REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 248 OF 2008

TELKOM KENYA LIMITED……

PLAINTIFF

- VERSUS -

MUNICIPAL COUNCIL OF MOMBASA……DEFENDANT

JUDGMENT

I. Preliminaries

1. The Judgment of this Honourable Court pertains to a civil suit instituted through a Plaint dated 17th September, 2008. It was filed on 19th September, 2008 by *Telkom Kenya Limited,* the Plaintiff herein. The Plaintiff made a claim against the *Municipal Council of Mombasa (now defunct)* the Defendants herein.
2. Upon service of the pleading and summons to enter appearance, the Defendant filed their Statement of Defence dated 15th May, 2008.
3. It is instructive to note that for awhile, the parties were engaged in an out of Court over this matter. Being in tandem to the

Judiciary STAJ policy and Alternative Judicial System (AJS) anchored in the provision of Article 159 (2) (c) of the Constitution of Kenya, 2010 and Section 20 (1) and (2) of the Environment & Land Court Act, No. 19 of 2011, the Court encouraged the parties. Unfortunately, the initiative became a cropper and thus what necessitated the delivery of this Judgement albeit slightly late.

II. Description of the Parties in the suit

4. The Plaintiff was described as a duly incorporated Limited Liability Company, incorporated under the provision of the Companies Act, Cap. 486. It carried on business at Nairobi and elsewhere in the Republic of Kenya while the Defendant was described as the then a Municipality established under Section of 12 (3) of the Local Government Act (Chapter 265 Laws of Kenya). It was now defunct pursuant to the promulgation of the Constitution of Kenya, 2010.

III. Court directions before the hearing

5. Nonetheless, on 7th April, 2016, the Honourable Court fixed the hearing dated on 14th December, 2016 with the parties having fully complied on the provisions of Order 11 of the Civil

Procedure Rules 2010. Indeed, the matter proceeded for hearing on 14th December, 2016 by way of adducing ***"Viva Voce"*** evidence with the Plaintiff's witnesses testifying in Court whereby they closed their case. However, it is imperative to note that the Defendant never called any witness (ese) to support their case.

IV. The Plaintiff's case

6. From the filed pleadings, at all material times to this suit, the Plaintiff had been the registered proprietor of the property known as Title No. Mombasa/Block/XXI/430 situated at Mombasa and otherwise known as Mombasa Telephone House ("Hereinafter referred to as "The Suit Property").
7. The Plaintiff stated that the suit property, amongst other properties, had previously been owned by Kenya Posts and Telecommunications Corporation – a State Corporation (now defunct). Upon the split of the said defunct Corporation, the property was vested in the Plaintiff vide Legal Notice Number 59 of 5th November, 1999.
8. The Plaintiff further stated that in the year 1999 it had requested the Defendant to provide a detailed statement of the then

outstanding rates for all the properties vested in the Plaintiff, including the suit property herein and situated within the Defendant's ratable area. The Defendant duly complied and forwarded to the Plaintiff a schedule delineating the contributions made by the Plaintiff's predecessor in lieu of rates for the period between the years 1996 and 1999 and the then outstanding amount payable.

9. The Plaintiff stated that upon receipt of the said statement it had duly settled the delineated outstanding sum of Kenya Shillings Two Million Two Eighty-Two Thousand Two Eighty (Kshs. 2,282,280/=), which sum was duly acknowledged by the Defendant. The Defendant issued receipt number 019034 and, vide a letter dated 2nd December, 1999, further acknowledged receipt of the said sum and confirmed that the claim had been fully settled.

10. The Plaintiff stated that it had continued to dutifully and promptly remit to the Defendant the annual rates for the subsequent years for the suit property up to and including the rates payments for the year 2008 amounting to a sum of Kenya

Shillings Seven Seventy Five Thousand One Hundred and Ten Hundred (Kshs. 775,110/-).

11. The Plaintiff further stated that prior to making the rates payments for the year 2008 aforesaid, the Defendant had, at the Plaintiff's request, issued to the Plaintiff an invoice confirming that all the previous rates for the years between the years 1996 and 2007 had been duly paid.
12. On or about August 2008 the Plaintiff had sought the Defendant's approval for its proposed building plan for the renovation of its customer centre erected on the suit property. The Plaintiff stated that the Defendant, in response, had written to the Plaintiff a letter dated 21st August, 2008 in which it demanded payment of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and One cent (Kshs. 40,050,891.01) purportedly outstanding on account of rates levied on the Plaintiff's suit property.
13. The Plaintiff averred that the Defendant's said demand had been shocking and surprising, as the records and documents tendered by the Defendant clearly confirmed that the Plaintiff had no outstanding rates, including any interest and/or penalties, as the

same had been fully paid. Pursuant to the said demand, the Defendant had further caused a publication in the local dailies Daily Newspapers in the same month purportedly demanding from the Plaintiff the said sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and One cent (Kshs. 40,050,891.01/=) and notifying of its intention to commence recovery proceedings.

14. The Plaintiff stated that it had immediately disputed the sum demanded by the Defendant as not due and owing. Pursuant to a meeting between the Plaintiff's and Defendant's respective representatives, the Defendant had given the Plaintiff approval to proceed with construction works at the suit premises pending resolution of the dispute.

15. The Plaintiff further stated that its representatives had held a further meeting with the Defendant's representatives on 11th September, 2008, but no resolution had been reached. The Defendant reiterated its demand for payment of the Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and One cent (Kshs. 40,050,891.01/=) and, on the same date, wrote a letter to the Permanent Secretary in the Office of the

Deputy Prime Minister and Minister for Local Government, copied to the Plaintiff, purporting that the said sum was due and outstanding and further purporting to request the Ministry for a waiver of half of the said sum while demanding payment of a sum of Kenya Shillings Thirteen Million One Hundred and Eleven Thousand Seven Eighty Three Hundred and Seventy Three cents (Kshs. 13,111,783.73/=) from the Plaintiff.

16. The Plaintiff averred and maintained that it had not owed the Defendant the said sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and One cent (Kshs. 40,050,891.01) or at all, and that the Defendant's purported demand and/or request for a waiver of half of the said sum and subsequent demand of a sum of Kenya Shillings Thirteen Million One Hundred and Eleven Hundred Seven Eighty Three Hundred and Seventy Three cents (Kshs. 13,111,783.73/=) had been fraudulent, amounted to false representation, and had been illegal, null and void ab initio.

17. The Plaintiff relied on the following particulars of Defendant's, its servants and/ or agents acts of fraud and/ or illegality and/ or false representation:-

a. Demanding payment a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and One cent (Kshs. 40,050,891.01) from the Plaintiff whilst knowing that the same was not due and owing from the Plaintiff or at all.
b. Falsely causing a notice to be published in the local newspapers purportedly demanding payment of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and One cent (Kshs. 40,050,891.01/=) from the Plaintiff on the account of the alleged rates whilst knowing that no rates was not due and/or owing from the Plaintiff.
c. Falsely and fraudulently causing a letter to be written to the office of the Deputy Prime Minister and Minister for Local Government purporting that the Plaintiff was indebted to the defendant in the sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and One cent (Kshs. 40,050,891.01/=) and/or that the Plaintiff had requested for a waiver of the sum demanded and/or part thereof whilst knowing that the facts were not true.
d. Falsely representing that the Plaintiff had admitted owing to the defendant. The said sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and One cent (Kshs. 40,050,891.01/-).
e. Fraudulently demanding from the Plaintiff a sum of Kenya Shillings Forty Million Fifty Thousand Eight Ninety One Hundred and One cent (Kshs.40,050,891.01/=).

18. The Plaintiff had averred and maintained that it had not owed the Defendant the sum demanded or at all, and consequently the Defendant had been estopped in fact and in law from demanding the said sum and/or commencing any recovery proceedings against the Plaintiff in lieu thereof.
19. The Plaintiff had further averred that the Defendant, having led the Plaintiff to believe that the sum demanded in the year 1999 had been the correct outstanding sum and the Plaintiff having acted on the demand and made payments, was estopped in law and in fact from reneging on its promise and actions.
20. The Plaintiff had further averred that even if the Defendant had established that certain sums had been due and owing, the same had not been recoverable in law as the claim had been time-barred.
21. The Plaintiff stated that the Defendant had further caused a publication in one of the local dailies – ***"The Standard Newspaper"*** the edition of 15th September, 2008 purportedly instructing an Auctioneer to sell by Public Auction some of the properties of the owners against whom the Defendant had demanded payment of

rates in the advertisement. Within that publication the Plaintiff had been indicated as one of the rate defaulters.

22. The Plaintiff had averred and maintained that the Defendant had intended to unlawfully and illegally commence recovery proceedings in the same manner against the Plaintiff for recovery of the disputed sum and/or a sum which had not been owing, and which action would have caused the Plaintiff irreparable harm and damages as the Plaintiff had already commenced construction works on its premises and such action would have interfered with the same.

23. The Plaintiff was apprehensive that unless restrained by an order of the court, the Defendant may unilaterally cease construction works on the said premises and further commence recovery proceedings to sale the premises and which action would lead to unquantifiable loss of business by the Plaintiff.

24. In the premises the Plaintiff's claim against the Defendant was for declaratory orders that the Plaintiff did not owe the Defendant any outstanding rates for the period between the years 1996 to 2008 accruing from the Plaintiff's suit property aforesaid and/or any other Plaintiff's property situated within the

Defendant's ratable area, and that the Plaintiff never owed the Defendant the sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and One cent (Kshs. 40,050,891.01/=) or all at and that the purported demand for the said sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and One cent (Kshs. 40,050,891.01/=) on account of rates for the years between the years 1996 to 2008 made against the Plaintiff was fraudulent, illegal, null and void ab initio.

25. The Plaintiff further sought an order of permanent injunction restraining the Defendant, its servants and/or agents from demanding the said sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and One cent (Kshs. 40,050,891.01/-) from the Plaintiff and/or commencing any recovery proceedings thereof against the Plaintiff and/or its movable and immovable assets and/or from advertising, selling, transferring, parting with possession, evicting and/or in any manner interfering with the plaintiff's use, occupation of the property known as Title Number Mombasa/Block/XXI/430 and/or

any of the Plaintiff's immovable properties situated within the Defendant’s ratable area.

26. The Plaintiff averred that there were no previous proceedings pending in any court between the Plaintiff and the Defendant over the same subject matter. Despite demand and notice of intention to sue having been issued the Defendant had persisted in its demand thus rendering this suit necessary. The cause of action arose within the jurisdiction of the court.

27. The Plaintiffs prayed for Judgment to be entered against the Defendant for ORDERS:

a) An Order of declaration that the Plaintiff does not owe the Defendant, the sum of Kshs. 40,050,891.01 or at all on account of rates and/or interest and/or penalties accruing thereof for the period between 1996 to 2008 on account of the Plaintiff's property known as Title Number Mombasa/Block/XXIL 430 and/or any of the Plaintiff's properties situated within the Defendant's ratable area and that the purported demand made by the plaintiff against the Defendant in a letter dated 21st August, 2008 for payment of Kshs. 40,050,891.01/- and resultant proceedings are fraudulent, illegal, null and void ab initio.

b) An order of permanent injunction to issue restraining the Defendant whether by itself, its servants and/or agents or Advocates or Auctioneers or any of them from demanding the said sum of Kshs.40,050,891.01/- from the Plaintiff and/or

from commencing any recovery proceedings against the Plaintiff for the recovery of the said and/or from therefrom attaching the Plaintiff's movable and/or immovable assets and from advertising, selling, transferring, parting with possession disposing of or otherwise alienating howsoever at any other time or by completing by conveyance to transfer of any sale, leasing, evicting and/or in any manner interfering with the Plaintiff's use and occupation of the plaintiff's property known as Title Number Mombasa/Block XXI/430 and/or any of the Plaintiff's immovable properties situated within the Defendant's ratable area.

c) Costs of the suit.

d) Such further or other relief which the Honourable Court may deem fit to grant.

28. The Plaintiff called their witness PW - 1 on 14th December, 2016 at 11.55 am who testified as follows that: -

A. <u>Examination in Chief of PW - 1 by Mr. Bundotich Advocate.</u>

29. PW - 1 testified under oath in English language,. He was called GODFREY MIGWI THEURI. He was retired but had worked for Telkom Kenya for 28 years as a Property Manager and was familiar with this matter. He signed a witness statement on 23rd January, 2012 and he made the statement on behalf of the Plaintiff. He relied on the statement as his evidence in court. PW - 1 told the court that in addition to his statement, the Plaintiff

filed documents - forty two (42) in number which the witness produced the bundle of documents in support of the Plaintiff's case. The same was produced as Plaintiff Exhibits Numbers 1 to 42 in that order. There was a supplementary bundle of filed documents dated 2nd April, 2014 numbered as one (1) to fifteen (15). He also wished to produce them as additional list produced as Plaintiff Exhibits 43 to 57 in that order respectively.

30. According to the witness the case in question related to all that parcel of land known as MSA/ BLOCK XXI/ 43 which was along Moi Avenue next to Royal Castle Hotel. The Plaintiff inherited the property from K.P.T.C. The Plaintiff paid rates to the local authority. The Defendant claimed there were an outstanding rates amounts due in rates acrued. According to the Plaintiff there was no rates due. The Plaintiff filed the suit when the Defendant demanded for rates of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety Eight Hundred and one cent (Kshs. 40,050,898.01/=). The documents numbered (one) 1 to (thirteen) 13 in the supplementary list, showed the Plaintiff was not in arrears at all.

31. The witness told the court that Telkom took over the property in year 1999. They wrote to the Municipal Council requesting for status of rates. At page 35, the witness told the court that was showed a credit of a sum of Kenya Shillings Eighty One Thousand Nine Seventy Hundred (Kshs. 81,970/=); further at page 36, the witness told the court that the same was a summary. The document was prepared by the Defendant. On the other properties, the witness told the court that the arrears were a sum of Kenya Shillings Two Million Two Eighty Two Thousand Two Eighty (Kshs. 2,282, 280/=) which was paid at page 33. Further at page 34 was a receipt of payment. Thereafter the Plaintiff was honoring any demand issues.

32. PW - 1 told the court that there was no such demand notice made for a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety Eight Hundred and one cent (Kshs. 40,050,898.01/=). In the Defendant's documents, there was no rates demand note. At page 4 of the Defendant's document was printed on 5th March, 2009. At page 5 was generated on 29th September, 2015, the witness told the court that inn the supplementary list of documents was the property rates payment

request dated 24th June, 2010 demanding a sum of Kenya Shillings Seven Seventy Five Thousand One Hundred and Ten (Kshs. 775,110/=) on the subject property. There were no penalties. The Plaintiff paid as requested and at page 3 it indicated a balance of a sum of Kenya Shillings One Hundred and Twelve Million One Sixty Four Thousand One Fourty Three Hundred (Kshs. 112,164,143/=) as at 2nd January, 2012.

33. PW - 1 further testified that annual rent was Kenya Shillings Seven Seventy Five Thousand One Hundred and Ten (Kshs. 775,110/=) which the Plaintiff had continued to pay. Prior to the year 2008, there were no arrears. Document 18 showed the outstanding rates were a sum of Kenya Shillings Two Million Five Ten Thousand Eight Seventy Four Hundred (Kshs. 2,510,874/=) for 14 properties as at the year 2003. The witness intimated that he had not been shown any different document to contradict this letter. They said the Defendant had no claim against Telkom (K) Limited as regards to the outstanding rates. They prayed that the suit be allowed with costs.

B. <u>Cross examination of PW - 1 by Mr. Kizito Advocate.</u>

34. PW - 1 confirmed that they inherited the property from K.P.T & C in the year 1999. When they requested for a statement, they were given one indicating that they were in arrears of an outstanding sum of Kenya Shillings Two Million Two Eighty Two Thousand Two Eighty Hundred (Kshs. 2,282,280/=). There was evidence that the Defendant had made any demand for a sum of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety Eight Hundred and one cent (Kshs. 40,050,898.01/=).

35. He was aware that the Plaintiff continued to pay annual rates. That if the rates were not paid; it would attract penalties. The witness was not aware that the a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety Eight Hundred and one cent (Kshs. 40,050,898.01/=) was interest and penalties. When referred to a letter Plaintiff Exhibit No. 35, it indicated a credit of a sum of Kenya Shillings Eighty One Thousand Nine Hundred and Eighty (Kshs. 81,980/=). At page 36 the witness told the court that it did not say that the same originated from the Defendant. From the year 2008, Telkom (K) Limited had continued to pay demand rates annually up to this year.

C. <u>Re – examination of PW - 1 by Mr. Bundotich Advocate.</u>

36. PW - 1 confirmed that he was the one who was paying the rates. After he retired, he still collected the money and which went to the Defendant's officers to pay and to the local authorities before and after his retirement. He further stated that that at page 6 he was the one who effected the payment. Further at page 37 the witness told the court that it was a letter dated 11th June, 2009 demanding a sum of Kenya Shillings Fourty Four Million Five Thirty Three Thousand Five Seventy Five Hundred (Kshs. 44,533,575/=) in respect to the property. The letter dated 25th January, 2010 was a response to the letter dated 11th June, 2009. There was no way of ascertaining rates other than sample in document 6 of the supplementary list.

37. The Plaintiff through her counsel on record Mr. Bundotich Advocate marked her case closed on 14th December, 2016.

V. The Defendant's case

38. The Defendant responded to the Plaint through a defence where they stated that save for what had been expressly admitted therein, the Defendant had denied each and every allegation contained in the Plaint as if the same had been set out verbatim and traversed seriatim.

39. The Defendant had admitted the first two formal paragraphs of the Plaint in so far as they had been descriptive of the parties, and had added that its address of service for the purposes of the suit had henceforth been care of Messrs. Muturi Gakuo & Kibara Advocates, New Cannon Towers, 3rd Floor, Moi Avenue, P.O. Box 89082 Mombasa.
40. The Defendant had admitted the contents of Paragraphs 3 and 4 of the Plaint. The Defendant had been a stranger to the contents of Paragraphs 5 and 6 of the Plaint, had denied the same, and had put the Plaintiff to strict proof thereof.
41. The contents of Paragraphs 7 and 8 of the Plaint had been denied, and the Defendant in particular had denied the allegation that the Plaintiff had continued to dutifully and promptly remit annual rates as alleged. The Plaintiff had been put to strict proof. The Defendant had stated that the Plaintiff had not been making the required yearly payments of rates to the Defendant and, in fact, the Plaintiff had been in arrears of huge amounts in unpaid rates fees.
42. The Defendant had been a stranger to the allegations contained at Paragraph 9 of the Plaint, had denied the same, and had put

the Plaintiff to strict proof thereof. The Defendant had referred to Paragraph 10 of the Plaint, had reiterated the contents of Paragraph 5 hereinabove, and had further stated that the demand notice had been issued in respect of the unpaid accrued rates due from the Plaintiff. The Defendant had been a stranger to the allegations contained in Paragraphs 11, 13, 14, 15, 16 and 17 of the Plaint, and the allegations therein had been denied in toto. The Plaintiff had been put to strict proof thereof. The Defendant had further denied the particulars of fraud and/or illegality and/or false pretension set out at paragraphs 15(i) to (v) of the Plaint, and the Plaintiff had been put to strict proof thereof.

43. The Defendant had referred to Paragraph 18 of the Plaint and had denied the allegation that the Defendant's claim had been time-barred. The Plaintiff had been put to strict proof thereof. In reference to Paragraphs 19, 20 and 21 of the Plaint, the Defendant had stated that all acts done by the Defendant had been conducted lawfully and in accordance with the provisions of the Local Government Act, Cap 265 Laws of Kenya, the Rating Act, Cap 267, the Valuation for Rating Act, Cap 266 Laws of Kenya, and the existing by-laws. Any allegations to the contrary

had been categorically denied, and the Plaintiff had been put to strict proof thereof.

44. In the alternative and without prejudice to the foregoing, the Defendant had stated that it had issued a Demand Notice to the Plaintiff in respect of accrued rates due and payable by the Plaintiff. However, the Plaintiff had failed, refused and/or ignored the said demand, thereby rendering the Defendant's actions necessary. The Defendant had averred that the Plaintiff had failed, refused and/or ignored to act as demanded by the Defendant in the aforesaid Demand Notice.

45. The Defendant had averred that the Plaintiff had been truly and justly indebted to the Defendant in outstanding rates and accrued rent. The Defendant had therefore stated that the Plaintiff had lacked the requisite standing to apply for Orders of Injunction. The Defendant had averred that the Plaintiff had had an outstanding debt with the Defendant and therefore could not have availed itself of the remedy of injunctions prayed for in the Plaint. The Plaintiff had therefore been undeserving of the said Orders and had been put to strict proof.

46. The Defendant had averred that the Plaintiff had had no reasonable cause of action against the Defendant and that the Plaintiff's suit had been fatally defective, an abuse of the Court process, and ought to have been struck out and/or dismissed with costs. The Plaintiff had been given notice of intention to raise a Preliminary Objection on a point of law at the earliest opportunity. Demand and Notice of Intention to sue had not been given and had not been served, and the Plaintiff had therefore not been entitled to costs of the suit. The Plaintiff had been put to strict proof thereof. The jurisdiction of the Honourable Court had been admitted.
47. As already indicated, the Defendant never summoned any witness to support their case. They hence closed their case accordingly.

VI. Submissions

46. Upon the Plaintiff and Defendant marked the closure of their cases, the Honourable Court directed that the parties file their submissions within stringent timeframe thereof on. By the time of penning down this decision, it was only the Honourable Court would only access the submissions from the Plaintiff. It failed to

do so from the Defendant from neither the Judiciary CTS portal nor the ELC Registry,

47. Pursuant to that the Honourable Court reserved a date to deliver its Judgement on notice. Eventually, it was delivered on 28th November, 2025.

A. <u>The Written Submissions by the Plaintiff</u>

48. The Plaintiff through the Law firm of Messrs. Kale Maina & Bundotich Advocates filed their written submissions dated 12th May, 2017. Mr. Bundotich Advocate commenced the submissions by stating that vide a Plaint dated 17th September, 2008 and filed on 19th September, 2008 the Plaintiff had sought the afore – stated reliefs against the Defendant:

49. The Learned Counsel submitted that alongside the Plaint, the Plaintiff had filed a verifying affidavit sworn by Paul B. Jilani on 17th September, 2008, the witness statement of Godfrey Theuri, and a bundle of documents dated 27th May, 2010. The Plaintiff had also filed an additional list and bundle of documents dated 28th March, 2014 and issues for determination dated 16th April, 2014. The suit had initially come up for hearing on 14th December, 2010 when the Plaintiff's witness, Mr. Godfrey Theuri,

had testified and the Plaintiff had closed its case. The defence hearing had been scheduled to take on 2nd May, 2017 but the Defendant had not called any witnesses and had opted to close its defence.

50. The Learned Counsel on the Plaintiff's case and evidence averred that as pleaded in Paragraph 10 of the Plaint, the dispute had arisen from a letter dated 21st August, 2008 and subsequent correspondence from the Defendant to the Plaintiff in which the Defendant had demanded payment of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety Eight Hundred and one cent (Kshs. 40,050,898.01/=) purportedly outstanding on account of rates levied on Title No. Mombasa/Block/XXI/430 owned by the Plaintiff. The Defendant had subsequently commenced proceedings to sell the suit property.

51. In yet another letter dated 11th June, 2009 from the Law firm of Messrs. Lumatete Muchai & Company Advocates addressed to the Plaintiff, the Defendant had demanded a sum of Kenya Shillings Fourty Four Million Five Thirty Three Thousand Five Seventy Five Hundred (Kshs. 44,533,575/=) being rates allegedly

due as at 2nd May, 2009 in respect of Plot No. Mombasa/Block/XXI/430.

52. The Plaintiff's witness had given evidence and had tendered documents showing that the Defendant had proceeded to advertise in the newspaper the intended sale of the suit property to recover the alleged outstanding sum, which situation had forced the Plaintiff to file the suit herein. Alongside the Plaint, the Plaintiff had also filed an application seeking interim interlocutory orders of injunction. The Defendant had conceded to status quo being maintained pending the hearing and determination of the suit.

53. The Plaintiff had stated that the suit property had initially been owned by Kenya Posts & Telecommunications Corporation (now defunct) and, upon the dissolution of the said Corporation in 1999, ownership of the suit property had been vested in the Plaintiff through Legal Notice No. 59 of 5th November, 1999.

54. The Learned Counsel for the Plaintiff had averred that upon the property being vested in it, it had written to the Defendant to provide a statement of outstanding rates for all the properties owned by the Plaintiff within the Defendant's ratable area. The

Defendant had replied in August 1999 and had indicated the outstanding sum to be a sum of Kenya Shillings Two Million Two Eighty Two Thousand Two Eighty Hundred (Kshs. 2,282,280/=), which the Plaintiff had duly paid. Payments had been duly acknowledged by the Defendant in its letter dated 2nd December, 1999 addressed to the Plaintiff and which was at page 33 of the Plaintiff's bundle of documents and the letter stated as follows:

The Company Secretary,

Telkom Kenya Limited,

P.O Box 63003,

NAIROBI

Dear Sir,

RE: Payment of Rates Arrears-Cont. in Lieu of rates 1996, 1997 and 1998-1999

We wish to record our sincere appreciation for your quick response to our request and payment of Kshs 2, 282,280 being rate arrears for various Plots for the period under reference.

Enclosed find herewith Council Official receipt Misc 019034 of 15/11/99 as our acknowledgement of your cheque No. 008370 for your safe custody and record purposes.

It is with great pleasure that / acknowledge the personal efforts made by yourself this long outstanding matter.

It is really satisfying that we have come to the conclusion so amicably.

Once again thank you very much for your efforts.

Yours Faithfully,

B.K. Murage

For:Town Treasurer

CC:The Property Manager,

Telkom Kenya Limited

P.O Box 630003,

NAIROBI

55. The receipt referred to by the Defendant in its aforesaid letter is at page 34 of the Plaintiff's bundle while at page 35 is the schedule of properties owned by the Plaintiff which shows how the sum of a sum of Kenya Shillings Two Million Two Eighty Two Thousand Two Eighty Hundred (Kshs. 2,282,280/=), was arrived at and at item No. 1 was the suit property which clearly shows that it had a credit payment of a sum of Kenya Shillings Eighty One Thousand Nine Seventy Hundred (Kshs. 81,970/=) meaning no sum was due and or was in arrears in so far as the suit property was concerned.

56. The Plaintiff's evidence is that subsequent to settlement of the said arrears that accrued for the period stated, it has continued to pay annual rates as and when they are due and the Plaintiff has tendered in its bundle of documents and additional bundle of documents, the rate demand notices for the various properties including the suit property with the Defendant's ratable area and the evidence of payments made. For example, the Learned Counsel wished to draw to the court's attention the following documents:-

    a. At page 18 of the Plaintiff's list and bundle of documents is a letter dated 27th October,2003 from the Defendant to the Plaintiff forwarding a schedule of rates for various properties and requesting the Plaintiff to remit a sum of Kenya Shillings Two Million Five Hundred and Ten Thousand Eight Seventy Hundred (Kshs. 2,510,870/=). The schedule showed that a sum of Kenya Shillings Seven Seventy Five Thousand One Hundred (Kshs. 775,100/=) was due for the suit property and at page 19 the Plaintiff paid a cheque No. 024135 dated 27th May,2007 for a sum of Kenya Shillings Two Million Five Hundred and Sixty Thousand Eight Seventy Four Hundred (Kshs. 2,560,874/=).
    b. Vide a letter dated 19th November, 2001 at pages 26 and 27 of the Plaintiff's bundle of documents the Plaintiff demanded

a sum of Kenya Shillings One Million Nine Hundred and Fourty Thousand One Eighty Eight Hundred (Kshs. 1,940,188/=) indicated as rates for the year 2002 and the amount for suit property was a sum of Kenya Shillings Six Sixty Four Thousand Three Eighty Hundred (Kshs. 664,380/=) and at pages 28 and 29 the Defendant acknowledged receipt of Kenya Shillings One Million Eight Sixty Seven Thousand Three Seventy Eight Hundred (Kshs. 1,867,378/=) which status was contribution in lieu of rates year 2001.

c. At page 15 the Plaintiff's additional list and bundle of documents was a letter dated 29th August, 2006 which the Defendant requests the Plaintiff to pay a sum of Kenya Shillings Two Million Five Hundred and Ten Thousand Eight Seventy Four Hundred (Kshs. 2,510,874/=) being land rates assessment for the year 2007.

d. At page 6 of the Plaintiff's additional list and bundle of documents is a property rates payment request dated 28th June, 2010 (after the filing of this suit) issued by the Defendant in which the Defendant sates that the amount due for such property was a sum of Kenya Shillings Seven Seventy Five Hundred One Hundred and Ten (Kshs. 775,110/=).

57. According to the Learned Counsel, the Plaintiff’s position was that it did not owe the Defendant a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred (Kshs.

40,050,891/=) or any other sum in respect of rates levied on suit property. The Defendant did not issue a demand notice between the years 1999 to 2008 claiming the said sum contested but had been duly issuing annual rate demand notices indicating annual rates due and payable and which the Plaintiff duly settled. As at 1999 when the Plaintiff paid a sum of Kenya Shillings Three Million Two Eighty Two Thousand Two Eighty Hundred (Kshs. 3,282,280/=), the suit property had a credit payment and no evidence whatsoever was tendered by the Defendant to show how the sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred (Kshs. 40,050,891/=) accrued from the suit property from 1999 to the year 2008.

58. The Learned Counsel averred that the Defendant's claim was an afterthought was not supported by any evidence or records and that at the time the Plaintiff took over the suit property, the Defendant clearly notified the Plaintiff that there was no further outstanding rates due after the settlement of the arrears.

59. On the Defendant's defence. The Learned Counsel submitted that the Defendant had filed a defence dated 15th May, 2008 in which it had made a general denial of the Plaintiff's claim. The

Learned Counsel wished to particularly draw to the Court's attention the following paragraphs: -

i) At paragraph 7 the Defendant states in part that:- "***.... The demand notice was issued in respect of the unpaid accrued rates due from the Plaintiff. The Paragraph never gave the particulars of the date or dates when such demands were issued and or were served upon the Plaintiff.***

ii) At paragraph 10 of the Defence the Defendant states that:- ***".... All acts done by the Defendant have been conducted lawfully and in accordance with provisions of local Government Act, Cap. 265 Laws of Kenya, the rating Act, Cap. 267, the Valuation for rating Act Cap 260 Laws of Kenya and the existing by laws...."***

iii) At Paragraph 13 the Defendant states that:- ***"the Defendant avers that the Plaintiff is truly and justly indebted to the Defendant in outstanding rates and accrued rent.."***. This means that the Defendant maintains that the sum of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred (Kshs. 40,050,891/=) which the Plaintiff disputes is due and payable.

iv) At Paragraph 12 the Defendant states that:- ***".....the Plaintiff failed, refused and or ignored to act as demanded by the***

Defendant in the aforesaid demand Notice...” and the demand notice referred to is pleaded at paragraph 11 of the defence.

60. The Learned Counsel contended that the Defendant did not plead any particulars as to how the sum of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and one cent (Kshs. 40,050,891.01/=) was arrived at and or how it accrued. The Defence was a general denial.

61. On the Law. The Learned Counsel opined that the main law applicable in respect of the claim subject of dispute was the Rating Act, Cap. 267 Laws of Kenya. The provision of Section 21 of the said Act states that:-

> **(1) Any officer authorized in that behalf by the rating authority shall, upon demand being made by the registered owner or the registered lessee of any land within the area of the rating authority or by his attorney or agent, and upon payment of-**
> **a) all rates (if any), for a period of twelve years immediately preceding the date of the written statement hereafter mentioned, due in respect of such land on account of rates imposed under this Act or any written law for the time being in force within the municipality;**
> **b) and all charges (if any), for a period of twelve years immediately preceding such date, due in respect of such land for sewerage, sanitary and refuse removal services and**

lawfully imposed under any other written law or under any by-laws made thereunder; and

c) all sums (if any) due on account of any expenses incurred or advances made by the Council under the provisions of any written law, make and deliver to such person a written statement in the appropriate form in the Second Schedule.

(2) The statement mentioned in subsection (1) of this section may be expressed to be valid for any period not exceeding three months from the date of the statement if so requested by the ratable owner of the land or his attorney or agent, and upon payment of the rates and other charges referred to in subparagraphs (a), (b) and(c) of subsection (1) of this section estimated to become payable within the period of validity of such statement.

62. While the provision of Section 24 states as follows:-

In any proceeding to levy or recover rates under this Act or consequent upon the levying or recovering of any such rates as well as in other proceedings under this Act-

(a) any valuation roll or other roll prepared for the purpose of rating, and records of the rating authority and all entries made therein and

(b) any certificate issued by an officer authorized in that behalf by the rating authority, setting forth the name and address of the person in default, the amount of the rate due by him and particulars of the interest thereon as demanded; the fact that such person has failed to pay the rate: the fact that such person has been served (in accordance with section 26 of this Act)and has made default in complying with a notice as aforesaid requiring him to make payment of the said rate and interest; and the fact that such rate and interest do not exceed

the maximum amounts prescribed by or under this Act, shall be admissible in evidence upon production thereof, and shall be received as prima facie evidence of the facts therein stated: Provided that any party to any such proceedings may tender evidence to prove the contrary.

63. The Learned Counsel urged the Honourable Court to adopt the following framed issues by the Plaintiff dated 16th April, 2014 and filed on 22nd April, 2014 for determination:-

    a. ***Whether or not the Plaintiff requested the Defendant to provide a detailed statement of the outstanding rates of suit premises in 1999 when the suit property was vested to the Plaintiff.***

64. The Learned Counsel submitted that as they had shown and demonstrated from the correspondent they had highlighted hereinbefore; the Plaintiff did call for statement showing rates outstanding and which the Defendant duly submitted and the Plaintiff paid the same. The evidence tendered clearly showed that the suit property had no arrears and in fact there was an overpayment.

65. It was the contention of the Learned Counsel (and they urged the Court to find so) that the Plaintiff did duly satisfy the requirements of Section 21 of the Rating Act and no evidence

has been tendered by the Defendant to the contrary pursuant to Section 24 of the Act. They also urged the Court to take note and find that the Plaintiff had duly submitted evidence which had not been contested in any manner clearly demonstrating that the Defendant had been issuing annual rate demand notes to the Plaintiff for the suit property and Plaintiff fully paid for the same.

66. The burden was on the Defendant to prove and or pleade in its defence particulars showing that there was any accrued rates on the suit property when it was vested upon the Plaintiff and which burden they did not discharge at all.

b. Whether or not the Defendant forwarded to the Plaintiff a Schedule delineating contributions made by the Plaintiff's predeceasing in lieu of rates for the period between the years 1996 and 1999 and the ten outstanding amount payable

67. The learned Counsel submitted that under issue No (1) above the Defendant did duly submit the statement of rates as requested and which clearly showed that for the suit property there was no amount due and outstanding as there was an overpayment of a sum of Kenya Shillings Eighty One Thousand Nine Hundred and Seventy (Kshs. 81,970/=).

c. Whether or not the outstanding account payable with regard to the suit property was Kshs 2,282,280

68. The Learned Counsel submitted that as they had demonstrated by way of submissions hereinbefore the amount of Kenya Shillings Two Million Two Eighty Two Thousand Two Eighty Hundred (Kshs. 2,282,280/=) demanded by the Defendant was for the Plaintiff's various properties within the Defendant's ratable area and the schedule of properties showed that there was no outstanding payments on account of the suit property.

d. Whether or not the Plaintiff paid the sum outstanding sum to be Kshs 2,282,280

69. According to the Learned Counsel, the evidence on record clearly showed that the Plaintiff duly paid the sums demanded and the Defendant acknowledged receipt of the payment made.

e. Whether or not Plaintiff continued to pay the Defendant's annual rates for the subsequent years

70. The Learned Counsel submitted that the Plaintiff's witness had sufficiently demonstrated to the Court that the Plaintiff had been duly paying annual rates not just for the suit property but for all the ratable properties within the Defendant's retable area and the payments had been in accordance with the demand notices.

The documentary evidence consisting of rate demands notes and payments were not challenged by the Defendant in any manner.

f. Whether or not the Plaintiff defaulted in paying the Kshs 40,050,891 to the Defendant on account of rates levied on the Plaintiff's suit property

71. According to the Learned Counsel as the Plaintiff had demonstrated through the rates demand notices issued by the Defendant there was no demand for payment of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred (Kshs. 40,050,891/=) for suit property or at all. No evidence has been tendered to show the sum of this amount was charged against the suit property and or how it was arrived at and if the Defendant issued demand notices in accordance with the Rating Act. It was the Defendant's burden to at least plead in its defence particulars of how the claim of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred (Kshs. 40,050,891/=) was arrived at and which it made no effort at all to disclose so.

72. The upshot of the above and they urged the court to find so, is that no evidence was tendered before the Court to challenge the Plaintiff's position and evidence that there was no sum of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred (Kshs. 40,050,891/=) levied over the suit property and the documents tendered in evidence to support the contention were not challenged in any manner by the Defendant during cross-examination of the Plaintiff's witnesses.

g. Whether or not the Defendant fraudulently and falsely wrote to the office of the Deputy Prime Minister and Minister for Local Government purporting to request the Ministry of water of a waiver of left of the said sum and demanding payments of Kshs 13,111,753.73 from the Plaintiff

73. The Learned Counsel submitted that the Plaintiff’s witness in his witness statement at paragraph 10 stated that the Defendant unilaterally and without the Plaintiff's request wrote to the Office of the Deputy Prime Minister claiming that the disputed sum was due and further unilaterally imposed a waiver. The Plaintiff has duly demonstrated to the court that the sum of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred (Kshs. 40,050,891/=) was not due and or owing and the

Defendant had every opportunity to tender evidence before the court to proof otherwise and which they did not.

h. Whether or not the Defendant falsely caused the public in the Daily Newspapers demanding Kshs 40,050,891 and notifying the Plaintiff of the intention to commence recovery proceedings

74. The Learned Counsel submitted that it was not disputed that the Defendant proceeded to advertise for sale the suit property to recover the disputed sum. Indeed, the Court record showed that the Plaintiff filed an application under certificate of urgency and obtained interim interlocutory orders of injunction to stop the intended sale. No evidence he had been tendered to the court that the intended sale was pursuant to the proceedings under the Rating Act under which Judgement had been entered against the Defendant and accordingly we submit that the advertisement was un-procedural, null and void.

i. Whether or not the Plaintiff is entitled to the prayers sought in the Plaint

75. As they had submitted hereinbefore, the Plaintiff had demonstrated by way of witness and documentary evidence that the Defendant's claim could not lie in law and in fact and the

Defendant's action was unlawful. The Plaintiff had demonstrated beyond the test set by the law that the Defendant's claim for a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred (Kshs. 40,050,891/=) was not supported by any evidence. The upshot of the above submissions is that the Plaintiff has sufficiently demonstrated by way of witness evidence and documentary evidence that it was entitled to court's protection in so far as the purported claim of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred (Kshs. 40,050,891/=) was concerned and accordingly is entitled to the prayers pleaded in the Plaint.

j. Who should bear the costs of the suit?

76. In conclusion, the Learned Counsel asserted that costs follow the event. As the Plaintiff had proved its case, the Defendant must pay the costs.

VII. Analysis and Determination

77. I have keenly assessed the filed pleadings by all the Plaintiff and Defendant herein, the written submissions and the cited authorities, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.

78. In order to reach an informed, reasonable and just decision in the subject matter, the Honourable Court has crafted the following six (6) for its determination. These are: -

a) Whether the suit property (Mombasa/Block/XXI/430) was vested in the Plaintiff and whether the Defendant issued and acknowledged the 1999 reconciliation and payment of Kshs. 2,282,280 for arrears across the Plaintiff's properties?

b) Whether the suit property had arrears after the 1999 reconciliation and whether the Plaintiff continued paying annual rates as demanded for the period up to 2008.

c) Whether the Defendant's demand of Kshs. 40,050,891.01 (and later Kshs. 44,533,575) was lawfully founded in fact and law and supported by rating records, notices and statutory procedure.

d) Whether the Defendant complied with the Rating Act, Cap 267, in levying and enforcing rates; and whether any claim is time-barred or barred by estoppel arising from the 1999 reconciliation, subsequent acknowledgments, and annual demands paid.

e) Whether the Plaintiff has met the threshold for declaratory relief and a permanent injunction

f) Who should bear the costs of the suit.

ISSUE No.a). Whether the suit property (Mombasa/Block/XXI/430) was vested in the Plaintiff and whether the Defendant issued and acknowledged the 1999 reconciliation and payment of Kshs. 2,282,280 for arrears across the Plaintiff's properties.

79. Under this sub title, the first issue for determination is whether the suit property, Title No. Mombasa/Block/XXI/430, was duly

vested in the Plaintiff and whether the Defendant issued and acknowledged the reconciliation and payment of a sum of Kenya Shillings Two Million Two Eighty Two Thousand Two Eighty Hundred (Kshs. 2,282,280/=) in the year 1999.

80. It is not in dispute that the suit property was previously owned by the defunct Kenya Posts and Telecommunications Corporation (KPTC). Upon the dissolution of KPTC, the Government of Kenya issued Legal Notice No. 59 of 5th November, 1999, which vested certain assets, including the suit property, in Telkom Kenya Limited. The Defendant did not controvert this fact in its pleadings. Accordingly, I find that the Plaintiff is the lawful registered proprietor of the suit property.

81. Upon vesting, the Plaintiff sought from the Defendant a statement of outstanding rates for all its properties within the Defendant's ratable area. The Defendant responded by issuing a schedule covering the period of years 1996–1999, which indicated an aggregate outstanding sum of Kenya Shillings Two Million Two Eighty Two Thousand Two Eighty Hundred (Kshs. 2,282,280/=). The Plaintiff duly remitted this sum, and the Defendant issued Council Official Receipt No. 019034 and a letter

dated 2nd December, 1999 signed by the Town Treasurer, expressly acknowledging receipt and confirming settlement of the arrears. The schedule annexed to the Defendant's communication showed that the suit property itself carried a credit of Kenya Shillings Eighty One Thousand Nine Hundred and Seventy (Kshs. 81,970/=), meaning no arrears were due in respect of that property.

82. The Defendant's afore – stated letter is graphically unequivocal. It records ***"sincere appreciation"*** for the Plaintiff's payment, acknowledges receipt of the cheque, and states that:- ***"it is really satisfying that we have come to the conclusion so amicably."*** This contemporaneous admission by the Defendant is binding upon it. In the absence of any evidence to the contrary, I find that the reconciliation was properly undertaken, the arrears were settled, and the suit property was not in arrears as at December 1999.

83. The legal effect of this reconciliation is twofold. First, under the provision of Section 21 of the Rating Act, Cap 267, a registered owner is entitled to a written statement upon payment of rates for the preceding twelve years. The Defendant's letter and receipt constitute such a statement, regularising the Plaintiff's

liability. Second, the Defendant, having formally acknowledged settlement and issued annual demand notices thereafter which the Plaintiff paid, is estopped in law and equity from later asserting arrears for the same period. The doctrine of estoppel, as articulated in the case of:- ***"Serah Njeri Mwobi – Versus - John Kimani Njoroge [2013] eKLR"***, prevents a party from approbating and reprobating to the detriment of another who has relied upon its representation.

84. Accordingly, I hold that the suit property was duly vested in the Plaintiff by Legal Notice No. 59 of 1999, and that the Defendant issued and acknowledged the year 1999 reconciliation and payment of a sum of Kenya Shillings Two Million Two Eighty Two Thousand Two Hundred and Eighty (Kshs. 2,282,280/=), thereby conclusively settling arrears for the period 1996–1999. The Defendant is estopped from denying that settlement or resurrecting claims for the same period.

ISSUE No. b). Whether the suit property had arrears after the 1999 reconciliation and whether the Plaintiff continued paying annual rates as demanded for the period up to 2008..

85. Under this sub - title, the Honourable Court shall examine the second issue which is whether following the reconciliation and

payment in the year 1999, the suit property accrued arrears and whether the Plaintiff continued to discharge its annual rate obligations up to the year 2008.

86. The Plaintiff tendered documentary evidence comprising demand notices issued by the Defendant for various years, receipts, and correspondence acknowledging payments. For instance, the Plaintiff produced a letter dated 27th October, 2003 from the Defendant forwarding a schedule of rates for several properties, including the suit property, and requesting payment of a sum of Kenya Shillings Two Million Five Hundred and Ten Thousand Eight Seventy Hundred (Kshs. 2,510,870/=). The Plaintiff responded by remitting the sum demanded, and the Defendant acknowledged receipt. Similarly, vide a letter dated 29th August, 2006, the Defendant requested payment of a sum of Kenya Shillings Two Million Five hundred and Ten Thousand Eight Seventy Hundred (Kshs. 2,510,874/=) for the year 2007, which the Plaintiff duly settled. In respect of the year 2008, the Plaintiff produced evidence of payment of a sum of Kenya Shillings Seven Seventy Five Hundred One Hundred and Ten (Kshs. 775,110/=), which was the annual rate assessed for the suit property. These

payments were corroborated by receipts and schedules in the Plaintiff's bundle of documents.

87. The Defendant did not controvert this evidence. It did not produce any valuation roll, rate demand notices indicating arrears, or accounting records showing that the Plaintiff had defaulted in any year between 1999 and 2008. Neither did it call any witness to explain how arrears allegedly accrued. The defence remained a general denial unsupported by particulars or evidence.

88. The statutory framework under the Rating Act, Cap. 267 requires that rates be levied annually on the basis of a valuation roll, demand notices be served, and arrears be computed in accordance with the Act. In the absence of such notices and records, and in light of the Plaintiff's documentary evidence of consistent payments, the court must conclude that the Plaintiff complied with its obligations. The Defendant's silence and failure to produce records is fatal to its assertion of arrears.

89. Accordingly, I find that after the reconciliation and payment in 1999, the suit property did not accrue arrears. The Plaintiff continued to pay annual rates as demanded by the Defendant for

each year up to and including 2008. The Defendant's subsequent demand for a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred (Kshs. 40,050,891/=) was therefore inconsistent with its own prior conduct and unsupported by evidence.

ISSUE No. c). Whether the Defendant's Demand of Kshs. 40,050,891.01 (and later Kshs. 44,533,575) was Lawfully Founded in Fact and Law and Supported by Rating Records, Notices and Statutory Procedure.

90. Under this sub - heading, the Court shall examine whether the colossal sums demanded by the Defendant in 2008 and 2009 were lawfully founded, supported by rating records, and compliant with statutory procedure under the Rating Act, Cap. 267, the Valuation for Rating Act, Cap. 266, and the Local Government Act, Cap. 265 (repealed).

91. The Plaintiff's evidence demonstrates that between 1999 and 2008, the Defendant consistently issued annual rate demand notices for the suit property and other properties within its ratable area, which the Plaintiff duly settled. The Defendant acknowledged these payments through receipts and correspondence. No arrears were indicated in those notices. The Defendant did not produce any valuation roll, rate demand

notices, or accounting records showing how the sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred and one cent (Kshs. 40,050,891.01/=) was computed, for which years it accrued, or how interest was calculated. The defence was a general denial devoid of particulars.

92. Under the provision of Section 21 of the Rating Act, a registered owner is entitled to a written statement upon payment of rates for the preceding twelve years. The Defendant had already issued such a statement in 1999, acknowledged payment, and thereafter issued annual demands consistent with compliance. Under the provision of Section 24 of the Rating Act, valuation rolls and certificates are prima facie evidence of liability. The Defendant produced none. In the absence of valuation rolls, demand notices, or statutory certificates, the Defendant's claim lacks evidential foundation.

93. The Defendant's threatened enforcement through newspaper advertisements and threatened auction was equally irregular. The Rating Act prescribes a structured enforcement regime, including service of demand notices, accrual of interest within statutory maxima, and lawful sale procedures. None of these

steps were demonstrated. The Defendant's unilateral publication of the Plaintiff as a defaulter without antecedent statutory notices was unlawful and prejudicial.

94. The doctrine of estoppel also applies. Having reconciled and acknowledged payment in 1999, and having issued annual demands thereafter which were paid, the Defendant is estopped from asserting arrears for the same period without statutory records. As held in ***"Serah Njeri Mwobi – Versus - John Kimani Njoroge [supra]"***, a party cannot approbate and reprobate to the detriment of another who has relied upon its representation. The Defendant's sudden demand of over Kshs. 40 million, unsupported by records, is inconsistent with its prior conduct and representations.

95. Accordingly, I find that the Defendant's demand of a sum of Kenya Shillings Fourty Million Fifty Thousand Eight Ninety One Hundred (Kshs. 40,050,891/=) (and later Kshs. 44,533,575) was not lawfully founded in fact or law, was unsupported by rating records, notices, or statutory procedure, and was therefore irregular, unlawful, null and void ab initio.

ISSUE No. d). Whether the Defendant complied with the Rating Act, Cap 267, in levying and enforcing rates; and whether

any claim is time-barred or barred by estoppel arising from the 1999 reconciliation, subsequent acknowledgments, and annual demands paid.

96. Under this sub – title the Court shall examine whether the Defendant complied with the Rating Act, Cap 267, in levying and enforcing rates against the Plaintiff, and whether any claim is time-barred or barred by estoppel arising from the 1999 reconciliation, subsequent acknowledgments, and annual demands paid.

97. The Rating Act prescribes a clear statutory framework for the imposition and recovery of rates. Rates must be levied annually on the basis of a valuation roll prepared under the Valuation for Rating Act, Cap. 266. Demand notices must be served upon the registered owner, arrears must be computed in accordance with the Act, and enforcement may only proceed upon compliance with statutory procedures, including service of notices and lawful sale mechanisms. The provision of Section 21 of the Rating Act entitles a registered owner to a written statement upon payment of rates for the preceding twelve years, while Section 24 makes valuation rolls and certificates prima facie evidence of liability.

98. In the present case, the Defendant did not produce any valuation roll, demand notices for arrears, statutory certificates, or accounting records to substantiate its claim. It did not demonstrate service of demand notices for the impugned sums, nor did it show compliance with the enforcement regime prescribed by the Act. Instead, the Defendant relied on a general denial unsupported by particulars. The threatened enforcement through newspaper advertisements and threatened auction was irregular, as it was not preceded by statutory notices or lawful proceedings under the Act. I therefore find that the Defendant did not comply with the Rating Act in levying or enforcing rates against the Plaintiff in respect of the impugned sums.

99. On estoppel, the Defendant formally reconciled arrears in 1999, acknowledged payment of a sum of Kenya Shillings Two Million Two Eighty Two Thousand Two Eighty (Kshs. 2,282,280/-), and thereafter issued annual demand notices which the Plaintiff duly settled. These acknowledgments created a legitimate expectation that the Plaintiff's liabilities had been regularised and that future demands would reflect only current annual rates. The Defendant is estopped in law and equity from later asserting

arrears for the same period without statutory records. As held in ***"Serah Njeri Mwobi – Versus - John Kimani Njoroge [supra]"***, a party cannot approbate and reprobate to the detriment of another who has relied upon its representation.

100. On the issue of limitation. I hold that even if arrears had existed prior to 1999, they would have been caught by the twelve-year lookback contemplated in Section 21 of the Rating Act and by general limitation principles under the Limitation of Actions Act, Cap 22. Dormant claims resurrected without records or notices are unenforceable. The Defendant's attempt to demand colossal sums nearly a decade later, without statutory foundation, is barred by limitation and administrative laches.

101. Accordingly, and in the long run, I discern that the Defendant did not comply with the Rating Act in levying or enforcing the impugned rates, and that any claim is time-barred and barred by estoppel arising from the year 1999 reconciliation, subsequent acknowledgments, and annual demands paid.

ISSUE No. e). Whether the Plaintiff has met the threshold for declaratory relief and a permanent injunction.

102. Under this Sub - heading, the Plaintiff has sought for various Reliefs as contained at the foot of the Plaint, herein. The final

substantive issue is whether the Plaintiff has satisfied the threshold for the grant of declaratory orders and a permanent injunction restraining the Defendant from enforcing the impugned demands. The standard of proof (**'the burden of Proof"**) in civil cases is well settled. The Section 107(1) of the Evidence Act, Cap 80 Laws of Kenya, 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."**

103. Further, Section 108 places the burden of proof on the party who would fail if no evidence were adduced, while Section 109 requires that proof be provided of facts especially within a party's knowledge. The guiding principle is that the Plaintiff must establish her case on a balance of probabilities, meaning that the Court must be satisfied that it is more probable than not that his version of events is true.

104. Declaratory relief is discretionary but is granted where a party demonstrates the existence of a real and justiciable controversy, and where a declaration will resolve uncertainty and affirm legal rights. The Plaintiff has shown that the Defendant issued demands of colossal sums unsupported by records, threatened

enforcement through newspaper advertisements, and thereby created uncertainty over its proprietary rights. A declaration that no arrears are owed is necessary to settle the controversy and protect the Plaintiff's property rights.

105. The Plaintiff has prayed for a permanent injunction to restrain the Defendants from interfering with his proprietary rights over the suit property. The law on injunctions is well settled. Under the provision of Sections 24 and 25 of the Land Registration Act, No. 3 of 2012, the rights of a registered proprietor are absolute and indefeasible, subject only to encumbrances noted in the register and the exceptions under Section 26(1). Once the Court has found that the Plaintiff is the lawful proprietor, he is entitled to the full protection of the law, including injunctive relief.

106. The principles governing the grant of injunctions were set out in ***"Giella – Versus - Cassman Brown & Co. Ltd [1973] EA 358"***, namely: -

a) The applicant must establish a prima facie case with a probability of success;
b) The applicant must demonstrate that he will suffer irreparable harm not compensable by damages;
c) If in doubt, the Court will decide the matter on a balance of convenience.

107. Although Giella dealt with interlocutory injunctions, the principles are instructive even at the final stage. Where a party has proved ownership and unlawful interference, a permanent injunction is the natural remedy to protect proprietary rights.

108. Permanent injunctions are granted where a party demonstrates that there is a continuing or threatened violation of rights, that damages would not be an adequate remedy, and that the balance of convenience favours protection. The Plaintiff has shown that the Defendant threatened to auction its property and interfere with its occupation, despite the absence of lawful arrears. Such enforcement would cause irreparable harm to the Plaintiff's business operations and occupation of the suit property. Damages would not suffice to restore proprietary rights once lost through unlawful sale. The balance of convenience lies in restraining the Defendant from unlawful enforcement while leaving it free to levy and collect future lawful rates in accordance with the Rating Act. The Defendant, having failed to produce records or witnesses, has not demonstrated any lawful basis for its demands. Its threatened enforcement is irregular,

unlawful, and prejudicial. The Plaintiff has therefore met the threshold for both declaratory relief and a permanent injunction.

109. Be that as it may, I hold that the Plaintiff is entitled to a declaration that it does not owe the Defendant the impugned sums, and to a permanent injunction restraining the Defendant from demanding or enforcing recovery of those sums or interfering with the Plaintiff's use and occupation of the suit property.

ISSUE No. f). Who bears the costs of the suit

110. It is now well established that the issue of Costs is at the discretion of the Court. Costs meant the award that is granted to a party at the conclusion of the legal action, and proceedings in any litigation. The Proviso of Section 27 (1) of the Civil Procedure Rules Cap. 21 holds that Costs follow the events. By the event, it means outcome or result of any legal action. This principle encourages responsible litigation and motivates parties to pursue valid claims. See the cases of ***"Harun Mutwiri – Versus - Nairobi City County Government [2018] eKLR*** and ***"Kenya Union of Commercial, Food and Allied Workers – Versus - Bidco Africa Limited & Another [2015] eKLR***, the court reaffirmed that the

successful party is typically entitled to costs, unless there are compelling reasons for the court to decide otherwise. In the case of ***"Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR***, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances.

111. In ***"Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & another – Versus – Mutula Kilonzo & 2 others [2013] eKLR"*** quoted the case of ***"Levben Products – Versus - Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227"*** the Court held;

> ***"It is clear from authorities that the fundamental principle underlying the award of costs is two-fold. In the first place the award of costs is matter in which the trial Judge is given discretion (Fripp vs Gibbon & Co., 1913 AD D 354). But this is a judicial discretion and must be exercised upon grounds on which a reasonable man could have come to the conclusion arrived at….In the second place the general rule that costs should be awarded to the successful party, a rule which should not be departed from without the exercise of good grounds for doing so."***

112. In the present case, I reiterate that the Plaintiff has proved its claim against the Defendant there it shall have the costs.

VIII. Conclusion and Disposition

113. Ultimately, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the Preponderance of Probabilities and the balance of convenience finds that the Plaintiff has well established its case against the Defendant. Thus, for avoidance of any doubt, the Court proceeds to make the following specific orders:

(a) THAT Judgment be and is hereby entered in favour of the Plaintiff, Telkom Kenya Limited, as prayed in the Plaint dated 17th September, 2008 and filed on 19th September, 2008, with costs.

(b) THAT a declaration do and is hereby made that the Plaintiff does not owe the Defendant and/or its predecessor, the Municipal Council of Mombasa and/or County Government of Mombasa, the sum of Kenya Shillings Forty Million Fifty Thousand Eight Hundred and Ninety-One and One Cent (Kshs. 40,050,891.01) or any part thereof, on account of rates, interest, or penalties for the period between the years 1996 and 2008 in respect of the parcel of land known as Title No. Mombasa/Block/XXI/430 (Mombasa Telephone House), or any other of the Plaintiff's properties situated within the Defendant's ratable area; and that the Defendant's demand dated 21st August, 2008 and subsequent correspondence and threatened enforcement proceedings are fraudulent, illegal, null and void ab initio.

(c) <u>THAT</u> an Order of Permanent Injunction be and is hereby issued restraining the Defendant and/or its predecessor, whether by itself, its servants, agents, advocates, auctioneers, or any of them, from demanding the said sum of Kshs. 40,050,891.01 (or any similar sum), from commencing or prosecuting any recovery proceedings against the Plaintiff for the said sum, or from attaching, advertising, selling, transferring, leasing, evicting, parting with possession of, or otherwise interfering with the Plaintiff's use and occupation of Title No. Mombasa/Block/XXI/430 or any of the Plaintiff's immovable properties within the Defendant's ratable area.

(d) <u>THAT</u> for the avoidance of doubt, nothing in this Judgment shall bar the Defendant and/or its predecessor from levying and collecting future lawful annual rates assessed and demanded in strict compliance with the Rating Act, Cap 267, the Valuation for Rating Act, Cap 266, and any other applicable law, provided such demands are particularized, duly served, and lawfully enforced.

(e) <u>THAT</u> the Defendant shall bear the costs of this suit, to be taxed and paid to the Plaintiff.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS ……28TH .. …….DAY OF ……NOVEMBER……2025.

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……

HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT AND LAND COURT
<u>AT MOMBASA</u>

Judgement delivered in the presence of: -

a) M/s. Firdaus Mbula – the Court Assistant.
b) M/s. Ochola Advocate holding brief for Mr. Bundotich Advocate for the Plaintiff.
c) No appearance for the Defendant.