

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**COMMERCIAL CASE NO. E166 OF 2019**

YOGESH PATTNI ..... 1<sup>ST</sup> PLAINTIFF  
AZMINA PATTNI ..... 2<sup>ND</sup> PLAINTIFF  
VICTORIA COMMERCIAL BANK LIMITED ..... 3<sup>RD</sup> PLAINTIFF

- VERSUS -

MOHAMMED MADHANI &  
COMPANY ADVOCATES ..... 1<sup>ST</sup> DEFENDANT  
DIAMOND TRUST BANK KENYA LIMITED ..... 2<sup>ND</sup> DEFENDANT  
INTCON AFRICA LIMITED ..... 3<sup>RD</sup> DEFENDANT  
FLYNN LIMITED ..... 4<sup>TH</sup> DEFENDANT  
NASIM DEVJI ..... 5<sup>TH</sup> DEFENDANT  
SWAN CARRIERS LIMITED ..... 6<sup>TH</sup> DEFENDANT

**J U D G M E N T**

1. The plaintiffs commenced this suit against the 1<sup>st</sup> – 4<sup>th</sup> defendants vide a plaint dated 7/6/2019 in which they sought the following orders: -

a) *The sum of Kshs. 85,000,000/- together with interest thereon at commercial rates as follows: -*

i) *Interest on Kshs. 30,000,000/- from 12<sup>th</sup> June 2017 until payment in full and*

- ii) *Interest on Kshs. 55,000,000/- from 22<sup>nd</sup> May 2018 until payment in full.*
- b) *An order directing the defendants to return to the plaintiffs the originals of the Guarantee dated 18<sup>th</sup> July 2018 for payment of Kshs. 40,000,000/- AND the Guarantee dated 18<sup>th</sup> July 2018 for payment of Kshs. 3,000,000/- both issued by the 3<sup>rd</sup> Plaintiff in favour of the 2<sup>nd</sup> Defendant.*
- c) *A permanent injunction restraining the defendants from calling in or demanding any payment whatsoever from the Plaintiffs arising from the Guarantee dated 18<sup>th</sup> July 2018 for payment of Kshs. 40,000,000/- AND the Guarantee dated 18<sup>th</sup> July 2018 for payment of Kshs. 3,000,000/- both issued by the 3<sup>rd</sup> Plaintiff in favour of the 2<sup>nd</sup> Defendant.*
- d) *Alternatively, to b) above, a declaration that the Guarantee dated 18<sup>th</sup> July 2018 for payment of Kshs. 40,000,000/- AND the Guarantee dated 18<sup>th</sup> July 2018 for payment of Kshs. 3,000,000/-, both issued by the 3<sup>rd</sup> Plaintiff in favour of the 2<sup>nd</sup> Defendant, are both void and unenforceable for failure of consideration.*
- e) *Damages for misrepresentation together with interest thereon at commercial rates from the date of filing suit until payment in full;*
- f) *Costs of this suit on full indemnity Advocate/Client basis together with interest thereon at commercial rates from the date of filing this suit until payment in full.*
- g) *Any other remedy that this Honourable Court may deem fit to grant.*

2. The plaintiffs' case was that sometimes in **June 2017**, they entered into an arrangement with the 1<sup>st</sup> to 4<sup>th</sup> defendant("the said defendants") to discharge land parcels **Kisumu/Municipality Block/12/406, 407 & 408** (hereinafter known as "the **Kisumu Properties**") by the 2<sup>nd</sup> defendant and have them transferred to the 1<sup>st</sup> plaintiff's nominated Special Purpose Vehicle, to discharge the 2<sup>nd</sup> defendant's charge over land parcel **Kajiado/EwuasoKedong/3180** (hereinafter known as "the **Kajiado Property**") and **Apartment Number 507 in Block 5 of Nairobi Game Park Apartments on Land Reference Number 209/166786** Langata Nairobi (hereinafter known as "the **Langata Apartment**") by way of simple deposit of title and subsequent surrender those titles to the 3<sup>rd</sup> plaintiff all for a consideration of **Kshs. 128,000,000/-**.
3. That prior to the said agreement or arrangement, the 3<sup>rd</sup> defendant had charged the **Kisumu** and **Kajiado Properties** as well as the **Langata Apartment** to the 2<sup>nd</sup> defendant to secure certain banking facilities.
4. That the plaintiffs entered into the said arrangement on condition that save for the 2<sup>nd</sup> defendant's respective charges over the aforesaid properties, all the said titles were clean and free from any encumbrance and/or adverse claims as represented to them by the 1<sup>st</sup> defendant.
5. That consequently, in good faith and believing the said titles to be clean, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff paid to the 1<sup>st</sup> defendant, a total sum of **Kshs. 85,000,000/-** in two instalments of **Kshs. 30,000,000/-** and **Kshs. 55,000,000/-** on **12/6/2017** and **22/5/2018**, respectively. Thereafter, the 3<sup>rd</sup> plaintiff issued two guarantees dated **18/7/2018** in favour of the 2<sup>nd</sup> defendant for the aggregate balance of **Kshs. 43,000,000/-**.

6. Subsequently however, the plaintiffs discovered that the Kajiado Property was not clean and free from adverse claims as represented by the said defendants but that it was subject to criminal proceedings and required to be submitted in evidence to the authorities. That the mode of transfer of the Kisumu Properties as proposed and put into effect by the 1<sup>st</sup> defendant was aimed at evading payment of stamp duty and was therefore illegal.
7. That in view of the foregoing, the plaintiffs withdrew from and cancelled the arrangement with the said defendants and demanded the refund of the **Kshs. 85,000,000/-** paid to the 1<sup>st</sup> and 2<sup>nd</sup> defendant and the return of the original Guarantees for cancelation but they refused.
8. The 1<sup>st</sup> defendant filed an amended defence dated **16/6/2022** in which it contended that, the 1<sup>st</sup> plaintiff and 3<sup>rd</sup> defendant entered into an arrangement between themselves whereby, the 1<sup>st</sup> plaintiff was to partner with the 3<sup>rd</sup> defendant's construction and development projects business and the two approached him to effect their instructions.
9. That the 1<sup>st</sup> plaintiff subsequently disclosed that under the proposed joint venture with the 3<sup>rd</sup> defendant, the 1<sup>st</sup> plaintiff would be the financier while the 3<sup>rd</sup> defendant would provide the land where the proposed development would be erected. That this was the Kisumu Properties and **Kisumu/Municipality/Block/406** both of which were to be purchased by the 1<sup>st</sup> plaintiff or a nominated company for **Kshs. 125,000,000/-**.
10. That the 4<sup>th</sup> defendant was proposed as the nominated company to whom the Kisumu Properties were to be eventually transferred to. That at the time, the Kisumu Properties were registered in the name of the 3<sup>rd</sup> defendant and charged

to the 2<sup>nd</sup> defendant for facilities advanced to the 3<sup>rd</sup> defendant by the 2<sup>nd</sup> defendant and thus, the purchase of the Kisumu Properties was to off-set part of the debt owed to the 2<sup>nd</sup> defendant.

11. That he disclosed to the 1<sup>st</sup> plaintiff that he had been retained by the 2<sup>nd</sup> defendant to secure its interest in the financing arrangement between the 2<sup>nd</sup> and 3<sup>rd</sup> defendant and thus, to avoid a possibility of conflict of interest he would neither advise nor act for the plaintiffs in the proposed transaction and the plaintiffs were at liberty to seek independent legal advice on how the transaction would be structured.
12. That with the full knowledge of his limited role, the 1<sup>st</sup> plaintiff paid to the 2<sup>nd</sup> defendant an initial sum of **Kshs. 30,000,000/-** with the balance of **Kshs. 95,000,000/-** to be paid within **60 days**. That on the **22/5/2018**, a payment of **Kshs. 55,000,000/-** was received from the 1<sup>st</sup> plaintiff upon ascertaining that the Kisumu Properties were non-encumbered and he subsequently advised that as a condition for the release of the balance of **Kshs. 40,000,000/-**, the 3<sup>rd</sup> plaintiff would require additional securities as collateral and would thus release **Kshs. 43,000,000/-** instead of the originally agreed **Kshs. 40,000,000/-** to finance the 3<sup>rd</sup> defendant's working capital requirements.
13. He further claimed that the 3<sup>rd</sup> defendant proposed to offer additional securities in the form of the Langata and Kajiado Properties and that it was subsequently agreed that, an undertaking for **Kshs. 43,000,000/-** be issued to facilitate release of the titles of the Kisumu and Langata Properties. That the Kajiado Property was never part of the original arrangement between the parties and that the same was brought into the transaction at the behest of the plaintiffs despite their knowledge that the title was not free from encumbrances.

14. That on **18/7/2018**, the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs' advocates, Messrs. Ashitiva Advocates undertook that the balance of **Kshs. 40,000,000/-** was payable within 14 days of registration of the Transfer and the Charges. The 3<sup>rd</sup> plaintiff issued an interbank Guarantee of the same date in favour of the 2<sup>nd</sup> defendant for the sum of **Kshs. 40,000,000/-** in respect of the Kisumu Properties and another interbank undertaking to the 2<sup>nd</sup> defendant for **Kshs. 3,000,000/-** upon release of the Kajiado and Langata titles.
15. That the objective of the transaction was not to evade paying stamp duty but was structured in that manner for the plaintiffs' benefit with the said proposal having come from the 1<sup>st</sup> plaintiff. That subsequently, exemptions for stamp duty were issued and therefore there was no impropriety in the transaction itself.
16. That the plaintiffs conduct of unilaterally withdrawing from the agreement was unconscionable and undeserving of the equitable reliefs sought.
17. The 3<sup>rd</sup> defendant filed an amended statement of defence and counterclaim dated **8/6/2022**. It admitted that it charged the Kisumu properties to the 2<sup>nd</sup> defendant and that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff paid to the 1<sup>st</sup> defendant a total of **Kshs. 85,000,000/-**. The plaintiffs later discovered that the Kajiado Property was not clean and free from adverse claims as represented by the said defendants.
18. That the mode of transfer of the Kisumu properties as proposed and put into effect by the 1<sup>st</sup> defendant was aimed specifically at evading payment of stamp duty and was therefore illegal.

19. The 3<sup>rd</sup> defendant denied receiving **Kshs. 85,000,000/-** or any Guarantees from the plaintiffs and put them to strict proof of the same. It prayed that the plaintiffs' suit be dismissed.
20. In its Counterclaim, the 3<sup>rd</sup> defendant contended that it entered into a joint construction contract with the 6<sup>th</sup> defendant for the construction of eight (8) houses on the Kisumu properties. That it was agreed that the 6<sup>th</sup> defendant was to provide titles for the Kisumu properties and mobilize **Kshs. 30,000,000/-** which the 3<sup>rd</sup> defendant was to utilize to begin the said construction.
21. That in consideration for the completion of the construction, the 6<sup>th</sup> defendant was to transfer to it two (2) of the eight (8) houses that were to be constructed on the Kisumu properties. That the 6<sup>th</sup> defendant concealed material facts pertaining to the size of the land available for the construction and also the ability of the 1<sup>st</sup> plaintiff to complete the construction hence breaching the joint construction contract between it and the 3<sup>rd</sup> defendant.
22. That to mitigate the aforementioned breaches, the 6<sup>th</sup> defendant proposed to it to purchase the Kisumu properties including the eight (8) houses to be constructed but it declined the proposal.
23. That in further effort to mitigate its breaches under the joint construction contract, the 6<sup>th</sup> defendant, under the guidance of the 1<sup>st</sup> – 5<sup>th</sup> defendant, proposed the registration of a charge over the Kisumu properties. It accepted and an agreement for the sale was executed for the Kisumu properties for **Kshs. 130,000,000/-** with the 2<sup>nd</sup> defendant financing the sale to the tune of **Kshs. 110,000,000/-** and the balance being offset from the debt that the 6<sup>th</sup> defendant owed to it.

24. That the 1<sup>st</sup> defendant acted for both itself and the 2<sup>nd</sup> & 6<sup>th</sup> defendant in the conveyance transaction in the pre-contract and contractual negotiations and it was therefore under a fiduciary duty and obligation to exercise reasonable professional skill which it breached. That the agreement for sale of the Kisumu properties was illegal, null and void for being tainted by unconscionable bargain antics and undue influence from the joint collusion of the defendants.
25. That in advancing to it the loan of **Kshs. 110,000,000/-**, the 2<sup>nd</sup> defendant breached the lending policies from commercial banks thus not entitled to recover the said sum and interest charged thereupon.
26. That the 1<sup>st</sup>, 2<sup>nd</sup> & 5<sup>th</sup> defendant perpetrated a fraud upon it by completing a payment in excess of the sum authorized by it as legal fees to the 1<sup>st</sup> defendant and further that the said defendants fraudulently and illegally orchestrated a corrupt scheme and colluded to convert a non-performing loan to a performing loan to the benefit of the 2<sup>nd</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendant.
27. That it relied upon the unprofessional legal advice by the 1<sup>st</sup> defendant to enter into the agreement for sale of the Kisumu properties which advice occasioned it economic loss of **Kshs. 130,000,000/-**, being the loan advanced by the 2<sup>nd</sup> defendant and the money the 6<sup>th</sup> defendant owed it.
28. The 3<sup>rd</sup> defendant therefore sought the following reliefs: -
- a) ***A declaration that the loan facility provided to the 3<sup>rd</sup> Defendant/Counterclaimant is unlawful, illegal and constitutes unjust enrichment of the 2<sup>nd</sup>, 5<sup>th</sup> & 6<sup>th</sup> Defendants and illegal interference with the economic interests of the 3<sup>rd</sup> Defendant/Counterclaimant, and the 3<sup>rd</sup> Defendant/Counterclaimant is entitled to restitution intergrum.***

- b) *A declaration that the sale agreement between the 3<sup>rd</sup> Defendant/Counterclaimant and the 6<sup>th</sup> Defendant is unlawful, illegal, invalid, null and void for being tainted by undue influence and unconscionable bargain.*
- c) *A declaration that the 1<sup>st</sup> Defendant is in breach of his fiduciary duty and obligation of exercising reasonable professional skill, attention and care owed to the 3<sup>rd</sup> Defendant/Counterclaimant.*
- d) *An order for the Defendants jointly and severally relieve the 3<sup>rd</sup> Defendant/Counterclaimant of all obligations under loan reference No. 004TLAA140840001.*
- e) *An order or the Defendants jointly and severally, to make good and pay to the 3<sup>rd</sup> Defendant/Counterclaimant the sum of Kshs. 69,712,913.36 being the sums paid by the 3<sup>rd</sup> Defendant/Counterclaimant to the 2<sup>nd</sup> Defendant, in relation to the payment of the loan reference No. 004tlaa140840001.*
- f) *An order for the 2<sup>nd</sup> Defendant to release title document over the charged property back to the 3<sup>rd</sup> Defendant/Counterclaimant.*
- g) *An order of specific performance compelling the 2<sup>nd</sup> Defendant to execute a Discharge of Charge in respect of the Charge registered in its favour over the charged property.*

29. In defence to the 3<sup>rd</sup> defendant's counterclaim, the 1<sup>st</sup> defendant relied on his amended defence dated **16/6/2022**. He contended that the claim was fatally defective for noncompliance with the provisions of **section 4 (1) (a) and 28 of**

***the Limitation of Actions Act.*** That the 3<sup>rd</sup> defendant lacked the locus standi to institute the proceedings as against him for want of privity of contract.

30. That it had no instructions, express or otherwise, to act for any party other than the 2<sup>nd</sup> defendant in the creation of charges and as such, it owed no fiduciary or any duty of care to any other party other than the 2<sup>nd</sup> defendant. That it was a stranger to the 3<sup>rd</sup> defendant's allegations of undue influence, collusion, unconscionable bargain, breach and fraud.
31. The 2<sup>nd</sup> and 5<sup>th</sup> defendant filed a joint statement of defence to the 3<sup>rd</sup> defendant's counterclaim dated **10/3/2021**. They contended that they were not parties to the agreement between the 3<sup>rd</sup> and 6<sup>th</sup> defendant and were thus not bound by the terms thereof.
32. That the 5<sup>th</sup> defendant never guided the 6<sup>th</sup> defendant to have the 3<sup>rd</sup> defendant purchase the Kisumu properties through financing by the 2<sup>nd</sup> defendant. That the 3<sup>rd</sup> defendant was at all times aware of the right to retain an advocate of its choice to act for it in the transaction and it was therefore estopped from alleging unconscionable bargain and bad legal representation.
33. That they obtained all the requisite information required and carried out the necessary due diligence before advancing any facilities to the 3<sup>rd</sup> defendant. That they were strangers to the particulars of loss counterclaimed by the 3<sup>rd</sup> defendant. That the advance of a loan of **Kshs. 100 million** to the 3<sup>rd</sup> defendant by the 2<sup>nd</sup> defendant could not be deemed to have occasioned economic prejudice.
34. That the Counterclaim was statute barred by the mandatory terms of ***section 4 (1) (a) and section 28 of the Limitation of Actions Act.***

35. The 6<sup>th</sup> defendant filed a statement of defence dated **23/3/2022** to the 3<sup>rd</sup> defendant's Counterclaim. It denied the allegations therein and contended that the counterclaim was statute barred under **section 4 (1) (a) and 28 of the Limitation of Actions Act** as the purported cause of action against it related to events that occurred in 2013.
36. It stated that it executed in **2013**, an agreement for sale of the Kisumu properties to the 3<sup>rd</sup> defendant for a total sale price of **Kshs. 130,000,000/-**. The 3<sup>rd</sup> defendant only paid **Kshs. 110,000,000/-** with **Kshs. 10,000,000/-** being offset from an earlier debt. There was a balance of **Kshs. 10,000,000/-** that the 3<sup>rd</sup> defendant had not settled despite the 6<sup>th</sup> defendant performing its part of the agreement and transferring the said properties.
37. At the trial, the plaintiff called one witness, **Yogesh Pattni** who testified as **Pw1**. He adopted his witness statement dated **7/6/2019** as his evidence in chief in which he reiterated the averments in the plaint. He produced the bundle of documents dated **10/5/2022** as **PExh1**.
38. In cross-examination, he stated that he was informed by the 6<sup>th</sup> defendant in **October, 2028** that there was a restrictive encumbrance on the Kisumu properties. That it is the 1<sup>st</sup> defendant who suggested the 4<sup>th</sup> defendant to act as the Special Purpose Vehicle and in which he, the plaintiff was made a director. That following the incorporation of the 4<sup>th</sup> defendant, the properties were transferred to it.
39. That prior to the issuance of the Guarantees by the 3<sup>rd</sup> plaintiff, the 1<sup>st</sup> defendant effected transfers for him and the 2<sup>nd</sup> plaintiff to become shareholders

in the 4<sup>th</sup> defendant. That he did not instruct the firm of **Ashitiva & Company Advocates** but rather the same was done by the 3<sup>rd</sup> plaintiff.

40. That the plaintiffs had an issue with the Langata and Kajiado properties and that had a search been carried out, the defect in the title for the Kajiado property could have been detected. That it was the firm of **Ashitiva Advocates** who pointed out the said defect.
41. In re-examination, he clarified that the firm of **Ashitiva Advocates** never acted for him but for the 3<sup>rd</sup> plaintiff. That the Kisumu properties had been transferred to the 4<sup>th</sup> defendant wherein the 3<sup>rd</sup> defendant was the majority shareholder.
42. On his part, the 1<sup>st</sup> defendant called two witnesses in support of its defence against the plaintiffs' case as well as the Counterclaim of the 3<sup>rd</sup> defendant. **D<sub>1</sub>W<sub>1</sub>, Mohamed Ali Kasamali Madhani** adopted his statement dated **29/3/2022** as his evidence in chief and produced the 1<sup>st</sup> defendant's list and bundle of documents of even date as **DExh1**. The evidence mirrored its defence.
43. In cross-examination, he told the Court that the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff approached him and informed him that they wanted to enter into a construction project with the 3<sup>rd</sup> defendant. That the transaction was to have a transfer of properties to a subsidiary of the 3<sup>rd</sup> defendant free of stamp duty and that is the model he took which was not illegal as he applied for stamp duty exemption and got the same. That the parties were free to carry out independent searches on the properties.

44. That to facilitate the transfer and discharge of the properties, there were undertakings given to pay the sum of **Kshs. 43,000,000/-**. That however, despite the properties being transferred and charged to Victoria Commercial Bank, the Bank did not honour its undertaking to pay the sum of **Kshs. 43,000,000/-**.
45. That the Langata property was not part of the initial purchase of the Kisumu properties for **Kshs. 125,000,000/-**. That he had known the 1<sup>st</sup> plaintiff as a friend for a long time prior to the transaction. That when the 1<sup>st</sup> plaintiff approached him, he advised him to open a Special Purpose Vehicle (SPV) and did not charge any fees. That his interest was to ensure that the 2<sup>nd</sup> defendant was paid.
46. That he offered the 1<sup>st</sup> plaintiff the 4<sup>th</sup> defendant, which was a shell company he had incorporated and whose shareholders were himself and his wife. That he and his wife subsequently transferred the shares in that company to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff and the 3<sup>rd</sup> defendant.
47. That he was not aware of the caution on the Kajiado property prior to being informed of the same by **Ashitiva Advocates**. That his representation was only limited role limited to undertaking discharges on behalf of the 2<sup>nd</sup> defendant and further that he advised on how the tax exemption was to be obtained.
48. In re-examination, **Mr. Madhani** stated that the 1<sup>st</sup> plaintiff must have been aware of the restrictions over the Kisumu properties prior to giving the Guarantees and that as at the date of the Guarantees, the restrictions did not exist having been lifted on the **7/3/2018**.

49. In cross-examination on the 3<sup>rd</sup> defendant's Counterclaim, **Mr. Madhani** testified that the 2<sup>nd</sup> defendant instructed him to prepare both the charge and transfer. That he did not do any due diligence as the instructions came from the bank and thus there was no duty on his part to do it. He denied unduly influencing the 5<sup>th</sup> defendant to take the facility.
50. **D<sub>1</sub>W<sub>2</sub> Nelson Ihachi Ashitiva** an advocate at Ashitiva Advocates LLP testified that the plaintiffs were his clients and that the 1<sup>st</sup> plaintiff was the C.E.O of the 3<sup>rd</sup> plaintiff. That his firm represented the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff as directors of the 3<sup>rd</sup> defendant in the transaction subject of this suit.
51. That his firm gave an undertaking of **Kshs. 40million** on the **18/1/2018** but that this undertaking did not cover the Langata and Kajiado properties. That the 3<sup>rd</sup> plaintiff did not remit the **Kshs. 40 million**. That the transaction has not been completed as the **Kshs. 40 million** has not been paid.
52. That after discovering that the Kajiado property was a subject in a criminal case, his firm returned the title to the 1<sup>st</sup> defendant. That it was agreed between the parties that the matter be held in abeyance. Subsequently however, the 1<sup>st</sup> defendant recalled the titles to the Langata and Kajiado properties and as such the guarantee for **Kshs. 3 million** was not payable.
53. The 2<sup>nd</sup> Defendant called one witness in support of its case. **D<sub>2</sub>W<sub>1</sub>, Francis Kariuki** adopted his witness statement dated **1/4/2022** as his evidence in chief and produced the bundle of documents dated **31/8/2021, 1/4/2022** and **1/7/2022** as **D2Exh1, 2 & 3**, respectively.
54. He testified that the Guarantees issued by the plaintiffs were issued whilst they were well aware of the issues involving the Kajiado property. That a

search over the Kisumu properties by the firm of **Ashitiva Advocates** showed that a restriction had been placed over the said properties.

55. That the securities were registered in favour of the 4<sup>th</sup> defendant and charged in favour of the 2<sup>nd</sup> defendant. That the intention of the transaction was the purchase of the Kisumu properties only. That **D<sub>1</sub>W<sub>1</sub>** only acted for the 2<sup>nd</sup> defendant in handling documents. That the bank undertook due diligence before loaning the 3<sup>rd</sup> defendant **Kshs. 110,000,000/-**.

56. The 3<sup>rd</sup> defendant called two witness in support of its case. **D<sub>3</sub>W<sub>1</sub>, Harish Patel** adopted his amended witness statement dated **29/6/2022** as his evidence in chief and produced the 3<sup>rd</sup> defendant's bundle and supplementary bundle of documents of the even date as **D<sub>3</sub>Exh1** and **2**, respectively. He was a director of the 3<sup>rd</sup> defendant.

57. He first met the 6<sup>th</sup> defendant in 2012 and they got into a project where he was to pump in **Kshs. 70 million** and the 6<sup>th</sup> defendant **Kshs. 30 million**. However, they fell into financial problem in 2013 by which time, **Mr. Madhani (D<sub>1</sub>W<sub>1</sub>)** was not yet in the picture.

58. That there was an encroachment on the Kisumu properties but the 6<sup>th</sup> defendant kept telling him that everything was alright. That he did not do any due diligence as being a contractor, he followed the 6<sup>th</sup> defendant's instructions. That by the time he went to see **D<sub>1</sub>W<sub>1</sub>**, he had finalized with the 6<sup>th</sup> defendant on the project to be undertaken on the Kisumu properties.

59. That he had no option but to purchase the Kisumu properties as he had already pumped money into the project. For that reason, he had no option but to do whatever the 6<sup>th</sup> defendant proposed. That **D<sub>1</sub>W<sub>1</sub>** came into the picture when

they approached the 2<sup>nd</sup> defendant where they were informed he, **D<sub>1</sub>W<sub>1</sub>**, was the bank's lawyer.

60. He testified that he met the 1<sup>st</sup> plaintiff in 2018 and introduced him to the Kisumu properties. That the 1<sup>st</sup> plaintiff pumped in **Kshs. 127 – 128 million** but he, 1<sup>st</sup> plaintiff did not visit the properties but rather relied on the documents produced. That he and the 1<sup>st</sup> plaintiff became joint partners in the Kisumu properties.
61. That **D<sub>1</sub>W<sub>1</sub>** was professionally negligent in his dealings and thus accused him of fraud. That both **D<sub>1</sub>W<sub>1</sub>** and the 2<sup>nd</sup> defendant were supposed to undertake due diligence. That the 2<sup>nd</sup> defendant knew about the encroachment on the Kisumu properties. That he did not have the financial ability for the bank to advance a loan of **Kshs. 100 million**. That the Kajiado property was registered in his wife's name however there was no agreement between his wife and the 3<sup>rd</sup> plaintiff over the said property.
62. In re-examination, **D<sub>3</sub>W<sub>1</sub>** told the Court that he met **Mr. Madhani** prior to entering into agreement with the 6<sup>th</sup> defendant but that he realized that there was encroachment on the Kisumu properties after purchasing them from the 6<sup>th</sup> defendant.
63. The 6<sup>th</sup> defendant called one witness in support of its case. **D<sub>6</sub>W<sub>1</sub>, Kiran Shah**. He adopted his witness statement dated **22/4/2022** as his evidence in chief and produced the 6<sup>th</sup> defendant's bundle of documents dated **31/3/2022** as **D<sub>6</sub>Exh1**. It was his testimony that as at **13/3/2013**, the 6<sup>th</sup> defendant knew of the encroachment on the Kisumu properties and that they informed the 3<sup>rd</sup> defendant of the same.

64. That it bought the Kisumu properties on or about 2011 or 2012 but that at the time they did not know of the encroachment until after the purchase though they did not do any survey prior to the purchase.
65. That as at **23/10/2018**, the 6<sup>th</sup> defendant still maintained its claim on the Kisumu properties and that the caveat was removed without the consent of the 6<sup>th</sup> defendant. He admitted that by the letter dated **19/12/2018**, the 6<sup>th</sup> Defendant stated that it had no claim over titles of the Kisumu properties. It was his testimony that he did not know if **D<sub>1</sub>W<sub>1</sub>** was the lawyer when all these dealings were taking place.
66. In re-examination, **D6W1** testified that the restriction over the Kisumu properties was because the 3<sup>rd</sup> defendant had not fully paid the purchase price. That as at the time of lifting the restriction in 2018, the 6<sup>th</sup> defendant had sold the properties to the 3<sup>rd</sup> defendant.
67. The 4<sup>th</sup> defendant did not file any pleadings nor did it participate in these proceedings.
68. The Court has carefully considered the pleadings, the evidence and the parties' respective submissions on record and the authorities relied on. The issues for the determinations are: -
- i) Whether the arrangement between the plaintiffs and the 1<sup>st</sup> to 4<sup>th</sup> defendant is enforceable?***
  - ii) Whether the plaintiffs were entitled to repudiate that arrangement?***
  - iii) Whether the 3<sup>rd</sup> defendant's Counterclaim is sustainable;***
  - iv) What reliefs, if any should be granted; and***

v) **Costs.**

69. The general rule is that, he who alleges must prove. **Section 107(1) of the Evidence Act** provides that: -

*“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”*

70. In Palace Investment Ltd v Geoffrey Kariuki Mwenda & Another [2015] eKLR, the Court stated that: -

*“The burden of proof is placed upon the appellant and is to be discharged on a balance of probabilities. Denning J. in Miller –vs Minister of Pensions [1947] 2 ALL ER 372 discussing the burden of proof had this to say: - “That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say: ‘We think it more probable than not’, the burden is discharged, but, if the probabilities are equal, it is not. Thus, proof on a balance or preponderance of probabilities means a win, however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties’ explanations are equally (un)convincing, the party bearing the burden of proof will lose, because the requisite standard will not have been attained.”*

71. On the first issue, the plaintiffs’ case was that, in or about 2017, they entered into a transaction by which the 3<sup>rd</sup> plaintiff was to take over the liabilities of the

3<sup>rd</sup> defendant with the 2<sup>nd</sup> defendant. That the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs were to purchase from the 3<sup>rd</sup> defendant certain properties that had been charged by the 2<sup>nd</sup> defendant for a consideration of **Kshs.128,000,000/-**. They paid a total sum of **Kshs.85,000,000/-** to the 1<sup>st</sup> and 2<sup>nd</sup> defendant but later realized that the subject properties were not clean. The Kisumu properties had restrictions and had an encroachment whilst the Kajiado property had a criminal angle to it. That they were entitled to rescind the transactions and have the guarantees issued for **Kshs.40m and 3m**, respectively cancelled.

72. The defendants denied the claim in total and contended that, the transaction was clean. The transaction was for the transfer of the Kisumu properties to the 4<sup>th</sup> defendant and that the guarantees were given with the full knowledge of the imperfections in the titles. That the restrictions in the Kisumu property had been removed and the titles transferred to the 4<sup>th</sup> defendant.

73. At the center of all this is the 1<sup>st</sup> defendant. He is an advocate of the High Court of long standing. He told the Court that he was involved all the way from 2012 to when the arrangement the subject of the suit was entered into. I think that it would be prudent to set out the chain of events before determining the issues set out above.

74. It would seem that the 6<sup>th</sup> defendant was the owner of the Kisumu properties which it had charged to the 2<sup>nd</sup> defendant for a substantial amount. It was not able to service the same and in order to bail itself out, it got into an arrangement some reason, it was agreed that the Kisumu properties be transferred to the 3<sup>rd</sup> defendant for **Kshs.130,000,000/-**.

75. Since the 6<sup>th</sup> defendant had no money, the 2<sup>nd</sup> defendant which held a charge over the properties ‘advanced’ the 3<sup>rd</sup> defendant **Kshs.110,000,000/-, Kshs.10m** was offset with a debt the 3<sup>rd</sup> 4<sup>th</sup> defendant had with the 3<sup>rd</sup> defendant. A sum of **Kshs.10m** remained unpaid which led to the 6<sup>th</sup> defendant to lodge a restriction on the properties in 2014 which would later raise issues.
76. The 3<sup>rd</sup> defendant was unable to service the facilities advanced for the acquisition of the Kisumu properties. It therefore entered into an arrangement for the sale and purchase of the Kisumu properties by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff who would thereon carry out some project. The testimony of **D1W1** was that he advised 1<sup>st</sup> plaintiff how to perfect the intention. That advised him to establish an SPV to hold the properties.
77. According to **D1W1**, the 1<sup>st</sup> plaintiff had been his friend and he had been advising him for over 25 years on personal matters. That in this transaction, although he advised him how to perfect the transaction and evade payment of stamp duty, by him transferring to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff the 4<sup>th</sup> defendant which he and his wife owned, his prime interest was to help the 2<sup>nd</sup> defendant recover its outlay.
78. The testimony of **Pw1** was firm and consistent. He and his wife entered into the arrangement to purchase and acquire interest in the Kisumu properties provided that they were clean. That although they paid a total sum of **Kshs.85m** out of the **Kshs.125m**, they later found that the title was not clean and there was an encroachment.
79. It is not disputed that as at the time the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs paid the **Kshs.85m** to the 1<sup>st</sup> and 2<sup>nd</sup> defendant, there was a restriction by the 6<sup>th</sup>

defendant who is still claiming the balance of its **Kshs.10m** from the 3<sup>rd</sup> defendant on the sale of the Kisumu properties. They only came to discover about it in October, 2018. There is nothing on record to show that the arrangement was otherwise as contended by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs.

80. There was no sale agreement that was executed by the parties to express the arrangement as entered. The overall intention was the sale by the 3<sup>rd</sup> defendant to and the purchase by the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff of the Kisumu properties and subsequently, the Lang'ata property.
81. The question is, could the transaction be enforceable without a sale agreement in respect thereof? This Court does not think so. The entire transaction was for the sale and purchase of the properties in question. It is clear that it was intended that the balance of **Kshs.95m**, after the initial payment of **Kshs.30m** was paid, was to be paid within 60days. Nothing was paid from June 2017 until 2018.
82. The plaintiffs' contention was that, the transactions between them and the defendants were unenforceable due to non-compliance with **section 3 (3) of the Law of Contracts**. The arrangement in this suit was purely an intended sale and purchase of the subject properties. There was no sale agreement or memorandum evidencing this fact. This was contrary to the provisions of **section 3(3) of the Law of Contract Act** which provides that contracts for disposition of interest in land shall be in writing. The above Section is replicated in almost identical terms in **section 38 of the Land Act, 2012**. To the extent that the impugned arrangement was contrary to the said provision of the law, the same is unenforceable.

83. It was contended that the fact that payment had been made and received, **Kshs.85m** and transfer effected, there was a contract in terms of the law. This Court does not think so. The said provision of **section 3(3) of the Contract Act** is clear as to its spirit and intent. It does not call for double guessing or double interpretation. To the extent that there was an attempt to pass interest in the Kisumu properties and subsequently the Lang'ata and Kajiado property in contravention of the said section, the arrangement was illegal and unenforceable. A contract for disposition of an interest in land must be evidenced by a document in writing setting out all the terms and conditions appurtenant thereto. See **Charles Keiga Butichi vs. Albert Adams Yugi [2011] ekr.**

84. There was the second limb of the plaintiff's claim. That the transaction was illegal as it was designed by the 1<sup>st</sup> defendant to evade payment of stamp duty. The evidence on record is clear. Although **D1W1** contended that he never acted for any of the plaintiffs, it is crystal clear that, he admitted that he had known the 1<sup>st</sup> plaintiff for over 25 years and that he had acted for him in his private matters. That during the setting of the subject arrangement, he is the one who advised the 1<sup>st</sup> plaintiff that an SPV be formed to hold the properties so as to avoid paying stamp duty. That it is him who transferred to him the 4<sup>th</sup> defendant. That the arrangement was intended to avoid the payment of stamp duty.

85. When being cross-examined by **Mr. Savia**, **D1W1** told the Court: -

***“The arrangement of transferring the properties to a subsidiary was to have tax convenience. The process was long: ie Get IntCom hold 99% shareholding in Flynn Ltd. Then the sale of transfer of***

*properties to Flynn then have IntCom transfer all its shares to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiff.*

*I see pg.38 of PExh1. This is Form D, a Certificate of Transfer. It is 100/- each. Stamp Duty would be paid on this consideration. It is a transfer of shares. ....*

*I did not transfer the properties to Flynn Ltd because we wanted to avoid stamp duty.*

*...”*

86. The witness admitted that he structured the arrangement as a corporate structuring of the 3<sup>rd</sup> defendant yet it was a sale and purchase of land transaction. To the extent that the arrangement was designed and executed with the intention of defeating statutory provisions, payment of taxes which is a constitutional imperative for every individual and entity, the same was illegal and the Court cannot be made an instrument of enforcing an illegality. **See Scott vs. Brown [1892] 2 QBD 724.**

87. I saw the **D1W1 and D1W2** testify. Even though they are advocates of long standing, the Court did not believe them. They came out as witnesses who were not prepared to tell the truth but to cover the tracks that had been muddied in a well calculated move to not only circumvent the law but extend to the plaintiffs the shot end of the stick.

88. While it was clear that by 29/11/2018, the firm of **Desai Savia & Pallan Advocates** had written to the 1<sup>st</sup> defendant cancelling not only the arrangement but also the Guarantees and demanded the refund of the **Kshs.85m** paid to the

1<sup>st</sup> and 2<sup>nd</sup> defendant, **D1W1 and D1W2** continued to correspond between themselves on the supposed transaction. Further, although their respective Firms had indicated that the issue of the Lang'ata and Kajiado properties be held in abeyance, yet the discharge of 'the charges and Charges over the Kisumu properties were effected on **17/4/2019**. There was all effort to pass over the un-performing facilities over the said properties from the 2<sup>nd</sup> defendant to the 3<sup>rd</sup> plaintiff. When **D1W2** testified, he could not explain this fact.

89. Accordingly, the first issue is answered in the negative, the arrangement between the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs and the 1<sup>st</sup> to 4<sup>th</sup> defendant is unenforceable for illegality and being contrary to law.

90. The second issue is whether the plaintiffs are entitled to repudiate the arrangement between them and the 1<sup>st</sup> to 4<sup>th</sup> defendant. The plaintiffs' contention was that they had entered into the arrangement provided that it was clean. That it turned out that the titles were clean. The defendant's contention was otherwise. That the guarantees were given while knowing that there were restrictions in the Kisumu properties and that the Kajiado property was not in the picture.

91. Firstly, as already held, there was no document that set out all the terms and conditions of the arrangement. It is common sense that no party would purchase a property that is not clean. That was the plaintiffs' contention and it makes sense. While the restriction in the Kisumu properties may have been removed in March, 2018, the encroachment to the said properties remain to-date. It was the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs' contention that, with the encroachment, the Kisumu properties were no longer fit for the purpose for which they were being procured.

92. There was no evidence that the plaintiffs were advised or knew of the encroachment before the payment of the **Kshs.85m** or issuance of the two guarantees. It was clear that with the aforesaid encroachment in the Kisumu properties, that is not what the plaintiffs originally bargained for. Further, with the state of the Kajiado property's uncertain status, the guarantees cannot stand.

93. The guarantees were being issued and accepted on the grounds that the properties were being sold and purchased (see their wording) in a clean and uncontested state. There was nothing about internal corporate re-organization. To the extent that that was not the case, sale and purchase, they are unenforceable. The one for **Kshs.40m** read: -

***“We understand that the firm, Mohamed Madhani & Co. Advocates (“MMC”) acts for the vendor in the aforesaid sale and purchase”.***

94. All the above is clear that even if this Court was to consider the arrangement between the Plaintiffs and the 3<sup>rd</sup> defendant to have been valid, it is clear that there was nothing that was offered to and obtained by the plaintiffs for the **Kshs. 85,000,000/-** paid as well as the Guarantees given on **18/7/2018** for payment of **Kshs. 40,000,000/- and Kshs. 3,000,000/-**, respectively.

95. Accordingly, this Court finds that the plaintiffs proved their case against the 1<sup>st</sup> to 4<sup>th</sup> defendant on a balance of probabilities.

96. Turning to the 3<sup>rd</sup> defendant's Counterclaim, it was the 3<sup>rd</sup> defendant's case that its claim encompassed a breach of fiduciary duty, unprofessional conduct and advise by the 1<sup>st</sup> defendant, unconscionable bargain and predatory practices by the 2<sup>nd</sup> & 5<sup>th</sup> defendant that led it to incur loss and damage and that the 6<sup>th</sup> defendant was liable to complete the contract entered into.

97. In their defence to the Counterclaim, the 1<sup>st</sup>, 2<sup>nd</sup> & 5<sup>th</sup> and 6<sup>th</sup> defendant all contended that the 3<sup>rd</sup> defendant's Counterclaim was fatally defective for noncompliance with the provisions of **section 4 (1) (a) and 28 of the Limitation of Actions Act** and as such the 3<sup>rd</sup> defendant lacked the locus standi to institute the proceedings.
98. **Section 4(1)(a) of Kenya's Limitation of Actions Act** establishes a six-year limitation period for actions founded on contract, meaning a claim under a contract must be filed within six years of when the right to sue accrued. **Section 28** of the same Act addresses extensions of the limitation period in cases of fraud or mistake, preventing time from running in such situations until the plaintiff discovers the fraud or mistake, as long as the plaintiff could not have reasonably discovered it earlier.
99. In determining whether the Counterclaim filed by the 3<sup>rd</sup> defendant was time barred, it is not in dispute that the cause of action arose sometime in the year **2013** when the 3<sup>rd</sup> defendant and 6<sup>th</sup> defendant entered into an agreement for sale of the Kisumu properties for a total sale price of **Kshs. 130,000,000/-**.
100. In the circumstances, the said action ought to have been filed latest by the year 2019. However, in this case the Counterclaim was filed on the **17/1/2021** and amended on the **8/6/2022**.
101. The Court of Appeal in the case of **Divecon Limited v Samani (1995 – 1998) 1EA P 48** and in **Josephat Ndirangu Vs Nenkel Chemicals (EA) Limited [2013] eKLR** was categorical that the limitation period is never extended in matters based on contract.

102. Being guided by the above decisions of the Court of Appeal which are binding on this Court, and in view of the express provisions **of Sections 4(1) and 28 of the Limitation of Actions Act**, this court has no jurisdiction to entertain the 3<sup>rd</sup> defendant's Counterclaim dated **17/1/2021**.

103. The upshot of the above is that the Court find no merit in the 3<sup>rd</sup> defendant's Counterclaim and proceeds to strike it out.

104. In the premises, what reliefs should issue? The plaintiffs sought a raft of reliefs in their Plaint. The prayer for damages and injunction are unmerited. The Court finds that the plaintiffs proved their case on a balance of probabilities whereas the 3<sup>rd</sup> defendant's Counterclaim failed on account of want of jurisdiction.

105. Consequently, judgment is entered for the plaintiffs against the 1<sup>st</sup> to 3<sup>rd</sup> defendant as follows: -

a) ***The sum of Kshs. 85,000,000/- together with interest thereon at commercial rates as follows: -***

i. ***Interest on Kshs. 30,000,000 from 12<sup>th</sup> June 2017 until payment in full and***

ii. ***Interest on Kshs. 55,000,000 from 22<sup>nd</sup> May 2018 until payment in full.***

b) ***A declaration that the Guarantee dated 18<sup>th</sup> July 2018 for payment of Kshs. 40,000,000/- AND the Guarantee dated 18<sup>th</sup> July 2018 for payment of Kshs. 3,000,000/-, both issued by the 3<sup>rd</sup> Plaintiff in favour of the 2<sup>nd</sup> Defendant, are both void and unenforceable for failure of consideration.***

c) *Costs for the Plaintiffs' suit against the 1<sup>st</sup> – 3<sup>rd</sup> defendants.*

d) *The Counterclaim of the 3<sup>rd</sup> defendant is struck out with costs to the 4<sup>th</sup> – 6<sup>th</sup> defendant.*

It is so decreed.

**DATED** and **DELIVERED** at Kisumu this 3<sup>rd</sup> day of October, 2025.

**A. MABEYA, FCI Arb  
JUDGE**