Appeal No. 105 of 2017 ([2017] eKLR summarized the elements of the doctrine as follows:

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.
  - (b) That former suit was between the same parties or parties under whom they or any of them claim.
  - (c) Those parties were litigating under the same title.
  - (d) The issue was heard and finally determined in the former suit.
  - (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
21. According to the Defendant, the suit property was the subject matter in the former suit which involved the same parties herein, being, inter alia, the Plaintiff and Defendant. That in the former suit, the Plaintiff was the 2<sup>nd</sup> Defendant while the Defendant herein was sued as the 1<sup>st</sup> Defendant. In addition, the Defendant contends that the plea of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time. The Defendant cited *Henderson v Henderson* 1843 3 Hare 100 [1843 67 E.R. 313], *Cleophas Wafula v Asmin Nasambu and another* BGM ELC No. 107 of 2012 [2021] eKLR and *Thomas Owen Ondiek and Another v National Bank of Kenya and Another* ELC CA Civil Appeal No. 182 of 2011 [2015] eKLR where the Court of Appeal stated that, “It is trite law that an issue or claim that should have been raised in an earlier case cannot be raised in a subsequent suit between the same parties.”
22. The Defendant submits that in the circumstances of this case, the Plaintiff ought to have filed a counterclaim against the Defendant in the former suit since it was a party to the suit. It urges that the Plaintiff’s case is barred by the doctrine of *res judicata* by failing to raise the issues it now raises herein. It cites the decision in *Cleophas Wafula v Asmin Nasambu and another* (*Supra*) where the court observed that:
- I have no doubt in my mind that the remedies being sought by the plaintiff in this case could, with due diligence, have been raised in the subordinate Court which heard and determined the previous suit involving the parties herein. Nothing stopped the plaintiff herein from seeking, by way of a Counter – Claim, the injunctive relief that he now seeks with respect to the land parcel No. East Bukusu/South Sang’alo/1789.
- It has not been suggested that the subordinate Court had no jurisdiction to determine in the previous suit, the remedies being sought in this suit... Having considered all the issues raised by the defendant’s Counsel in the Preliminary Objection, I am satisfied that this suit *res judicata* and amounts to an abuse of the process of this Court.
23. The Plaintiff submits that this suit is not res judicata as the present suit involves the Plaintiff and the Defendant whereas in HCCC No. 659 of 2007, the Plaintiff was sued as the 2<sup>nd</sup> Defendant together



with Defendant's predecessor as the 1<sup>st</sup> Defendant and the issues in dispute as set out in the judgment were; whether title number 7785/259 was regularly charged to Southern Credit Banking Corporation Limited (1<sup>st</sup> Defendant), whether statutory notices were issued before sale of property herein to the 2<sup>nd</sup> Defendant, whether transfer of LR. 7785/259 by the 1<sup>st</sup> Defendant to 2<sup>nd</sup> Defendant should be cancelled, whether 3<sup>rd</sup> Plaintiff should be awarded 24,000,000 being value of building materials, whether Plaintiffs are entitled to damages and who is entitled to costs.

24. The Plaintiff further submits that the court in HCCC No. 659 of 2007 did not conclusively determine the rights of the Plaintiff as the issue of refund was not dealt with in the judgement. It maintains that the Defendant has not provided the pleadings in the said suit or proved that the court made any finding as to the refund of the purchase price paid by the Plaintiff. It therefore urges the court to find that the suit is not res judicata.
25. The difference between HCCC No. 659 of 2007 and this suit is that the former involved the three other parties who are not principal parties to this suit; Sharok Kher Mohamed Ali, Said Muhiddin Gatibaru and Firoze Nurali Hirji. Further, the nature of the claim is as between the Plaintiff and the Defendant which was between the Defendant and the third parties herein in the former suit. I hold that this suit does not fall on all fours within the doctrine of res-judicata particularly since the issues between the Plaintiff and Defendant were not adjudicated for the reason that the case was between the Defendant herein and the third party therein. The Defendant contends that the Plaintiff ought to have filed a counterclaim in the former suit. I reject this submission as the issue in the former case concerned the relationship and dealing between the Plaintiffs, Defendants and third party. What the Plaintiff seeks in this suit is against the Defendant which issue has not been adjudicated upon.
26. While I hold that the doctrine of res judicata does not apply to this case, the parties are estopped from litigating issues that have already been determined by a court of competent jurisdiction. This is referred to as issue estoppel. In *Trade Bank Limited v LZ Engineering Construction Limited* [2001] EA 266, the Court of Appeal adopted the following definition of issue estoppel found [\*Halsbury's Laws of England\*](#) (4th Ed.):

An estoppel which has come to be known as Issue Estoppel may arise where a plea of res judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once already been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law.

27. It is not in doubt that the court in HCCC No. 659 of 2007 pronounced itself on the validity of the sale by the Defendant to the Plaintiff. The court came to the conclusion that the charge over the suit property was irregular and therefore null and void. It consequently cancelled the transfer of the suit property as between the Plaintiff and the Defendant. The parties are estopped from litigating this issue as a court of competent jurisdiction has pronounced on it. At this stage, I would point out that the Defendant suggested that the court in that case did not have jurisdiction as the matter ought to have been determined in the ELC. I cannot accept this argument because this court lack jurisdiction to adjudicate over a final decision of a court of concurrent jurisdiction. If the Defendant is dissatisfied



with the said judgment, then it should pursue legal avenues of review or appeal. This court is bound to take the judgment as it finds it.

28. Turning back to the Plaintiff, the Plaintiff particularly at paragraph 8, pleads that it discovered that the Defendant acted fraudulently and misled it to purchase the suit property. It then goes on to plead particulars of fraud which are in effect the grounds upon which the court in HCCC No. 659 of 2007 set aside the sale of the suit property. I hold that the issue of fraud regarding the sale of the suit property has already been adjudicated and this court cannot proceed to determine it again as this is barred by the doctrine of issue estoppel. I therefore strike out paragraph 8 of the Plaintiff for this reason.

#### **Whether the suit is statute barred.**

29. The Defendant's case is that the Plaintiff's suit is time-barred under section 4(1)(a) of the Limitation of Actions Act which requires that actions founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. It further contends that cause of action was founded on the Agreement for Sale dated 12<sup>th</sup> September 2007 between the Plaintiff and the Defendant in respect of the suit property. It submits that the Plaintiff's cause of action accrued more than 6 years ago and the Plaintiff has had knowledge of the same ever since. It points out that the Plaintiff had knowledge of the alleged fraud when HCCC No. 659 of 2007 was filed in 2007 and the Plaintiff served with all the court papers and participated in the proceedings. The Defendant refers to section 26(c) of the Limitation of Actions Act which provides as follows:

Where, in the cause of an action for which a period of limitation is prescribed, either:

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it." (Emphasis mine)

30. The Defendant contends that since the Plaintiff actively participated in the former suit and was represented by counsel, it is estopped from claiming that it was unaware of the circumstances vitiating the sale of the suit property until after the judgment was delivered in the former suit. It maintains that this action is grounded not on the judgment of the former suit but the Agreement dated 12<sup>th</sup> September, 2007 between the parties Accordingly, it urges that the suit should be struck out having been brought after unreasonable and unexplained delay of more than 13 years since the cause of action accrued.
31. The Plaintiff rebuts the Defendant's contention that the suit is statute barred on the ground that after the parties entered into the Sale Agreement in 2007, it was given possession of the suit land upon paying the purchase price and it was not privy to the fraudulent and or illegal acts that the Defendant's predecessor had not followed due process in fraudulently selling the suit land using its purported statutory power of sale.
32. It states that the fraudulent actions of the Defendant's predecessor (Southern Credit Banking Corporation Limited) only came to its knowledge after delivery of the said judgment on 19<sup>th</sup> December 2018 when the court set aside the sale. The Plaintiff relies on section 26(a) and (c) of the Limitation of Actions Act to support its case and avers that it is only after the judgment that it commenced efforts



to claim a refund from the Defendant who has refused until now to make good the Plaintiff's demand hence this current case.

33. On this issue I am in agreement with the Plaintiff that its cause of action arose when the court gave its judgment in HCCC No. 659 of 2007. The reference to cause of action referred in the *Limitation of Actions Act* is in reference to the claimant and not to the world generally. I say so because in that case, the Plaintiff herein did not allege or claim fraud. The Plaintiff was the second defendant in that case defending the validity of the sale to it by the Defendant. Its position at all times was that the sale was valid until the court held otherwise. It is only when the court declared that the sale was invalid that the Plaintiff's cause of action arose. I therefore dismiss this ground of objection.

### **Whether the court should enter judgment on admission**

34. In its application dated 22<sup>nd</sup> of April 2022, the Plaintiffs seeks judgment for the admitted sum of Kshs. 12,500,000.00. The Defendant denies that it admitted the claim. The Plaintiff relies on order 13 rule 2 of the *Civil Procedure Rules* which provides that:

Any party may at any stage of a suit, where admission of facts has been made, either on the pleadings or otherwise, apply to the court for such judgment or order as upon such admissions as he may be entitled to, without waiting for the determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just.

35. The Plaintiff relies on the deposition of the Defendant's Legal Officer, John Wageche who confirms that the parties entered into a sale agreement for the suit property and the transaction that led to the suit property being transferred to the Plaintiff. It therefore submits that the averments not only in the deposition but also in the Defendant's own pleadings that is the Amended Defence and Counter Claim dated 6<sup>th</sup> July 2021 amount to admission and the same are unequivocal and plainly clear without any ambiguities.
36. The Plaintiff submits that since the Defendant has admitted that the Plaintiff paid the full purchase price and the court in HCCC No 659 OF 2007 delivered judgment in favour of the interested parties declaring the subject charge null and void, this court should enter judgement on admission in favour of the Plaintiff on the admitted amount.
37. The Defendant opposes the application for judgment on admission on the ground that the Plaintiff has not established that the alleged admissions the Plaintiff relies on are clear, unequivocal, plain and obvious on the face of the pleadings without requiring a magnifying glass to ascertain their meaning.
38. It points out the impugned paragraphs of the Supporting Affidavit which form the basis for the Application for Judgment on admission to be entered do not contain an unequivocal admission of facts much less an admission of the claimed purchase price of Kshs 12,500,000.00. It submits that the paragraphs are merely descriptive of the Plaintiff's complaint and a repetition of what the Defendant believes the Plaintiff's case to be and all the paragraphs of the affidavit taken together cannot amount to an admission entitling the Plaintiff to judgment.
39. Both sides cited extensive authorities as to the circumstances the court may enter judgment on admission (see *Synergy Industrial Credit Limited v Oxyplus International Limited and 2 Others* ML HCOMM No. E077 of 2021 [2021] eKLR, *Jondu Enterprises v Royal Garments Industries EPZ* ML HCOMM No. 29 of 2014 [2014] eKLR and *Datini Mercantile Limited v Kenya Commercial Bank Limited and 4 Others* ML HCOMM No. 411 of 2008 [2021] eKLR). In *Choitram v Nazari* [1984] KLR 327 Madan JA., held that, "Admissions have to be plain and obvious, as plain as a pikestaff and



clearly readable because they may result in judgment being entered. They must be obvious on the face of them without requiring a magnifying glass to ascertain their meaning.”

40. Having considered the Plaintiff’s application and the basis on which it is made, I am inclined to accept the Defendant’s argument that the Plaintiff has not made out a case for judgment on admission. As I understand, the Defendant accepts the factual narration of events but denies the Plaintiff’s claim. The Plaintiff cannot turn around in an application for judgment on admission and plead the Defendant is estopped from denying the Plaintiff’s claim yet the application for admission is not on that basis, I decline to enter judgment on admission.

#### **Whether the Defendant should be ordered to deposit**

41. The last order the Plaintiff seeks is for the court to order the Defendant to deposit Kshs. 67,167,946 within thirty days of the Order being the balance of the sum claimed in a reputable bank in the name of the Plaintiff’s Advocate and the Defendant’s Advocate on record pending the hearing of the suit.
42. I will not belabour the reasons why this prayer cannot be granted. First, the substance of the claim is for special damages which must not only be pleaded but also proved (see for example *Bangue Indosuez v D J Lowe and Company Ltd*}} MSA CA Civil Appeal No. 79 of 2002 [2006] eKLR). Since special damages must be proved, I cannot at this stage order the deposit of an amount which is contested. Second, directing a party to deposit the sum claimed in the suit amounts to execution before judgment. The court will not order a party to deposit the amount claimed unless it is shown that it intends to leave the jurisdiction of the court or otherwise intends to evade a decree that may be passed against it (see *Kuria Kanyoko t/a Amigos Bar and Restaurant v Francis Kinuthia Nderu, Helen Njeru Nderu and Andrew Kinuthia Nderu* [1982-88] KAR 1287).

#### **Conclusion and disposition**

43. Having considered the facts of the case and the applications, I allow the Defendant’s application to the extent that I strike out paragraph 8 of the Plaintiff as they seek to re-litigate the issue that have been determined in HCCC No. 659 of 2007 in regard to the sale and transfer of the suit property to the Plaintiff by the Defendant. The issue of fraud cannot be re-litigated and the fact that the sale was declared null and void is beyond inquiry by this court.
44. While I dismiss the applicant’s application for judgment on admission as prayed in the Plaintiff, I harken back to what I have stated about the judgment in HCCC No. 659 of 2007. The findings of the court in that judgment amounts to an issue estoppel. The Defendant cannot deny that the sale agreement and subsequent transfer of the suit property to the Plaintiff was annulled. Since the sale and transfer was annulled by the court, the Defendant cannot deny the transaction and the fact that it now owes the Plaintiff what it paid.
45. This court is duty bound under article 159 of the *Constitution* to exercise justice without technicalities. Further, in applying the overriding objection set out sections 1A and 1B of the *Civil Procedure Act*, the court must, in exercising its jurisdiction, facilitate just, expeditious, efficient, proportionate and affordable resolution of matters. I therefore hold that in the circumstances and in light of the determination of the court in HCCC No. 659 of 2007, no purpose will be served re-litigating whether the Plaintiff is entitled to a refund in light of annulment of the contract by the court. I am of course, conscious of the right of the Defendant to be heard before an adverse action is taken against it. I therefore call upon the Defendant to show cause why it should not pay to the Plaintiff the sum of Kshs. 12,500,000.00 and for judgment to be entered against it accordingly.
46. For the reasons I have outlined above, I now order as follows:



- a. The Defendant's Notice of Motion dated 21<sup>st</sup> March 2022 is allowed only to the extent that Paragraph 8 of the Plaintiff's Notice of Motion is hereby struck out.
- b. The Plaintiff's Notice of Motion dated 22<sup>nd</sup> April 2022 is dismissed.
- c. The Defendant is directed to show cause on a date fixed why it should not pay the Plaintiff Kshs. 12,500,000.00 and judgment entered against it.
- d. The costs of both applications are reserved.

**DATED and DELIVERED at NAIROBI this 6<sup>th</sup> day of APRIL 2023.**

**D. S. MAJANJA**

**JUDGE**

**Court Assistant: Mr M. Onyango.**

Mr Ongegu instructed by Ongegu and Associates Advocates for the Plaintiff.

Mr instructed by Ngeri, Omiti and Bush Advocates LLP for the Defendant.

