



Kenya Railways Corporation v Aluminax Limited & 4 others (Environment & Land Case 147 of 2008) [2024] KEELC 420 (KLR) (30 January 2024) (Judgment)

Neutral citation: [2024] KEELC 420 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 147 OF 2008**

**MD MWANGI, J
JANUARY 30, 2024**

BETWEEN

KENYA RAILWAYS CORPORATION PLAINTIFF

AND

ALUMINAX LIMITED 1ST DEFENDANT

FURRIE URASA 2ND DEFENDANT

EDITH MUNJAKU JENKINS 3RD DEFENDANT

JARED KERONGE BOSIRE 4TH DEFENDANT

COMMISSIONER OF LANDS 5TH DEFENDANT

JUDGMENT

1. About 23 years ago, in the year 2001, a policy decision was made by the Government of Kenya to dispose of some non-core land held by the Kenya Railways Corporation to raise operational capital and reduce expenditure on rates and property maintenance costs. To execute the policy, an inter-ministerial Committee was set up to oversee the process.
2. The inter-ministerial Committee set the terms for the sale of the identified properties which was to be through public tenders. An advertisement was done in the East African Standard Newspaper of 18th April, 2002. In the advertisement, the Plaintiff invited bids from interested parties for the purchase of the listed properties. The bids were to be addressed to the Managing Director, Kenya Railway Corporation, P.O. Box 30121, NAIROBI, to reach him not later than 2nd May, 2002. Any enquiries were to be directed to the Estate Manager, Tel. 221211 Ext. 2974, 2739 D/L 330130.
3. The bids that were received from interested parties for the purchase of the listed properties were opened in July, 2002.



4. The suit property in this case L.R. No. 3734/840 (original number 3734/3/360) as delineated on Land Survey Plan Number 78782 together with the building and improvement erected thereon and also known as L.R. No. 3734/840 – Mzima Springs Road, Lavington, Nairobi, an estate in fee simple measuring 0.909 of an acre or thereabouts was one of the non-core properties identified for sale.

The Plaintiff's case

5. The Plaintiff in its plaint dated 4th April, 2008 pleaded that the Defendants unlawfully and fraudulently colluded to corruptly and illegally defraud it of the suit property sometimes in the year 2004. It alleges that the 3rd and 4th Defendants in perpetration of the said fraud, irregularly, unlawfully and without authority purported to offer the suit property for sale to the 2nd Defendant and in so doing stole the title document of the suit property from the Plaintiff Corporation and forged and or fraudulently procured the signatures of the Plaintiff's former Managing Director and the Corporation Secretary.
6. The 3rd and 4th Defendants were at the material times the Acting Estate Manager and the Acting Corporation Secretary of the Plaintiff Corporation respectively, as pleaded in the plaint.
7. The Plaintiff further accuses the Defendants of fraudulently colluding to undervalue the suit property and purporting to dispose the same to the 2nd Defendant at a consideration of Kshs 6,500,000/=.
8. The Plaintiff alleges that though the suit property was allegedly offered for sale to the 2nd Defendant and who purportedly paid the 10% deposit on 2nd November, 2004, the balance of the purported purchase price was paid by the 1st Defendant, who was and is in any event a stranger to the alleged sale offer. The 1st Defendant purportedly paid the balance on 18th October 2005, nearly one year after the alleged sale offer and when the Board of the Plaintiff had particularly stopped the alleged sale vide its 217th Board Meeting held on 25th November 2004.
9. The Plaintiff categorically states that it did not offer the suit property for sale and or sell it to either the 1st or the 2nd Defendant. The purported sale was conducted fraudulently by the Defendants in collusion and without any authority whatsoever from the Plaintiff Corporation and in breach of the Corporation's regulations and procedures for disposing of properties.
10. The Plaintiff reiterates that the Defendants colluded to forge and or fraudulently procured the signatures of the Corporation's former Managing Director, Mr. Andrew Wanyande and falsely represented him as an authorized signatory in order to prepare and execute the letter of offer, the sale agreement and the transfer in respect of the suit property. The Plaintiff asserts that the 4th Defendant executed the documents without authority, consequently, the 3rd and 4th Defendants were arrested and charged in Criminal Case No. 1543 of 2006 Republic -versus- Edith Munyaku Jenkins, Jared Kerongo Bosire and another.
11. The Plaintiff further accuses the 1st and 2nd Defendants of fraudulently colluding with the 5th Defendant to cause the suit property to be illegally transferred and registered in the name of the 1st Defendant. The Plaintiff therefore asserts that the 1st and 2nd Defendants are not innocent purchasers for value as they are the main architects of the fraud and colluded with the 3rd, 4th and 5th Defendants to unlawfully, corruptly and fraudulently defraud it of the suit property.
12. The purported sale transaction, if any, was unlawful, fraudulent and contrary to the provisions of the *Kenya Railways Corporation Act* and the Plaintiff's regulations and procedures governing the sale and disposal of its property. Upon the Plaintiff realization of the fraudulent sale and transfer, the Plaintiff refunded the purported purchase price but the Defendants declined to accept it.



13. The Plaintiff particularizes the allegations of fraud at paragraph 21(a) – (j) of the plaint.
14. The Plaintiff prays for judgment against the Defendants jointly and severally for:
 - a. A Declaration that the purported sale of the suit property together with the building and improvement erected and being thereon by the 3rd and 4th Defendants to the 1st and 2nd Defendants is fraudulent, wrongful and unlawful.
 - b. A permanent injunction be issued restraining the Defendants by themselves, agents, servants, employees or otherwise howsoever from entering, evicting, cutting trees, demolishing structures and buildings, selling, transferring, alienating, or in any way dealing with or interfering with the proprietary rights, interests and possession enjoyed by the Plaintiff Corporation over the suit property together with the building and improvement erected and being thereon.
 - c. An order of this Honourable Court directing the 5th Defendant to cancel the registration of the 1st Defendant as the purported proprietor of the suit property together with the building and improvement erected and being thereon and to correct the register by restoring the registration of Kenya Railways Corporation as the Lawful proprietor of the suit property.
 - d. General damages.
 - e. Costs.
 - f. Interests on (e) and (f) above.

Defence and Counter-Claim by the 1st Defendant

15. The 1st Defendant vide its statement of Defence dated 15th May, 2008 denied the allegations by the Plaintiff insisting that due process was followed in obtaining the title to the suit property. Vide the amended statement of Defence and Counter-Claim amended on 18th May 2022, the 1st Defendant restated the above position but also introduced a Counter-Claim against the Plaintiff asserting that the Plaintiff had breached the fundamental terms of the sale agreement (between the Plaintiff and the 1st Defendant dated 24th November 2004) by failing to deliver vacant possession of the suit property.
16. The 1st Defendant asserted that the Plaintiff lost title/ownership of the suit property the moment it was sold and title issued to the 1st Defendant for valuable consideration. The 1st Defendant avers that by a notice issued in the East African Standard of 18th April, 2002, the Plaintiff offered for sale its various properties including the suit property. The 1st Defendant made enquiries with a view to purchasing the suit property and as a result, the Plaintiff agreed to offer for purchase the suit property. The 1st Defendant denied the allegations of fraud and illegality in the plaint and put the Plaintiff to strict proof.
17. The 1st Defendant stated that it accepted the offer and made a deposit of 10% of the purchase price which the Plaintiff accepted. It subsequently paid the balance of the purchase price and an official receipt was issued to it by the Plaintiff. The 1st Defendant affirms that it followed the usual procedures for sale of property namely, signing of the agreement for sale, and transfer. Transfer was properly registered and title issued in the 1st Defendant's name.
18. The 1st Defendant maintained that it purchased the property in good faith for valuable consideration after conducting an official search and satisfying itself that the suit property was available for sale. The title having been transferred to it, it is protected by *the Constitution* and the Law. It therefore has a right



to use the said property to the exclusion of any other party. The 1st Defendant categorically denied any illegality or fraud on its part and put the Plaintiff to strict proof.

19. In its Counter-Claim, the 1st Defendant reiterated the above averments and asserted that it acquired conclusive title over the suit property. It accuses the Plaintiff of breach of the contract and enumerates the particulars of breach at paragraph 24 (a) – (d) of its amended Defence and Counter-claim. It accused the Plaintiff of failing/refusing to give it vacant possession of the suit property despite several demands to surrender the property.
20. The 1st Defendant in its Counter-Claim prays for a total of 8 orders namely:
 - a. An order that the Plaintiff's suit be dismissed with costs.
 - b. An order that the Plaintiff gives vacant possession of the suit property.
 - c. An order that the Plaintiff's employees have trespassed onto the 1st Defendant's property.
 - d. An eviction order do issue against the persons residing on the suit property.
 - e. An order for damages for breach of the agreement for sale dated 24th November, 2004.
 - f. Mesne profits from 8th June, 2005 until delivery of possession.
 - g. An order that the Plaintiff do pay interest on (e) and (f) above at court rates until payment in full.
 - h. An order that the Plaintiff do pay the costs of this suit and counter-claim together with interest thereon at court rates.

Defence and Counter-claim by the 2nd Defendant.

21. Vide her further Amended Statement of Defence and Counter-Claim, the 2nd Defendant denied the Plaintiff's case and averred that she has a proprietary interest in the suit property in view of the fact that the Plaintiff had issued her with a letter of offer in respect of the suit property dated 8th October 2004. She then proceeded and paid the Plaintiff Kshs 650,000/=, being 10% of the purchase price as stipulated in the Letter of Offer. However, the Plaintiff refused/failed to facilitate Completion of the transfer within the stipulated 60 days.
22. It is the 2nd Defendant's case that there was a Lawful Consensual agreement for sale of the suit property between her and the Plaintiff. She denies the allegations of fraud and illegality advanced by the Plaintiff in its case.
23. In her Counter-claim, she asserts that she made an offer to the Plaintiff for purchase of the suit property following a newspaper advertisement by the Plaintiff inviting offers from interested parties to purchase the properties listed therein. She was given a letter of offer inviting her to purchase the suit property for Kshs 6,500,000/=.
24. The 2nd Defendant affirms that she accepted the offer by signing and returning a copy of the letter to the Plaintiff with a sum of Kshs 650,000/= being 10% of the purchase price. According to the letter of offer, the Plaintiff was to prepare an agreement and subsequently a transfer. The letter of offer provided that once executed, the formal agreement would supersede it, but until then, the terms and conditions of the letter of offer were binding.
25. The 2nd Defendant states that the Plaintiff did not take even a single step towards preparing either the formal agreement or the transfer, to facilitate the Completion of the Sale. The Plaintiff instead, through



the 3rd and 4th Defendants fraudulently prepared a sale agreement with the 1st Defendant (Aluminax Ltd) who did not have an interest in the suit property since it had not been issued with a letter of offer. The 2nd Defendant avers that the Plaintiff has indeed renounced the letters of offer, sale agreement and transfer documents relied upon by the 1st Defendant as being fraudulent and the purported signatures therein being forgeries.

26. The 2nd Defendant points out to numerous shortcomings in regard to the purported sale of the suit property to the 1st Defendant as follows:-
- a. The letter of offer dated 12th October, 2004 was not signed by the 1st Defendant's Corporation Secretary and had a forged signature of the Plaintiff's Managing Director.
 - b. The 10% deposit was paid by the 1st Defendant on 18th February, 2005, over 3 months after the Plaintiff had received the deposit from the 2nd Defendant over the same property.
 - c. The sale agreement relied on by the 1st Defendant is dated 24th November, 2004. This date was before the 10% deposit was paid as provided in the offer letter relied on by the 1st Defendant.
 - d. The transfer of the suit property was allegedly signed by the former Managing Director of the Plaintiff Corporation, Mr. Andrew Wanyande on 2nd June, 2005 while he had left the Plaintiff Corporation on 16th December, 2004.
 - e. The transfer to the 1st Defendant was fraudulently registered on 8th June, 2005 while the 1st Defendant purports to have paid the balance of the purchase price 4 months later on 18th October, 2005.
27. The 2nd Defendant avers that the Plaintiff is in breach of the Contractual relationship established by the Letter of Offer by failing to prepare the sale agreements and transfer documents for execution, failing to facilitate completion within the stipulated 60 days and failing to give a vacant possession to her. Consequently, the Plaintiff has been unable to enjoy the fruits of her investment in terms of deposit of the purchase price. The 2nd Defendant further avers that she has been denied the opportunity to utilize the suit property which should rightfully belong to her.
28. The 2nd Defendant prays for the following orders:
- a. That the Plaintiff's suit be dismissed with costs.
 - b. That a declaration is hereby made that the Plaintiff acted in breach of contract by failing to facilitate and or impeding completion of the transfer of title to the suit property to the 2nd Defendant.
 - c. That the Plaintiff be and is hereby ordered to transfer the title to the suit property to the 2nd Defendant as soon as she pays the balance of the purchase price being Kshs 5,850,000/- within 60 days of the judgment or as the Court may direct.
 - d. That in the alternative to prayer (c), the Plaintiff be and is hereby ordered to refund the 2nd Defendant's damages being 10% of the current value of the suit property plus interest at 20% from the date of the deposit of the purchase price.
 - e. Costs of the suit.
29. The 3rd, 4th and 5th Defendants too filed their respective statements of Defence in essence denying the Plaintiff's allegations in the Plaint and putting the Plaintiff to strict proof.



Evidence Adduced

30. This case proceeded to full hearing. The 3rd, 4th and 5th Defendants did not participate in the hearing. They did not offer any evidence.

Evidence Adduced on behalf of the Plaintiff

31. The Plaintiff called Mr. Livingstone Kamande Gitau, its former Chief Surveyor, as its sole witness. The witness adopted his witness statement dated 17th January, 2023 as his evidence in chief. He shall be referred to as PW 1 henceforth.
32. It is worthy noting that the parties agreed to have all the documents in their respective lists of documents admitted as exhibits and marked accordingly. They also agreed that the proceedings in the Criminal Case No. 1545 of 2006 be admitted as evidence in this matter as well. The original file in the criminal case is before the court.
33. PW 1's evidence in chief affirms the allegations in the plaint.
34. In response to the questions by Mr. Odoyo, Advocate for the 1st Defendant, PW 1 stated that he was the Plaintiff's Chief Surveyor until the year 2010. He also served as the Estate Manager of the Plaintiff Corporation in an acting capacity for a period of 1 year. However, in August, 2004, he was not the Acting Estate Manager. He could not remember who was acting then. He was not involved in the transactions giving rise to this suit.
35. PW1 confirmed that the suit property was valued at 9.0 million. He affirmed his statement that none of the bidders proceeded with the transactions (in regard to the suit property) with the result that it was not sold.
36. PW1 stated that he was aware of an offer to the 2nd Defendant but the same was reversed by the Board of the Plaintiff Corporation, since the 2nd Defendant was the wife of the Managing Director then.
37. PW 1 asserted that he was not aware if the 1st Defendant paid the 10% deposit of the purchase price to the Plaintiff Corporation.
38. It was PW1's testimony that sale agreements for the Plaintiff are prepared by the Corporation Secretary in liaison with the Legal Department. At the material time, Jared Keronga Bosire was the Legal Manager of the Plaintiff.
39. In the agreement presented by the 1st Defendant, the Lawyer for the Plaintiff is indicated as Jared K. Bosire whereas the agreement is indicated as signed by the Managing Director, and witnessed by the Corporation Secretary. The same position with the transfer document.
40. Regarding the outcome of the Criminal Case, PW1 confirmed that all the accused persons were acquitted of all the charges.
41. In response to questions by Mr. Sagana, Advocate for the 2nd Defendant, PW1 confirmed that the 2nd Defendant had been given an offer by the Managing Director of the Company with the purchase price indicated as Kshs 6.5 million. A deposit equivalent to 10% of the purchase price was to be paid upon acceptance of the offer. The Managing Director of the Corporation signed the offer letter after the 2nd Defendant had signed it. The Corporation Secretary affixed the Corporation Seal on it. PW1 confirmed that the 2nd Defendant paid the deposit of 10% which was received and receipted by the corporation.
42. PW1 further confirmed that the suit property was within the program approved by the Cabinet for sale. It was amongst the advertised properties. According to PW1, the reserve price for the suit property



was Kshs 8.1 million, just like plot No. 3734/839 which was adjacent to it. That adjacent plot was indicated as having been sold to Esther Koimet for Kshs 6.5 million.

43. It was PW1's testimony that the reserve prices were arrived at by the government valuer. The adjacent plot was sold through a similar process.
44. PW1, on further probing by the Advocate for the 2nd Defendant stated that his statement about the reason for the stoppage of the sale to the 2nd Defendant because she was the wife of the Managing Director was a not official. A wife of the Managing Director of the Corporation was not excluded from buying the Plaintiff's Properties.
45. PW1 confirmed that the letter of offer presented by the 1st Defendant was not signed by the Corporation Secretary. PW1 confirmed that Mr. Wanyande, a former Managing Director of the Plaintiff Corporation had retired from the Plaintiff Corporation on 16th December, 2004.

Evidence adduced on behalf of the 1st Defendant

46. The 1st Defendant's witness was one David Kamunya Runo, a director of the 1st Defendant Company. He adopted his witness statement dated 26th January, 2022 as his evidence in chief. He shall be referred to as DW1.
47. In response to questions by the Plaintiff's Advocate, Mr. Agwara, DW1 stated that he saw the advertisement by the Plaintiff Corporation and decided to submit an application. He confirmed that he had not exhibited the application in support of his case. He could not also remember the date of the said application. He explained that his lawyer was helping him with the application.
48. He affirmed that there were deadlines stated in the application. He could not tell if his application was submitted within the timelines. His offer was Kshs 6.5 million.
49. Questioned about the Criminal Case, DW1 confirmed that he was a witness in the Criminal Case – witness number 9. He admitted that in his testimony before the Criminal Court, he had stated that he was using one by the name of Tarus to help him in his application and not his lawyer as he had stated before this court.
50. DW1 alleged that his letter of offer came from the Managing Director's office. The said Tarus picked it from there on his behalf as he was unwell at the time. Though he could not remember exactly when the letter was picked, he estimated that it may have been in the year 2004. He could not as well remember the month when it was picked. The deposit equivalent to 10% of the purchase price was payable in 14 days – whereas the completion was to be in 60 days. The letter of offer is dated 12th October, 2004.
51. DW 1 affirmed that he is not the one who accepted the offer on behalf of the 1st Defendant. A co-director by the name of Dina Chelang' did. He was not there when she signed the acceptance.
52. DW 1 admitted that he made payments after the deadline but the Plaintiff Corporation accepted them. He was late in making the payments because of a cash flow challenge.
53. It was DW1's testimony that the former Managing Director of the Plaintiff Corporation, Mr. Wanyande denied signing the 1st Defendant's letter of offer. In respect to the agreement, DW1 could not tell who signed on behalf of the Plaintiff Corporation. On behalf of the 1st Defendant, it was signed by Dina Chelang'.
54. The Managing Director of the Plaintiff Corporation also denied signing the agreement.



55. DW1 confirmed that the Plaintiff had written to him seeking to refund the purchase price but he refused to accept the money. A banker's cheque had even been written in his name but he rejected it. He instructed his lawyer to return it to the Plaintiff Corporation.
56. In response to questions by Mr. Sagana, Advocate for the 2nd Defendant, PW 1 confirmed that Mr. Wanyande denied signing his letter of offer which was also not signed by the Corporation Secretary. He too denied signing the agreement the 1st Defendant was relying on; the transfer as well.
57. PW1 agreed that the amount of money paid to the Plaintiff (as balance of the purchase price) was Kshs 5,299,993.50. Though he alleged to have paid the rates due to the suit property, he had no evidence to confirm such payments.
58. In response to Mr. Motari, State Counsel representing the 5th Defendant, DW1 once again affirmed that he did not pay the 10% deposit within the stipulated timelines in the letter of offer. He further did not adhere to the special condition(s) in the agreement. He again admitted that the Managing Director of the Plaintiff Corporation and the Corporation Secretary denied their signatures on the letter of offer, agreement and the transfer.

Evidence adduced on behalf of the 2nd Defendant.

59. The 2nd Defendant testified as a witness in her own case. She adopted her witness statement dated 20th June, 2022 as her evidence in chief. She affirmed her witness statement in her testimony. She stated that she learned about the intended sale of the Plaintiff's properties from the East African Standard Newspaper.
60. DW1 stated that after perusing the advertisement she developed interest in the suit property. She sent her offer to purchase it before expiry of the deadline set in the advertisement. She however sent it to the Estate Manager though the advertisement had provided that it be sent to the Managing Director. It was duly acknowledged.
61. Her offer was to purchase the suit property at Kshs 6.5 million because, as she stated, the compound was unkempt and the house required rehabilitation. It was also not connected to a sewer line.
62. DW2 asserted that she was issued with a letter of offer by the Plaintiff sometimes in the year 2004. She allegedly went to the Estate Manager of the Plaintiff to make enquiries and she as advised that she could go ahead and pay the 10% deposit. She paid with a bankers' cheque and was issued with a receipt.
63. It was DW2's position that the letter of offer was binding having been signed by both sides. It was to be followed up with an agreement but the Plaintiff did not however give her a formal agreement.
64. DW2 stated that she only came to learn about the 1st Defendant in Court. Its letter of offer was issued after hers. The Corporation Secretary of the Plaintiff did not even sign the said letter. They paid 10% deposit after the 2nd Defendant had already paid hers.
65. In response to questions by the Plaintiff's Advocate, Mr. Agwara, DW2 confirmed that Mr. Wanyande who was the Managing Director of the Plaintiff Corporation at the time was her husband. She however did not learn about the suit property from him but from the advertisement in the Newspaper.
66. Though the advertisement had required offers to be addressed to the Managing Director, she addressed hers to the Estate Manager, Miss Jenkine. She had not exhibited a copy of her bid.
67. DW2 affirmed that she received her letter of offer through her postal address. It stated that it was subject to Contract. It was further subject to the Plaintiff having a clear title free from encumbrances. Though



she was required to pay the 10% deposit within 14 days, she paid after the lapse of that period without applying for extension of time. She came to learn about the dispute between the Plaintiff and the 1st Defendant when she went to enquire about the delay in preparation of her Contract. She was told that it was the reason for the delay since the Plaintiff did not have a clear title.

68. DW2 stated that she did not receive the letter of 13th December, 2007 refunding the deposit amount paid to the Plaintiff.
69. In response to Cross-Examination by Mr. Odoyo, DW2 reiterated that she had not received a refund of her money paid to the Plaintiff. She elaborated that she was unable to follow up the transaction because she lost a son and her husband in close succession. She confirmed that she had not sought the Cancellation of the 1st Defendant's title in her Counter-claim. She denied receiving the letter from the Plaintiff recalling or reversing her offer letter.

Court's Directions:

70. Upon close of the hearing, the court directed parties to file written submissions. The 3 parties complied and I have had the opportunity to read their respective submissions. The parties had an opportunity to highlight the submissions before the court on 15th November, 2023. The record of the proceedings of that day form part of the record of this court.

Issues for determination

71. I think the issues in this case are clear cut. There is no dispute that the suit property was owned by the Plaintiff up to the time of the alleged transfer to the 1st Defendant. It is also not disputed that the suit property was one of the properties that was advertised for sale by the Plaintiff. The issues then for determination are:
- a. Whether the Plaintiff entered into a binding legal agreement for sale of the suit property with the 2nd Defendant.
 - b. Whether the Plaintiff validly and legally sold the suit property to the 1st Defendant.
 - c. Whether the Plaintiff is entitled to the prayers sought and if so, against which Defendant.
 - d. Whether the 1st Defendant is entitled to the prayers sought in its Counter-Claim.
 - e. Whether the 2nd Defendant is entitled to prayers sought in her Counter-claim.
 - f. What orders should be made on the costs of the suit and the Counter-claims.

Analysis and Determination:

A. Whether the Plaintiff entered into a binding legal agreement with either the 1st Defendant or the 2nd Defendant.

72. I choose to begin with the 2nd Defendant because the letter of offer she relies on in support of her case is dated earlier than that of the 1st Defendant.
73. It is common ground that the process of selling the identified properties was initiated by the advertisement in the East African Standard Newspaper of Thursday, 18th April, 2002. The advertisement invited offers from interested parties for the purchase of the listed properties including the suit property herein. The offers were to be addressed to the Managing Director of the Plaintiff Corporation and were to reach him not later than the 2nd May, 2002.



74. The 2nd Defendant in her testimony alleged that she submitted an offer to purchase the suit property in accordance with the stipulations in the advertisement and before the lapse of the deadline of 2nd May, 2002. She however did not provide any evidence to support that affirmation. She, under Cross-examination stated that she submitted her offer to the Estate Manager rather than to the Managing Director of the Plaintiff Corporation as stipulated in the advertisement.
75. The Ministerial Committee that was in charge of the process of disposing of the identified properties, in accordance with the minutes produced by the Plaintiff as exhibits at page 77 of the Plaintiff's trial bundle, met under the Chairmanship of the then Permanent Secretary in the Ministry of Transport and Communication Ambassador F.K. Muthaura for evaluation and award of the tenders. The criteria for the award of tenders was as follows:
- a. The highest bidder was the tender
 - b. Where two highest bidders tie on their bids and one of them has earlier been offered another property, then the one without wins.
 - c. Tenders not submitted in the prescribed form were disqualified.
 - d. Tenders which did not attain the threshold price though highest were not considered.
 - e. If the highest bidder fails to take the property, the property shall go to the second highest and if the offer is not taken up, the property should be re-advertised.
 - f. Properties which are not taken up through the tender process should be re-advertised.
76. The Committee proceeded to award the tenders following the above criteria. In regard to the suit property, minutes 11 states that the reserve price was Kshs 8.1 million. The highest bidder Mr. Gordon Onyatta at Kshs 25 million had withdrawn. The Committee apparently using Criteria (a) above, recommended that the property then be offered to Mr. M.S Chute, the next tenderer at the price of Kshs 12 million.
77. The Committee made a note that Mr. M.S. Chute had been the highest bidder on many properties and it was doubtful whether he would be able to buy all of them. It recommended that if M/S Chute failed to take it, it be offered to Lorna A. Ajom at Kshs 11 million.
78. From the foregoing, it is obvious that the 2nd Defendant's offer, if there was one, was unsuccessful. The 2nd Defendant did not make it to the short-list. Her offer of Kshs 6.5 million was even below, the reserve price set by the ministerial committee in charge of the process.
79. If either Mr. M.S. Chute or Lorna A. Ajom did not take up the property, going by the criteria (e) above, the property had to be re-advertised.
80. How the 1st and 2nd Defendants ended up with letters of offer for the Suit property without evidence of having submitted offers and having been awarded tenders is a mystery. To add in insult to injury, their offers of Kshs. 6.5 million were clearly below the set reserve price. Logically, the offers by Kenya Railways Corporation should have been premised on the award of tender. The issuance of offer letters to either the 1st or 2nd Defendant was therefore un-procedural, irregular and unlawful.
81. Should the court recognize and give legal effect to a letter of offer or agreement arising from an un-procedural/ irregular/unlawful process?



82. The legal position in such a scenario was pronounced by the court in the case of Kenya Pipeline Ltd - vs- Glencore Energy (UK) Ltd(2015) eKLR where the court stated as follows:-

“In Standard Chartered Bank V Inter Coms Services Ltd & 4 Others (supra) this court..... accepted the submissions made that once an issue of breach of statute is brought to the attention of the court in the course of proceedings, then in the interest of justice the court must investigate it because the courts fundamental role is to uphold the law. The court upheld and endorsed the old English case of Holman V Johnson (1775-1803) Aller 98 where Chief Justice Mansfield stated:-

The principle of public policy is this;

Ex dolo malo no ovitur citor . No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff’s own stating or otherwise, the cause appears to arise ex turpi causa, or the transgression of a positive law of the country, then the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”

83. On that basis alone, this court finds that the issuance of offer letters to either the 1st or 2nd Defendant was therefore un-procedural, irregular and unlawful. I will nonetheless go further to interrogate the offer letters in order to establish their legal implications notwithstanding my conclusion, above as good practice requires.
84. The 2nd Defendant’s case was that she received a letter of offer from the Plaintiff dated 8th October, 2004 for purchase of the suit property for the sum of Kshs. 6.5 million. The terms of the offer were that the 2nd Defendant pays a deposit of 10% of the purchase price being Kshs. 650,000/= within 14 days of the offer letter, while the date of completion would be sixty (60) days from the date of offer.
85. The 2nd Defendant testified that she obtained a banker’s cheque for the sum of Kshs. 650,000 on 2nd November 2004 and delivered it to the Plaintiff together with the duly signed acceptance. The Plaintiff accepted her banker’s cheque and letter of acceptance of offer under the Corporation’s seal and further the Managing Director and the Corporation’s Secretary duly signed it accepting to sell the suit property to her, on the terms and conditions set out in the letter of offer.
86. Clause 10 of the letter of offer stipulated that:
- “The formal sale agreement when executed will supersede this letter until then, the terms and conditions of this letter are binding when both parties have executed it.”
87. The 2nd Defendant insist that the letter of offer was binding in spite of the fact that a formal agreement was not prepared and executed as contemplated in clause 10. She contends that it amounted to a legally binding and enforceable contract between her and the Plaintiff. That is the ground upon which her counter-claim is based.
88. I will first address the issue of non-compliance with the timelines for payment of the deposit. The letter of offer was categorical on payment of a deposit of 10% of the purchase price amounting to Kshs. 650,000 within 14 days from the date of the letter; not from the date of its receipt.
89. The 2nd Defendant in a bid to justify her non-compliance alleged that the letter was sent to her by post, and that she acted on it as soon as she received it. No evidence was offered in support of the allegation. Nonetheless, the plaintiff should have sought an extension of the offer because by the time she purportedly made the payments, it had long expired.



90. The 2nd issue is on the completion date which was to be sixty (60) days from the date of the letter or earlier. The transaction was not completed within the stipulated time. Again, the 2nd Defendant did not seek an extension of the time.
91. Thirdly, the offer was subject to a formal contract. The parties did not make a formal agreement as contemplated.
92. In the case of *East African Fine Spinners Ltd (in receivership) and 3 others -vs- Bedi Investment Ltd [1994] eKLR*, the Court of Appeal dealt with the question of the Legal tenor of a letter of offer which was formally expressed to be subject to an anticipated formal contract that never crystalized. Gicheru JA (as he then was) expressed himself by adopting the words of Lord Westbury LA in *Chinnock -vs- The Marchioness of Ely 4 DE G J & S 638 at 646* as follows:
- “Where you have a proposal or agreement made in writing expressed to be subject to a formal contract being prepared, it means what it says; it is subject to and is dependent upon a formal contract being prepared. When it is not expressly stated to be subject to a formal contract it becomes a question of construction, whether the parties intended that the terms agreed on should merely be put into form, or whether they should be subject to a new agreement the terms of which are not expressed in detail.”
93. Guided by the above decided cases, I will paraphrase and state that the letter of offer of 8th October, 2004, means what it says, it is subject to and is depended upon a formal agreement being prepared. Until that formal agreement was executed, there was no contract between the parties.
94. My finding therefore is that there was no binding and legally enforceable contract between the 2nd Defendant and the Plaintiff.
95. The 1st Defendant too was relying on a letter of offer dated 12th October, 2004, allegedly issued to it by the Plaintiff. DW1 in responding to questions put to him during cross-examination admitted that the 10% deposit was paid after the stipulated time without seeking an extension. Further, he admitted that the former managing director of the Plaintiff Corporation, Mr. Wanyande, denied signing the letter of offer on behalf of the Plaintiff as well as the agreement in his testimony before the Criminal Court in Milimani Chief Magistrate’s Court Criminal Case No. CR 1545 of 2006(*Republic -vs- Rose Mueni Munguti, Edith Munyaku Jenklin and Jared Kerongo Bosire*).
96. The original file in the above referred criminal case is before me. The parties in any event mutually agreed to have the typed proceedings in the criminal case admitted in evidence in this matter.
97. I do confirm that the former Managing Director of the Plaintiff, Mr. Wanyande indeed testified as a witness in the Criminal case. He, under oath, denied signing the alleged letter of offer by the 1st Defendant and the subsequent agreement.
98. This brings me to question the validity of the alleged letter of offer by the 1st Defendant in addition to the fact of non-compliance with the timelines. As I have already stated in respect to the 2nd Defendant’s letter of offer, by the time the 10% deposit was purportedly paid, the offer had already lapsed. It needed to have been renewed.



99. The denial by the former Managing Director of the Plaintiff means that the letter of offer was not executed by an authorized officer of the Plaintiff. The same goes for the agreement relied on by the 1st Defendant making both invalid and unenforceable.

B. Whether the Plaintiff validly sold the suit property to the 1st Defendant.

100. From the foregoing, the purported sale and transfer of the suit property to the 1st Defendant was not only irregular but illegal as well. I need to add that the transfer document which was used to effect the transfer from the Plaintiff to the 1st Defendant was purportedly signed by Mr. Wanyande in his capacity as a Managing Director of the Plaintiff on 2nd June, 2005 while he had left the Plaintiff Corporation on 16th December, 2004. This, if nothing else, is a clear pointer to fraud. The signatures must have been forged or superimposed on the document. The 1st Defendant did not offer any evidence to explain how Mr. Wanyande could have signed the documents while he had already retired from the Corporation.

101. One other issue that was brought forth by Mr. Sagana Advocate for the 2nd Defendant in Cross-examination relates to the amount of money paid by the 1st Defendant in purported purchase of the suit property. After the deposit of Kshs 650,000/=, the 1st Defendant only paid a further sum of Kshs 5,299,993.50 as the balance of the purchase. This was allegedly after deduction of the amounts paid for the rates due and owing on the suit property on behalf of the Plaintiff Corporation. No evidence however was availed in Court on the alleged payment of the rates.

102. The import of this revelation is that the total amounts paid by the 1st Defendant for the purchase of the suit property was Kshs 5,949,993.93. This was short of the purported sale price of Kshs 6,500,000/=.

103. This is further evidence of irregularities. The transfer to the 1st Defendant was done irregularly, fraudulently and illegally.

C. Whether the Plaintiff is entitled to the orders sought

104. As pointed out earlier on in this judgment, the Plaintiff prayed for:

- a. A declaration that the purported sale of the suit property is fraudulent, wrongful and unlawful.
- b. A permanent injunction.
- c. An order directing the 5th Defendant to cancel the registration of the 1st Defendant as the purported proprietor of the suit property and correct the register by restoring the registration of Kenya Railways.
- d. General damages
- e. Costs
- f. Interest.

105. From my above analysis, the purported sale of the suit property to the 1st Defendant was not only irregular but fraudulent and unlawful.

106. Section 26 of the [Land Registration Act](#) provides that a certificate of title issued by the Registrar upon registration shall be taken by all courts to be prima facie evidence that the person named as the proprietor of the Land is absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except:

- a. On the ground of fraud or misrepresentation to which the person is proved to be a party; or



- b. Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.
107. Section 80 of the Act, empowers the court to order the rectification of the register by directing that any registration be cancelled or amended if satisfied that any registration was obtained, made or omitted by fraud or mistake.
108. In this case, the court finds and holds that the registration of the 1st Defendant as the proprietor of the suit property was obtained and or made illegally, and unprocedurally.
109. The court therefore allows the Plaintiff's case and directs the 5th Respondent to forthwith cancel the registration of the 1st Defendant as the purported proprietor of the suit property and to rectify the register by restoring Kenya Railways Corporation as the Lawful proprietor of the suit.
110. The Plaintiff further prayed for general damages. I have keenly perused the evidence presented before the Court. The Plaintiff has not justified the award of general damages. Though the title was transferred to the 1st Defendant, the Plaintiff has had possession of the suit property all through. The Plaintiff has not laid the basis for an award of General Damages.
111. In the case of David Bagine vs Martin Bundi (1997) eKLR, the Court of Appeal quoted with approval the judgement of Lord Goddard CJ in *Bonham Carter vs Hyde Park Hotel Ltd* (1948) 64 TLR 177 where he stated that:-

“The Plaintiffs must understand that if they bring actions for damages it is for them to prove damage. It is not enough for them to note down the particulars and, so to speak, throw them at the head of the court saying, ‘this is what I have lost, I ask you to give me these damages;’ they have to prove it.”

112. I disallow the prayer for general damages.
113. The Plaintiff's claim however, having succeeded against the 1st Defendant, I will grant the Plaintiff costs of the suit against the 1st Defendant.

D. What then is the fate of the 1st and 2nd Defendant's Counter-claims?

114. The 1st Defendant essentially seeks vacant possession of the suit property with damages and mesne profits. From the above finding, it is obvious that the 1st Defendant's counter claim against the Plaintiff fails in its entirety. The 1st Defendant's case is premised on an illegal contract.
115. In the case of *Kenya Pipeline Company Ltd –versus Glencore Energy (UK) Ltd* (supra) the court the upheld and endorsed the old English case of *Holman V Johnson* (1775-1803) ALLER 98, where Chief Justice Mansfield stated:-

“The principle of public policy is this;

Ex dolo malo no ovitur citor . No court will lend its aid to a man who found his cause of action on an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause appears to arise *ex turpi causa*, or the transgression of a positive law of the country, then the court says that he has no right to be assisted. It is on that ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.”



116. In *Kenya Airways Ltd vs Satwant Singh Flora* (2013) eKLR, the court stated that,

“No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the Defendant has pleaded the illegality or whether he has not. If the evidence adduced by the Plaintiff proves the illegality, the court ought not to assist him.”

117. This Court will not lend its aid to a party who founded his cause of action on an illegal act. I dismiss the 1st Defendant’s Counter-claim in its entirety with costs to the Plaintiff.

118. The 2nd Defendant’s claim essentially is for specific performance with an alternative prayer for refund of the sum of Kshs 650,000/= paid as deposit. The jurisdiction on specific performance is based on the existence of a valid enforceable contract. As Maraga J (as he then was) stated in *Reliable Electrical Engineers –vs- Mantra Kenya Ltd* [2006] eKLR;“

“It (specific performance) will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality which makes the contract invalid or unenforceable.”

119. The court has already found that there was no valid contract between the Plaintiff and the 2nd Defendant.

120. This brings me to the alternative prayer for the refund of the deposit paid with interest. The Plaintiff’s response was that the claim is time barred. I agree with the Plaintiff. The 2nd Defendant’s claim is clearly time barred.

121. The Plaintiff in his pleadings attempted to link the 1st and 2nd Defendant in a conspiracy to defraud it of the suit property. I need to state that there was no connection established between the 1st and the 2nd Defendant. I should state that no fraud has been proved against the 2nd Defendant. Though I strike out the 2nd Defendant’s Counter-claim, I will make no orders of costs against her.

Conclusion

122. The conclusion is that the Plaintiff’s case succeeds in the following terms:

- a. A Declaration be and is hereby made that the purported sale of the suit property L.R. No. 3734/840 (original number 3734/3/360) as delineated on Land Survey Plan Number 78782 together with the building and improvement erected thereon and also known as L.R No. 3734/840 – Mzima Springs Road, Lavington, Nairobi, an estate in fee simple measuring 0.909 of an acre or thereabouts together with the building and improvement erected and being thereon by the 3rd and 4th Defendants to the 2nd Defendant is fraudulent, wrongful and unlawful.
- b. A permanent injunction be and is hereby issued restraining the Defendants by themselves, agents, servants, employees or otherwise howsoever from entering, evicting, cutting trees, demolishing structures and buildings, selling, transferring, alienating, or in any way dealing with or interfering with the proprietary rights, interests and possession enjoyed by the Plaintiff Corporation over the suit property together with the building and improvement erected and being thereon L.R. No. 3734/840 (original number 3734/3/360) as delineated on Land Survey



Plan Number 78782 together with the building and improvement erected thereon and also known as L.R No. 3734/840 – Mzima Springs Road, Lavington, Nairobi, an estate in fee simple measuring 0.909 of an acre or thereabouts together with the building and improvement erected and being thereon.

- c. An order be and is hereby issued directing the 5th Defendant to cancel the registration of the 1st Defendant as the purported proprietor of the suit property L.R. No. 3734/840 (original number 3734/3/360) as delineated on Land Survey Plan Number 78782 together with the building and improvement erected thereon and also known as L.R No. 3734/840 – Mzima Springs Road, Lavington, Nairobi, an estate in fee simple measuring 0.909 of an acre or thereabouts together with the building and improvement erected and being thereon and to correct the register by restoring the registration of Kenya Railways Corporation as the Lawful proprietor of the suit property.
- d. The Plaintiff shall have the costs of this suit as against the 1st, 3rd and 4th Defendants jointly and severally.
- e. The 1st Defendant's Counter-claim against the Plaintiff is dismissed in its entirety with costs to the Plaintiff.
- f. The 2nd Defendant's Counter-claim against the Plaintiff is struck out but with no orders as to costs.

It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY OF JANUARY, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Agwara for the Plaintiff

Mr. Odoyo for the 1st Defendant

Mr. Sagana for the 2nd Defendant

N/A for the 3rd, 4th and 5th Defendants

Court Assistant: Yvette

M.D. MWANGI

JUDGE

