Bahra & another v Registrar & 3 others (Environment & Land Case 799 of 2014) [2024] KEELC 170 (KLR) (25 January 2024) (Judgment)

Neutral citation: [2024] KEELC 170 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 799 OF 2014

JO MBOYA, J

JANUARY 25, 2024

BETWEEN

AVTAR SINGH BAHRA .... 1ST PLAINTIFF

AMARJIT KAUR BAHRA .... 2ND PLAINTIFF

AND

THE CHIEF LAND REGISTRAR .... 1ST DEFENDANT

MANSOOR ISSA T/A ISSA & CO. ADVOCATES .... 2ND DEFENDANT

KATESTATES ESTATE LIMITED .... 3RD DEFENDANT

KENYA MEAT COMMISSION .... 4TH DEFENDANT

JUDGMENT

1. The Plaintiff's herein approached the Honourable court vide Plaint dated the 18th June 2014; and in respect of which same sought for a plethora of reliefs. Nevertheless, the original Plaint was subsequently amended and thereafter re-amended, resting with the Re-amended Plaint dated the 16th January 2017.

2. Vide the Re-amended Plaint dated the 16th January 2017; the Plaintiffs' have sought for the following reliefs; [verbatim];

   i. That the Plaintiffs' be declared the Legal Title Holders of L.R 4275/40 I.R. 126044, Riverside Drive, Nairobi; or alternatively, the 2nd Defendant be ordered to specifically perform his part of Agreement for Sale dated 1st March 2011 within set timelines.

   ii. In the alternative, Special and General damages as stated in paragraphs 12 and 14 be awarded against the First and Second Defendants.

iii. The 3rd Defendant be held jointly and/or severally liable with the 1st and 2nd Defendants to Refund to the Plaintiffs' the sum of Kshs. 37,308,063.20 together with Interests as particularized in paragraph 13 of the Re-amended Plaint.

iv. Interest be awarded on prayer b at 20% per annum from 21st February 2011 against the 2nd Defendant.

v. Any other Order or Relief which is just and expedient be granted.

vi. Costs be awarded.

3. Upon being served with the Plaint and summons to enter appearance, the 1st Defendant duly entered appearance and thereafter filed (sic) undated Statement of Defense in the year 2022.

4. On the other hand, the 2nd Defendant duly entered appearance and thereafter filed a Statement of Defense and Counterclaim dated the 23rd September 2014. Instructively, the 2nd Defendant sought for the following reliefs at the foot of the counterclaim; [verbatim];

i. The suit to be dismissed with cost.

ii. Judgment against the Defendants to the counterclaim jointly and severally for Kshs.30, 712, 960.80/= (Kenya Shillings Thirty Million Seven Hundred and Twelve Thousand Nine Hundred and Sixty and Cents Eighty) Only, together with Interests at Commercial Rates from the 1st July 2011 till payment in full.

iii. Costs of the Counter-claim.

5. On her part, the 3rd Defendant duly entered appearance and filed Statement of Defense dated the 29th April 2015; and in which Statement of Defense was subsequently amended with Leave of the Honourable court.

6. Furthermore, the 4th Defendant herein was subsequently joined into the proceedings and upon the joinder, same entered appearance, filed a Statement of Defense, as well as a Counter-claim dated the 8th March 2017; and in respect of which the 4th Defendant sought for, inter-alia, the following reliefs; [verbatim];

i. The Plaintiff's suit be dismissed with costs to the 1st and 2nd Plaintiff save for our counterclaim herein being allowed.

ii. A declaration that the 4th Defendant is the legal and rightful owner of all that parcel of land, L.R No. 4275/40, over which the 4th Defendant was [sic] sole and valid.

iii. A declaration that the allotment of the suit property to the 2nd Defendant on the 16th April 2010; by the Commissioner of Lands was fraudulent, unlawful, irregular and void ab initio.

iv. An order directing the 1st Defendant to cancel the Grant No. 126044 and the said Documents be brought before this Honorable court and be destroyed.

v. Permanent injunction be issued to restrain the 2nd Defendant whether by themselves, their agents, employees and/or servants from charging, selling, leasing, transferring, alienating or purporting to do the same and/or dealing in any manner howsoever with the parcel of land L.R No 4275/40.

vi. Any other order the Honourable court orders deems fit.

7. Suffice it to point out that the Counter-claim by and on behalf of both the 2nd and 4th Defendants, respectively, were disputed/ contested and responded to by the adverse Parties.

8. Moreover, the subject matter was thereafter listed for Pre-trial directions and whereupon the respective Parties confirmed due compliance with the provisions of Order 11 of the Civil Procedure Rules 2010.

9. Consequently and in this regard, the matter was thereafter set down for hearing.

Evidence by the Parties :

a. Plaintiffs' Case:

10. The Plaintiffs' case revolves and gravitates around the Evidence of two [2] witnesses, namely, Avtar Singh Bahra and Wycliffe Ombaye, who testified as PW1 and PW2, respectively.

11. It was the testimony of PW1, that same is a Business person, dealing in Real Estate and Development matters. Further and in any event, the witness added that same has been in the Real Estate business/ industry for more than 40 years.

12. Furthermore, the witness averred that same is conversant with the facts pertaining to and in respect of the instant matter. Additionally, the witness averred that same has since recorded a witness statement dated the 13th October 2016, which same (witness) sought to adopt and rely on as his Evidence- in - Chief.

13. Pursuant to and at the instance of the witness, the witness statement dated the 13th October 2016, was duly adopted and admitted as the Evidence- in -chief of the witness [PW1].

14. Other than the foregoing, it was the testimony of the witness that same has also been mandated and authorized to testify for and on behalf of the 2nd Plaintiff. Consequently and in this regard, the witness alluded to a Power of Attorney donated by the 2nd Plaintiff and which essentially mandated the witness to attend court and represent the Interests of the 2nd Plaintiff.

15. Moreover, the witness herein alluded to a List and Bundle of Documents dated the 19th June 2016, and thereafter sought to adopt and rely on the said Documents as Exhibits in proof of the Plaintiffs' case. Instructively, the documents at the foot of the List and Bundle of Documents dated the 19th June 2016; and same were adopted and were admitted as Exhibits P1 to P13, respectively.

16. Further and in addition, the witness also alluded to a Supplementary List of Documents dated the 13th October 2016; and sought to produce the documents thereunder as further Exhibits on behalf of the Plaintiffs. For coherence, the documents at the foot of the said List were thereafter produced and admitted before the court as Exhibits on behalf of the Plaintiffs, save for document number Nine [9] at the foot of the said List, which was marked for identification as PMFI- 23.

17. On the other hand, the witness herein alluded to the Re-amended Plaint dated the 16th January 2017; and thereafter invited the Honourable court to grant the reliefs sought thereunder. Besides, the witness also referred to the counter-claim by the 2nd Defendant and sought to have dismissed with costs.

18. Furthermore, the witness averred that same proceeded to and issued a termination Notice, whereby same sought to terminate the sale agreement which had been entered into between the Plaintiffs and the 2nd Defendant. In any event, the witness added that the termination notice was issued because the suit property could not be transferred to and registered in the name of the Plaintiffs.

19. Additionally, it was the evidence of the witness that same [PW1], was not under any duty/ obligation to pay the balance of the purchase price/ consideration , because even the first payments were under disputes.

20. Other than the foregoing, the witness averred that the Plaintiffs' are similarly claiming loss as against the 3rd Defendant, who was admittedly the Advocate for the 2nd Defendant during the Sale transaction.

21. It was the further evidence of the witness that same however did not enter into any sale agreement with the 4th Defendant herein. Further and in any event, the witness averred that it was mentioned unto him [PW1], that the 4th Defendant was the owner of the suit property.

22. Nevertheless, it was the Evidence of the witness that even though same (witness) neither entered into any sale agreement with the 4th Defendant, the Counter-claim by the 4th Defendant ought to be dismissed with costs.

23. In respect of the claim against the 3rd Defendant, the witness averred that the 3rd Defendant did not perform his functions/contractual mandates in accordance with the Sale agreement. Besides, the witness averred that the payments which were made at the foot of the Sale agreement were made to the 3rd Defendant, who was however obligated to hold the said funds pending the completion of the transaction/sale.

24. On cross examination, Learned Counsel for the 2nd Defendant, the witness herein averred that he (witness) and the 2nd Plaintiff, were purchasing the suit property from the 2nd Defendant. In any event, the witness averred that same was introduced to the 2nd Defendant by one of his (witness's) friends and thereafter the witness developed an interests in purchasing/ acquiring the suit property.

25. Whilst under further cross examination, the witness averred that subsequently same (witness) proceeded to and entered into a sale agreement with the 2nd Defendant pertaining to and in respect of the suit property. Further, it was the evidence of the witness that the purchase price was agreed at Kes.67, 851, 024/= only which was to be paid to and in favor of the 2nd Defendant.

26. Be that as it may, it was the testimony of the witness that prior to and before entering into and executing the sale agreement same (witness) had neither viewed nor visited the suit property, the subject of the intended sale.

27. It was the Evidence of the witness that during and in the course of the sale transaction, same (witness) was represented by a law firm , namely, M/s P.J Kakad Advocates who handled the entire transaction. Moreover, the witness averred that it was the duty of his advocates, namely, M/s P.J Kakad Advocates to carryout and undertake due diligence over and in respect of the suit property.

28. On the other hand, the witness averred that by the time same [PW1] entered into and executed the sale agreement, the suit property was registered in the name of the 2nd Defendant.

29. On further cross examination, the witness averred that the sale agreement relating to the sale of the suit property was prepared by the 3rd Defendant. At any rate, the witness averred that the 3rd Defendant herein was the advocate for the vendor, namely, the 2nd Defendant.

30. Similarly, it was the Evidence of the witness that the agreement which was entered into and executed by the Plaintiffs and the 2nd Defendant herein contained various clauses pertaining to, inter-alia, the purchase price as well as the rest of the conditions guiding the sale, including the completion date.

31. Besides, it was the Evidence of the witness that both the 2nd Plaintiff and himself proceeded to and complied with the terms of the sale agreement. For coherence, the witness averred that the 2nd Plaintiff and himself paid the 10% stakeholder sum at the time of the execution of the sale agreement.

32. Other than the foregoing, the witness averred that the monies at the foot of the stakeholder sum was paid to and in favor of the Plaintiff's advocate, namely, Mr. P.J Kakad Advocate, who was thereafter mandated and authorized to release the money to the 2nd Defendant.

33. In answer to a question as to whether due diligence was undertaken, the Witness stated that same undertaken by the Plaintiff's advocate and not by himself. In any event, the witness added that same was convinced that due diligence was undertaken, even if same (witness) did not have evidence of an official search before the Honourable court.

34. It was the further testimony of the witness, that the Plaintiffs herein have since paid to and in favor of the 2nd Defendant the sum of Kes.37, 318, 063/= only. Additionally, it was the evidence of the witness that same (witness) also released the sum of kes.30, 532, 960.80/= only to M/s P.J Kakad and Company Advocates for onwards transmission to the 2nd Defendant's advocate, subject to the terms of the agreement.

35. Other than the foregoing, the witness averred that same is aware that a Transfer instrument was thereafter crafted and forwarded unto him through his advocate on record for purposes of onward transmission to him (witness) for due execution. Instructively, the witness added that indeed the Transfer instrument was duly signed.

36. On further cross examination, the witness averred that even though the Transfer instrument had been executed and signed by the Parties, same was subsequently informed by his advocate that the Deed File in respect of the suit property was missing and thus unavailable. In this regard, the witness averred that as a result of the missing Deed File, the transfer over and in respect of the suit property was incapable of being effected.

37. At any rate, the witness averred that the transfer of the suit property has never been effected into the names of the Plaintiffs herein. In addition, it is the evidence of the witness that the 2nd Defendant herein surrendered to his advocates, namely, M/s PJ Kakad Advocates the completion documents, relative to the subject matter.

38. Furthermore, the witness also averred that whilst forwarding the completion documents, the advocates for the vendors[the 3RD Defendant herein], also requested for the release of the balance of the purchase price.

39. Besides, it was the testimony of the witness that the balance of the purchase price amounting to Kes.30, 532, 960.80/= only was only supposed to be released upon successful transfer and registration of the suit property. However, the witness averred that his transaction advocates intimated to him that there was a problem with the transfer and registration of the suit property in his (witness) name.

40. Nevertheless, whilst under cross examination, the witness added that the information pertaining to the fact that the transfer of the suit property was having problems was brought to his attention verbally.

41. Moreover, the witness averred that as a result of the failure by the 2nd Defendant (vendor) to effect the transfer and registration of the suit property, same (witness) was compelled to and indeed issued a termination notice. Instructively, the witness added that by the time same issued and served the termination notice, same had released all the payments to his advocates. In any event, the witness added

that the full payment of the purchase price was made to the Plaintiff's advocates [M/s P. J Kakad Advocates], as at the 23rd May 2011.

42. On further cross examination, the witness averred that the termination notice was issued on account on unavailability of records pertaining to and concerning the suit property at the Lands office.

43. It was the further testimony of the Witness that the 2nd Defendant herein also covenanted to place the Plaintiffs in possession of the suit property upon the payment of the full purchase price.

44. However, the witness averred that the balance of the purchase price was never released to and in favor of the 3rd Defendant. Additionally, the witness averred that subsequently same [PW1], was obligated to and indeed instructed and retained a valuer to value the property and form an opinion as to rental value of the suit property. In this regard, the witness added that a valuation exercise was thereafter undertaken culminating into the preparation of the valuation report dated the 19th March 2014.

45. Furthermore, the witness [PW1] averred that the valuation in question was undertaken after same (witness) issued and served the termination notice.

46. On further cross examination, the witness averred that same also proceeded to and retained an Architect for purposes of drawing and generating Building Plan in respect of an intended Development which was to be undertaken by the Plaintiff. Nevertheless, the witness averred that though the Building Plans were generated/prepared, same were however never submitted for approval.

47. Furthermore, the witness averred that by the time same instructed and engaged the Architect to draw the Building Plans, same (witness) had not received the Certificate of title/ Grant over and in respect of the suit property.

48. On cross examination by Learned counsel for the 3rd Defendant, the witness herein averred that the Plaintiff's Complaint against the 3rd Defendant relates to and concerns breach of clause 4.3 of the sale agreement. In addition, the witness averred that the 3rd Defendant was obligated to hold the stakeholders sum/money pending the completion of the transaction.

49. Whilst under further cross examination, thee witness averred that same was privy to a letter written by the 3rd Defendant and addressed to his (witness advocate) and in respect of which the 3rd Defendant was seeking for the permission/authority to release the stakeholder sum to the 2nd Defendant for purposes of perfection of the completion document.

50. Furthermore, the witness also acknowledged that the letter which was written by the 3rd Defendant and which sought for authority for release of the monies to the 2nd Defendant was duly received by his (witness advocates). Nevertheless, the witness averred that same has a complaint against the 3rd Defendant. In particular, the witness contended that his complaint against the 3rd Defendant relates to breach of Professional duty.

51. Whilst under further cross examination, the witness averred that despite his claim against the 3rd Defendant being for breach of Professional duty, same (witness) does not have any Professional undertaking from the 3rd Defendant in respect of the sum of Kes.37, 318, 063/= only.

52. Other than the foregoing, the witness averred that same proceeded to and issued a Termination Notice after the completion documents were released to his (witness) advocate, namely, M/s P.J Kakad & Co Advocate.

53. On further cross examination, the witness [PW1] testified that the 3rd Defendant herein was never his transaction advocate.

54. On cross examination by learned counsel for the 4th Defendant, the witness herein stated that the Plaintiffs' don't contest the claim by the 4th Defendant. In any event, the witness averred that same is not seeking/ claiming any orders as against the 4th Defendant.

55. On further cross examination, the witness averred that the same established and gathered that the title to the suit property doesn't belong to the 2nd Defendant.

56. On re-examination by Learned counsel for the Plaintiffs, the witness averred that the sale agreement which was entered into between the Plaintiffs, on one hand; and the 2nd Defendant, on the other hand, was a binding document on the Parties. Furthermore, the witness also averred that the 2nd Defendant was obligated to hand over vacant possession of the suit property upon payment of the full purchase price.

57. Other than the foregoing, it was the further evidence of the witness that by the time the 3rd Defendant wrote the Letter dated the 11th May 2010, same (3rd Defendant) had not availed all the completion documents.

58. Other than the foregoing, the witness averred that same (witness) thereafter proceeded to and issued a Termination Notice on account of breach of contract. In any event, the witness added that the Termination notice was issued after his (witness) advocate realized that the title to the suit property was not clean.

59. Additionally, the witness averred that the issuance of the Termination Notice was also informed by the discovery that the title of the suit property belong to the 4th Defendant and not the 2ND Defendant herein.

60. Whilst still under re-examination, the witness added that same (witness) is ready to return the title documents because the title of the suit property is not clean.

61. The second witness who testified on behalf of the Plaintiffs is Wycliff Ombaye. Same testified as PW2.

62. It was the testimony of the witness that same is a Director of the Tysons Limited, which is a Limited Liability Company, undertaking and offering valuations and Real Estate services.

63. Furthermore, the witness averred that same is a licensed and practicing valuer. In this regard, the witness provided his registration number as 60042.

64. Other than the foregoing, the witness averred that M/s Tysons Ltd received instructions from the 1st Plaintiff to undertake valuation over and in respect of L.R No. 4275/40, (hereinafter referred to as the suit property), and which is situated on Riverside drive, within the City of Nairobi.

65. It was the further testimony of the witness that upon receipt of instructions, same (witness) commenced the process of undertaking the requisite valuation and in this regard, same averred that he proceeded to and procured a copy of the Certificate of title in respect of the suit property.

66. Additionally, the witness averred that same also engaged with the 1st Plaintiff and sought to know the basis upon which the Plaintiff's required the valuation. In this regard, the witness added that same was thereafter informed of the purpose and/or basis for the intended valuation.

67. On the other hand, it was the testimony of the witness that same thereafter proceeded to and applied for a Certificate of official search in respect of the suit property. However, the witness added that despite the application/request for the certificate of official search, same (witness) was unable to procure the certificate of official search.

68. Moreover, the witness averred that same was unable to access the suit property, for purposes of valuation. Nevertheless, it was the testimony of the witness that despite not being able to access the property, same took into account the view of the property and the documentation that were availed unto him (witness) and thereafter proceeded to and generated a Certificate of valuation dated the 19th March 2014.

69. It was the further testimony of the witness that a Certificate of valuation addresses itself to an assumption that the value is the subject to satisfactory completion in accordance with the proposed Building design/plans.

70. On cross examination by Learned counsel for the 2nd Defendant, the witness averred that same [PW2] was registered as a practicing valuer with the valuers registration board in the year 2005.

71. On further cross examination, the witness averred that upon receipt of instructions, from the 1st plaintiff, same proceeded to and applied for a certificate of official search. However, the witness submitted that he was not able to procure and or obtain a copy of the certificate of official search.

72. In respect of the extent and scope of his instructions, the witness herein pointed out that his instructions were limited to the proposed constructions that the 1st Plaintiff intended to undertake on the suit property. Furthermore, the witness averred that his instructions were not to value the property in question.

73. Whilst under further cross examination, the witness averred that subsequently same proceeded to and prepared a Certificate of value and not a valuation report. In any event, the witness added that the purpose of a Certificate of value was to give the value of the property.

74. Nevertheless, when pressed further, the witness acknowledged that same is the author of the letter contained at page 83 of the Plaintiff's bundle and that according to the said Letter, same (witness) wrote to the 1st Plaintiff and alluded to a valuation report which was (sic) being forwarded to the 1st Plaintiff.

75. As pertains to whether the Drawing Plans for the proposed building were ever submitted for approval, the witness [PW2], indicated that the Drawing Plans, copies of which were availed to him (witness) were never approved.

76. Furthermore, it was the evidence of the witness that the valuation that same prepared and availed to court was premised under assumption that the intended Building by the Plaintiffs' would have been concluded within a duration of 18-24 months.

77. On cross examination by Learned counsel for the 3rd Defendant, the witness herein admitted and acknowledged that same has not tendered and adduced before the court a copy of the letter of instructions, which was issued by the 1st Plaintiff.

78. On cross examination by Learned counsel for the 4th Defendant, the witness herein admitted and acknowledged that same did not access and/or enter onto the suit property. Further and in addition, the witness averred that same also did not take cognizance of the Buildings that surrounds the suit property.

79. On the other hand, the witness admitted that same also was not privy to the exact rents that accrue from the properties which are located within the neighborhood of the suit property.

80. Moreover, whilst under further cross examination, the witness averred that the valuation/certificate of value which was tendered before the court, was premised on the assumption that the property in question is genuine and that the completion is done within the set timelines.

81. With the foregoing testimony the Plaintiffs' case was duly closed.

b. The 1st Defendant's Case:

82. The 1st Defendant's case revolves around the testimony of one witness, namely, Charles Kipkurui Ngetich. Same testified as DW1.

83. It was the testimony of the witness that same is the Deputy Chief Land Registrar at the ministry of Lands, Public works, Housing and Urban Developments. Furthermore, the witness added that same had worked at the Ministry for close to 20 years.

84. Additionally, the witness averred that same is privy to and conversant with the facts of the instant matter. In this respect, the witness averred that same [DW1] has since recorded a witness statement dated the 20th June 2022.

85. Moreover, the witness herein sought to adopt and rely on the contents of the witness statement dated the 20th June 2022 and thereafter the contents of the said witness statement were duly adopted and constituted as the Evidence- in chief of the witness.

86. On cross examination, by Learned counsel for the Plaintiff, the witness herein stated that at the foot of the witness statement, same has highlighted the process to be followed whenever one seeks to acquire a new Grant/Lease.

87. Furthermore, the witness [DW1], herein averred that same does not have any application for a new lease/Grant which was made by the 2nd Defendant.

88. Whilst under further cross examination, the witness averred that before a new lease/Grant is processed, there is need for a report to be prepared by the Department of Physical Planning, which report would clarify and/or authenticate whether the plot intended to be alienated, is available or otherwise.

89. In particular, the witness [DW1], averred that same has neither seen nor tendered before the Honourable court any such report, if any, was prepared in respect of the suit property.

90. On further cross examination, the witness admitted that a letter of allotment dated the 16th April 2010; was however issued to and in favor of the 2nd Defendant. In addition, the witness averred that the Letter of allotment was issued in favor of the 2nd Defendant because the term of the previous Lease had expired.

91. Whilst under further cross examination, the witness averred that at the foot of paragraph 6 of his witness statement, same has stated that the suit property was allocated to the 2nd Defendant. Besides, the witness added that the 2nd Defendant similarly proceeded to and paid the Stand premium, which was indicated at the foot of the letter of allotment.

92. Additionally, the witness testified that subsequently a Grant was issued and executed by the Commissioner of lands in favor of the 2nd Defendant.

93. Nevertheless, the witness averred that the land in question was hitherto registered in the name of the 4th Defendant. However, the witness added that the term of the lease in favor of the 4th Defendant expired in January 2010.

94. On further cross examination, the witness however admitted and acknowledged that prior to the expiry of the lease in favor of the 4th Defendant, the 4th Defendant wrote a Letter to the Commissioner of

lands and in respect of which the 4th Defendant sought for extension of the Lease in respect of the suit property.

95. It was the further testimony of the witness that subsequently the 4th Defendant was issued with a Letter of allotment over and in respect of the suit property. In this respect, the witness averred that the Letter of allotment in favor of the 4th Defendant is dated the 17th September 2012.

96. Additionally, it was the evidence of the witness [DW1], that subsequently the 4th Defendant was issued with a Certificate of title/Grant over and in respect of the suit property.

97. On cross examination by Learned Counsel for the 2nd Defendant, the witness herein stated that the Certificate of title in favor of the 2nd Defendant is genuine.

98. Whilst under further cross examination, the witness averred that to his knowledge the 4th Defendant (Kenya Meat Commission) is a Private Entity and not a Public body.

99. On the other hand, it was the testimony of the witness that by the time the suit property was being registered in the name of the 2nd Defendant, the suit property was free for alienation and registration in favor of the said 2nd Defendant.

100. On the other hand, it was the testimony of the witness that as of today, the 2nd Defendant is the legal and the registered proprietor of the suit property.

101. On cross examination by Learned counsel for the 3rd Defendant, the witness averred that as from the 16th April 2010, there was a search that was done over the suit property. In any event, the witness added that the search in question appears to have been done by a Government Entity insofar as same (certificate of official search) was not paid for.

102. On the other hand, the witness averred that between the 16th April 2010 and 23rd March 2012, no Transfer instrument was ever presented for registration, as pertains to and in respect of the suit property.

103. On cross examination by Learned counsel for the 4th Defendant, the witness herein averred that the 4th Defendant indeed issued a letter dated 1st December 2009 and in respect of which same (4th Defendant) sought for extension of the lease.

104. In addition, the witness also averred that the 4th Defendant also wrote another letter in follow up of the extension of the Lease.

105. Be that as it may, the witness averred that subsequently the office of the Commissioner of lands proceeded to and issued a Letter of allotment in favor of the 4th Defendant, which Letter of allotment was subsequently acted upon culminating into the issuance of a Certificate of title in favor of the 4th Defendant.

106. On further cross examination, the witness averred that same (witness) was privy to and aware of the information that the suit property was under investigations by the Ethics and Anti-Corruption commission. However, the witness added that same was not aware of the outcome of the investigations by the Ethic and Anti-Corruption commission.

107. Whilst under further cross examination, the witness stated that same is privy to and aware of the contents of a Letter at page 48 of the 4th Defendant's bundle of documents and the witness added that the letter in question relates to the complaints which was made to Ethic and anti-corruption commission.

108. Furthermore and when pressed further on the ownership pf the suit property, the witness herein averred that as at the year 2014, the suit property was lawfully registered in the name of the 4th Defendant.

109. With the foregoing testimony, the 1st Defendant's case was duly closed.

c. The 2nd Defendant's Case:

110. The 2nd Defendant's case is premised and anchored on the testimony of one witness, namely, Kenneth Boit. Same testified as DW2.

111. It was the testimony of the witness that same (witness) is a Director of the 2nd Defendant company. In any event, the witness added that the 2nd Defendant company was incorporated in the year 1999.

112. Moreover, the witness averred that by virtue of being a Director of the 2nd Defendant, same (witness) is therefore privy to and knowledgeable of the facts pertaining to the instant matter. Furthermore, the witness added that same has since recorded a witness statement dated the 24th October 2022; and which same sought to adopt and admit as his [DW2] Evidence in chief.

113. Pursuant to and at the instance of the witness, the witness statement dated the 24th October 2022, was duly admitted and constituted as the Evidence in chief of the witness.

114. Other than the foregoing, the witness also alluded to a List and Bundle of Documents dated the 23rd September 2014; and thereafter sought to adopt and rely on the Documents thereunder.

115. Instructively, the documents at the foot of the List dated the 23rd September 2014; were thereafter admitted and marked as Exhibits D1 to D4, respectively, on behalf of the 2nd Defendant.

116. Moreover, it was the evidence of the witness that the 2nd Defendant has similarly filed a Statement of Defense and Counterclaim and in this regard, same (witness) sought to adopt and rely on the contents thereof, as well as the reliefs sought thereof.

117. On cross examination by Learned counsel for the Plaintiff, the witness herein averred/ acknowledged that same has neither tendered nor produced before the court a copy of the CR12 relating to the 2nd Defendant.

118. Further and in addition, the witness also admitted that same has also not produced before the court any authority to mandate him (witness) to testify on behalf of the 2nd Defendant.

119. On further cross examination, the witness averred that the 2nd Defendant discovered that the suit property was available for allocation. However, the witness added that same does not have any evidence before the court to show that the 2nd Defendant applied for allocation of the suit property.

120. On further cross examination, the witness admitted that by the time the 2nd Defendant entered into and executed the sale agreement with the Plaintiffs, the 2nd Defendant had been the owner of the suit property for approximately 3 months.

121. Furthermore, it was the evidence of the witness that there was a variance and/or dichotomy between the names of the 2nd Defendant as contained in the Certificate of incorporation versus the Certificate of title/Grant. Nevertheless, the witness added that the 2nd Defendant herein subsequently generated a Deed of correction intended to address/correct the name of the 2nd Defendant.

122. It was the further testimony of the witness that the 2nd Defendant herein thereafter entered into and executed a sale agreement with the Plaintiffs. In any event, the witness averred that the sale agreement was dated the 1st March 2011.

123. Whilst under further cross examination, the witness admitted and acknowledged that the deposit/ stakeholders sum was remitted to and/or release to the 2nd Defendant. At any rate, the witness contended that the release/remittance of the deposit was undertaken in accordance with the clauses of the said agreement.

124. Furthermore, it was the testimony of the witness that the 2nd Defendant herein proceeded to and obtained the requisite completion documents pertaining to the suit property. However, the witness added that despite obtaining the completion document, which were thereafter forwarded to the Plaintiff's advocate, the Plaintiffs have failed to transfer the suit property and unto themselves.

125. Other than the foregoing, the witness averred that the 2nd Defendant has never been issued and/or served with a termination notice. In any event, it was the testimony of the witness that the 2nd Defendant herein has received the sum of kes.37, 319, 000/= only on account of the sale of the suit property.

126. On cross examination, by Learned counsel for the 1st Defendant, the witness admitted and acknowledged that same did not execute any document as pertains to the transaction beforehand.

127. Whilst under further cross examination, the witness averred that same has not tendered before the Honourable court any application letter, if any, that was made to the Commissioner of land. Nevertheless, the witness added that same has a copy of the letter of allotment which was issued in respect of the suit property.

128. It was the further testimony of the witness that the 2nd Defendant also proceeded to and paid the statutory levies/monies alluded to at the foot of the Letter of allotment, to the Commissioner of land.

129. Other than the foregoing, the witness averred that as at the time when the suit property was being allocated to the 2nd Defendant, the suit property had a development thereof. In any event, the witness added that neither the 2nd Defendant nor the Plaintiffs herein ever obtained vacant possession of the suit property.

130. On cross examination by Learned counsel for the 3rd Defendant, the witness stated that the 3rd Defendant herein was the advocate for the 2nd Defendant, namely, the vendor, as pertains to the sale transaction.

131. On the other hand, the witness that the purchaser's [Plaintiffs'] advocate was M/s P.J Kakad Advocate and not the 3rd Defendant.

132. On further cross examination, the witness averred that the 2nd Defendant and the Plaintiffs herein entered into and executed a sale agreement over and in respect of the suit property. In any event, the witness averred that the sale agreement contained various terms and conditions which were binding on the Parties.

133. Whilst under further cross examination, the witness has averred that upon the payment of the stakeholders sum, the 3rd Defendant herein on instruction of the 2nd Defendant, wrote to the advocates for the Plaintiffs and wherein the 3rd Defendant sought for authority to release the sum of Kes.5, 000, 000/= only to the 2nd Defendant to facilitate perfection of the completion documents.

134. Other than the foregoing, it was the testimony of the witness that subsequently the 3rd Defendant proceeded to and released the completion documents to the Plaintiff's advocates, namely, M/s

P.J Kakad Advocates. For good measure, the witness added that the completion documents were forwarded/released on the 11th May 2010.

135. Moreover, it was the testimony of the witness that the completion documents were duly received and acknowledged by the advocates for the Plaintiffs.

136. Whilst under further cross examination, it was the testimony that the completion documents which had hitherto been released to the Plaintiff's advocate, namely, M/s P.J Kakad Advocate], have since been returned to and acknowledged by the 2nd Defendant.

137. On cross examination by Learned counsel for the 4th Defendant, the witness herein pointed out that same has been a Director of the 2nd Defendant from the year 2010. Furthermore, the witness averred that the 2nd Defendant applied for allotment of the suit property and thereafter same (2nd Defendant) was issued with a Letter of allotment dated the 16th April 2010.

138. Similarly, it was the testimony of the witness that the 2nd Defendant herein thereafter proceeded to and made payments in terms of the stand premiums on or around September 2010. In any event, the witness added that the payment in question was made outside the 30 days period.

139. Be that as it may, the witness [DW2], averred that the payment by the 2nd Defendant was duly acknowledged and accepted by the Government.

140. Whilst under further cross examination, the witness was referred to a Letter contained at page 98 of the Plaintiff's bundle of documents and the witness acknowledged the contents thereof. In particular, the witness confirmed and admitted that the Letter in question was authored by the 2nd Defendant and same were surrendering the certificate of title in respect of the suit property.

141. Whilst under further cross examination, the witness admitted that same does not have the original Certificate of lease before the court.

142. On further cross examination, the witness admitted and acknowledged that same (witness) is aware that the 2nd Defendant wrote a Letter surrendering the certificate of title.

143. Furthermore, it was the evidence of the witness [DW2], that the 2nd Defendant herein never took possession of the suit property. In any event, the witness has acknowledged that same is neither privy to nor aware of the status of the suit property.

144. With the foregoing the 2nd Defendant's case was duly closed.

The 3rd Defendant's Case:

145. The 3rd Defendant's case is also premised and predicated on the Evidence of one witness, namely, Mansur Issa. Same testified as DW3.

146. It was the testimony of the testimony of the witness that same is an Advocate of the High Court of Kenya and currently practicing under the name and style of M/s Issa & Company Advocates. Furthermore, the witness averred that same is the 3rd Defendant in respect of the instant matter.

147. Other than the foregoing, the witness averred that same is privy to and conversant with the facts of the instant matter. In this regard, the witness added that same has since recorded a witness statement dated the 23rd May 2017.

148. Moreover, the witness thereafter sought the permission of the Honourable court to adopt and rely on the contents of the witness statement dated the 23rd May 2017; and to have same constituted as his Evidence in chief.

149. For coherence, the witness statement dated the 23rd May 2017; was thereafter admitted and constituted as the Evidence -in- chief of the witness.

150. Additionally, the witness alluded to the List and Bundle of Documents dated the 23rd May 2017; and thereafter sought to adopt and produce the various documents listed thereunder.

151. There being no objection to the production of the various documents alluded to at the foot of the List and Bundle of Documents dated the 23rd May 2017, same were thereafter admitted and marked as Exhibits D1 to D12, albeit on behalf of the 3rd Defendant.

152. Besides, the witness herein also alluded to the amended Statement of Defense dated the 23rd May 2017, which same [DW3] similarly sought to adopt and rely on.

153. On cross examination by Learned counsel for the 2nd Defendant, the witness pointed out that same generated and forwarded the various completion documents to M/s P.J Kakad Advocate who was the purchasers advocate. In any event, the witness added that the letter forwarding the completion documents was duly received and acknowledged by the purchasers advocate.

154. Additionally, it was also the testimony of the witness that subsequently, same also forwarded the Deed of rectification of the certificate of title to and in favor of the purchasers advocate. In this regard, the witness averred that the Deed of rectification was forwarded on the 11th May 2011.

155. Whilst under further cross examination, the witness testified that part of the completion documents, which were remitted to the purchasers advocates included the duly executed transfer instrument, as well as the Rates Clearance Certificate dated the 3rd August 2011.

156. It was the further testimony of the witness that upon forwarding the completion documents, same wrote a Letter to the purchasers advocates and sought for the payment of the balance of the purchase price. However, the witness added that the balance of the purchase price was never released by the Plaintiffs and or their advocates.

157. On cross examination by Learned counsel for the 4th Defendant, the witness herein clarified that same was the advocates for the vendor, namely, the 2nd Defendant herein.

158. Moreover, the witness averred that by virtue of being the Advocate for the vendor, same was not under statutory obligation/duty to undertake due diligence over and in respect of the suit property.

159. Conversely, it was the testimony of the witness [DW3], that the duty to undertake due diligence was on the part of the advocate for the purchasers.

160. On further cross examination, the witness averred that at the time that same acted for the vendor, (read 2nd Defendant) the 2nd Defendant herein was already having in her custody the Letter of allotment, as well as the Grant in respect of the suit property.

161. On cross examination by Learned counsel for the Plaintiffs, the witness herein reiterated the position that as the advocate for the vendor, same was under no obligation to carry out and/or undertake due diligence in respect of the suit property.

162. On the other hand, the witness averred that at the time of his retention to act for and/or on behalf of the 2nd Defendant herein, the 2nd Defendant was in possession of inter-alia, letter of allotment dated the

16th April 2010, as well as a Grant over and in respect of the suit property, which effectively confirmed that the suit property belonged to the 2nd Defendant.

163. In addition, the witness averred that though there was a variance between the names of the 2nd Defendant as appearing in the Certificate of Incorporation and the Grant, the 2nd Defendant herein was able to generate/prepare a Deed of rectification which was availed to the purchasers advocate.

164. Other than the foregoing, the witness herein averred that the stakeholders sum was to be retained by himself pending completion of the transaction. However, it was the testimony of the witness that on instructions of the 2nd Defendant, same (witness) wrote a letter to the purchaser's advocate and wherein same sought for and obtained authority to release the stakeholders sum to the 2nd Defendant to facilitate perfection of the completion documents.

165. Moreover, it was the evidence of the witness that same forwarded the completion documents to and in favor of the purchaser's advocate and that the last completion document was forwarded on the 3rd August 2011. Nevertheless, the witness added that despite forwarding the completion documents and thereafter requesting for the release of the balance of the purchase price, same was never released as requested or at all.

166. Whilst under further cross examination, the witness herein pointed out that the Deed file in respect of the suit property was never lost, mislaid and/or misplaced.

167. On further cross examination, the witness averred that same proceeded to and released the entire money received by him on account of the transaction to the vendor. In any event, the witness added that the release of the monies was done in accordance with the clauses of the sale agreement.

168. On the other hand, it was the evidence of the witness that the clauses of the said Agreement allowed same to release the monies before the effective registration of the transfer instrument.

169. On re-examination, the witness averred that the entire monies paid unto him were released in pursuance of the terms of the sale agreement. Further and in any event, the witness added that the release was also done with the consent/permission of the purchaser's advocates.

170. Finally, the witness averred that same did not execute any Professional undertaking in favor of the Plaintiffs herein.

171. With the foregoing testimony, the 3rd Defendant's case was duly closed.

e. The 4th Defendant's Case:

172. Similarly, the 4th Defendant's case is premised of the Evidence of one witness, namely, Anthony Omondi Ademba. Same testified as DW4.

173. It was the Evidence of the witness that same is currently the Company Secretary of the 4th Defendant, having replaced his predecessor, namely, Ann Gathoni Kamau. In any event, the witness added that same joined the employment of the 4th Defendant in August 2020.

174. Moreover, the witness herein averred that by virtue of his portfolio, same is conversant with the facts of the case. Besides, the witness averred that same has since recorded a witness statement dated the 2nd October 2023 and which same sought to adopt and rely on as Evidence in chief.

175. Suffice it to state that the witness statement dated the 2nd October 2023; was thereafter adopted and admitted as the Evidence in chief on behalf of the witness.

176. Other than the foregoing, the witness also alluded to the List and Bundle of documents dated the 8th March 2012; and thereafter sought to produce and tender before the court the various documents alluded to thereunder.

177. There being no objection on behalf of the adverse parties, the documents at the foot of the List under reference were produced and admitted as Exhibits D1 to D11 on behalf of the 4th Defendant.

178. Furthermore, the witness alluded to the Statement of Defense and counterclaim dated the 8th March 2017 and sought to adopt and rely on same. Instructively, the contents of the Statement of Defense and Counterclaim were duly adopted as sought.

179. On cross examination by Learned counsel for the Plaintiff, the witness herein averred that the 4th Defendant became the registered proprietor of the suit property in the year 1954. Furthermore, the witness added that the ownership of the suit property was premised on a Grant whose term was to expire in January 2010.

180. Moreover, it was the evidence of the witness that prior to the expiry of the term of the lease, the 4th Defendant wrote a letter to the Commissioner of Lands and wherein the 4th Defendant sought for extension of the term of the Lease.

181. On further cross examination, the witness averred that at the time when the 4th Defendant applied for the extension of the lease, the lease in question had not expired.

182. Whilst under further cross examination, the witness averred that the title in the name of the 4th Defendant was also charged to and in favor of National Bank of Kenya.

183. On the other hand, it was the evidence of the witness that the 4th Defendant was subsequently issued with a Letter of allotment over and in respect of the suit property, which Letter of allotment was thereafter acted upon by the 4th Defendant, culminating into the issuance a Certificate of title.

184. Other than the foregoing, it was the evidence of the witness that the 2nd Defendant herein voluntarily surrendered the certificate of title in respect of the suit property and upon the surrender, same was endorsed onto the record at the Land Registry on the 14th September 2012.

185. Additionally, the witness averred that upon the surrender and the endorsement of the said surrender by the Chief Land Registrar, the 4th Defendant was issued with a Certificate of title.

186. In any event, the witness added that the 4th Defendant herein has never entered into any sale agreement and/or transferred her interests over the suit property to any third-party.

187. On cross examination by Learned counsel for the 2nd Defendant, the witness herein reiterated that the 2nd Defendant surrendered her title to the Chief Land Registrar. In any event, the witness averred that the evidence of surrender has been tendered before the court.

188. On further cross examination, the witness however admitted and acknowledged that the documents that have been tendered and produced before the Honourable court by the 4th Defendant do not include the entry relating to the surrender by the 2nd Defendant.

189. Moreover, the witness averred that the lease in favor of the 4th Defendant was set to expire and indeed expired in the year 2010. However, the witness added that the 4th Defendant was thereafter issued with a Letter of allotment over the same property.

190. Besides, it was the evidence of the witness that upon the application for extension of the Lease, the 4th Defendant was vested with pre-emptive rights over the suit property and thus the suit property was not available for allocation to and in favor of the 2nd Defendant or at all.

191. Be that as it may and upon being referred to the witness statement of DW1 (Deputy Chief Land Registrar), the witness admitted that the entirety of the said statement does not include any averment that the 2nd Defendant ever surrendered the certificate of title.

192. On further cross examination and upon being referred to the statement of defense by the 1st Defendant, the witness averred that the statement of defense by the 1st Defendant confirms that the Certificate of title in favor of the 2nd Defendant was issued in error.

193. On cross examination by Learned counsel for the 3rd Defendant, the witness herein averred that the lease in favor of the 4th Defendant was set to expire in January 2010. Nevertheless, the witness added that prior to the expiry of the lease, the 4th Defendant applied for extension.

194. On re-examination by learned counsel for the 4th Defendant, the witness reiterated that the 2nd Defendant surrendered the certificate of title. In any event, the witness avers that the surrender was at the foot of the letter which was forwarded to the office of the Chief Land Registrar and that same was duly acted upon.

195. On the other hand, the witness averred that the application for extension of the lease on behalf of the 4th Defendant was similarly acted upon and thereafter the Commissioner of Land issued a letter of allotment culminating into the ultimate renewal of the Certificate of lease in favor of the 4th Defendant.

196. As pertains to the issuance of the Certificate of title to and in favor of the 2nd Defendant, the witness clarified that the 1st Defendant herein has acknowledged and confirmed that issuance of the Certificate of Title in question was in error.

197. With the foregoing testimony, the 4th Defendant's case was duly closed.

Parties' Submissions:

198. At the close of the hearing, namely, full hearing of the cases for the respective Parties, the advocates for the respective Parties sought for liberty to file and exchange written submissions and relevant case law.

199. Pursuant to and at the request of the advocates for the Parties, the Honourable court proceeded to and indeed granted liberty to the respective advocates to file and exchange their written submissions albeit within set timeline. For coherence, the advocate for the respective Parties, save for the 1st Defendant, proceeded to and filed their written submissions.

200. Instructively, Learned counsel for the Plaintiffs' filed two [2] sets of written submissions dated the 24th October 2023 and 11th December 2023. For good measure, the court has taken cognizance of the issues raised and highlighted at the foot of the said submissions by and on behalf of the Plaintiffs.

201. On the other hand, Learned counsel for the 2nd Defendant filed elaborate and comprehensive submissions dated the 28th November 2023; and in respect of which same has undertaken what is referred to as (sic) analysis of the evidence of the Parties cases and thereafter a Response to the Plaintiff's written submissions. Nevertheless, the said submissions also forms part of the record of the court.

202. On his behalf, the 3rd Defendant has filed elaborate written submissions totaling to 26 pages, together with a plethora of authorities running into a total of 88 pages. At the foot of the said submissions,

Learned counsel for the 3rd Defendant has isolated, highlighted and canvased three [3] issues for consideration by the court.

203. Finally, the 4th Defendant filed written submissions dated the 24th November 2023, duly indorsed with various authorities running into a total of 94 pages. Nevertheless, Learned counsel has isolated and canvassed three [3] salient issues for determination by the Honourable court.

204. Suffice it to point out, that the various submissions, [whose details have been enumerated in the preceding paragraphs], forms part of the record of the court and same shall be duly considered and taken into account, whilst interrogating the issues attendant to the subject matter.

205. Be that as it may, it is worthy to point out that the non-reproduction/ rehearsal of the salient features of the submissions filed by the Parties is not borne out of any contempt, or at all.

206. To the contrary, the Honourable court does appreciate the industry; and extent of research by the Parties, culminating into the elaborate submissions and the enormous caselaw that have been cited by the advocates for the respective Parties.

Issues for Determination

207. Having reviewed the pleadings, the evidence [both oral and documentary] and having taken into consideration the written submissions filed by and on behalf of the Parties, the following issues do emerge and are thus worthy of determination;

i. Whether the 2nd Defendant acquired a valid title to and in respect of the suit property and whether the 2nd Defendant had any [sic] rights capable of conveyance in favor of the (sic) the Plaintiffs.

ii. Whether the prayer/claim for Specific Performance by the Plaintiffs is legally tenable or otherwise.

iii. Whether the 3rd Defendant issued any Professional undertaking in favor of the Plaintiffs and if so, whether same has been breached or otherwise.

iv. What reliefs, if any, ought to be granted.

Analysis and Determination:

Issue Number 1 - Whether the 2nd Defendant acquired a valid title to and in respect of the suit property and whether the 2nd Defendant had any rights capable of conveyance in favor of the (sic) the Plaintiffs.

208. It is common ground that the suit property herein hitherto belonged to and was registered in the name of the 4th Defendant, namely, Kenya Meat Commission, on the basis of a Grant. For good measure, the 4th Defendant was registered as the owners of the suit property in the year 1954.

209. Furthermore, the Lease term at the foot of the Grant in favor of the 4th Defendant was bound to expire and indeed expired in January 2010.

210. Be that as it may, it is also not in dispute that prior to and or before the expiry of the lease term, the 4th Defendant generated and issued a Letter dated the 1st December 2009 and in respect of which same (4th Defendant) sought for extension of the term of the lease pertaining to and concerning the suit property.

211. Be that as it may, it is the contention and indeed the position by the 2nd Defendant that same were issued with a Letter of allotment dated the 16th April 2010, shortly after the expiry of the lease which was hitherto registered in the name of the 4th Defendant.

212. Additionally, the 2nd Defendant contends that upon being issued with the Letter of allotment dated the 16th April 2010, same proceeded to and made payments pertaining to and in respect of the stand premium, which payments were made in September 2010, albeit outside the statutory duration underpinned by (sic) the Letter of allotment.

213. Nevertheless, it was the evidence of DW2, that upon payment of the stand premium in September 2010, the Commissioner of land proceeded to receive and acknowledge the payment and thereafter processed a Certificate of title in favor of the 2nd Defendant.

214. Arising from the foregoing, it is the 2nd Defendant's position that having been duly issued with the certificate of title, same thus acquired lawful rights and interests thereto and hence same (the 2nd Defendant) became the legitimate proprietor of the suit property. In any event, the 2nd Defendant contends that on the basis of the Certificate of title issued by the Chief Land Registrar on the 12th October 2010, same (2nd Defendant) was therefore vested with the mandate to alienate and/or sell the suit property to the Plaintiffs.

215. Be that as it may, it is imperative to interrogate the propriety and/or validity of the process leading to the issuance of the Certificate of title to and in favor of the 2nd Defendant and thereafter to authenticate whether the process adopted was lawful and legitimate or otherwise. [See the dictum in the case of Munyu Maina versus Hiram Gathiha Maina (2013) eklr].

216. Towards ascertaining the propriety and validity of the process, I propose to look at same from different angles and/or perspectives and thereafter arrive at an appropriate conclusion.

217. To start with, there is no gainsaying that any person seeking to be allocated and/or procure unalienated Government Land, if any, was obligated to make the requisite application either to the Commissioner of lands; Local Authority; or to the President of the Republic of Kenya, in accordance with the provisions of the Government *Land Act*, Chapter 280 Laws of Kenya (now repealed).

218. Instructively, it is upon receipt of an application for allotment or alienation that the Commissioner of land would undertake the requisite consideration and thereafter issue a Letter of allotment, where appropriate. [See the dictum of the court of appeal in the case of Tarabana Company Limited v Sehmi & 7 others (Civil Appeal 463 of 2019) [2021] KECA 76 (KLR) (8 October 2021) (Judgment].

219. Be that as it may, it was a mandatory requirement for the application for allotment of land to be in writing prior to and or before same could be acted upon. However, in respect of the instant matter it was the testimony of DW2 that the 2nd Defendant herein did not make any written application or at all, prior to the allotment of the suit property in favor of the 2nd Defendant.

220. Perhaps at this juncture, it is important to reproduce salient aspects of DW2 testimony whilst under cross examination by Learned counsel for the Plaintiff.

221. Same stated thus;

> " The 2nd Defendant discovered that the land in question was available for allocation. I don't have any evidence that the 2nd Defendant applied for the land in question"

222. Furthermore, whilst under cross examination by Learned counsel for the 1st Defendant, DW2 stated thus;

> " I have not produced any application letter before the court"

223. From the foregoing testimony by DW2, it is difficult nay impossible to fathom how the 2nd Defendant obtained and/or were issued with (sic) a Letter of allotment dated the 16th April 2010, yet same had not made any request/application for such allotment.

224. The second perspective touches on the validity of the Letter of allotment dated the 16th April 2010, which was issued in favor of the 2nd Defendant.

225. Nevertheless, it is appropriate to underscore that though the ownership rights of the 2nd Defendant were predicated and premised on the Letter of allotment dated the 16th April 2010, which anchored the Certificate of title, it is worth noting that the 2nd Defendant did not deem it fit and/or expedient to tender and/or produce before the Honourable court evidence of the letter of allotment.

226. For coherence, the 2nd Defendant herein only tendered and produced before the court four [4] sets of documents whose details are contained at the foot of the List and Bundle of documents dated the 23rd September 2014. Quiet clearly, the Letter of allotment is not one of the said documents.

227. Nevertheless, a copy of the Letter of allotment dated the 16th April 2010; was produced by and on behalf of the Plaintiff and same is contained at page 33 of the original bundle of documents dated the 18th June 2014.

228. For good measure, the copy of the Letter of allotment produced and tendered before the Honourable court was a single page document devoid of the page containing (sic) the signature of the person, if at all, who generated and issued same. In this regard, it is not possible for the court to ascertain and/or authenticate whether the impugned Letter of allotment was executed by a duly authorized officer under the Government *Land Act*, Chapter 280, Laws of Kenya, or otherwise.

229. Furthermore, it is trite and established that a document that is reduced into writing only becomes authentic and valid if and where same has been signed by the person who is alleged to have issued same. Simply put, it is the signature of the issuer of the letter/document that confers legitimacy to the document/letter in question.

230. In my humble view, the copy of the letter of allotment which was tendered and produced before the court by and on behalf of the Plaintiffs is neither complete nor authentic. Consequently, the impugned document, in its current state, would certainly not found a basis for the issuance of a Certificate of title in favor of the 2nd Defendant.

231. Other than the foregoing perspective, it is also important to recall that it is trite and established that Letters of allotment ordinarily contain on their face special terms and conditions, inter-alia, acceptance in writing and payments of the stand premium albeit within 30 days of the postmark.

232. Arising from the foregoing, it would have been incumbent upon the 2nd Defendant (that is assuming) that the Letter of allotment was complete, to generate a Letter of acceptance and to pay the stand premium within the statutory 30 days.

233. Be that as it may, in respect of the instant matter, there is no dispute that the 2nd Defendant neither tendered nor produced any copy of the Letter of acceptance if any, that was generated by the 2nd Defendant upon receipt of (sic) the letter of allotment.

234. Moreover, the 2nd Defendant was also obligated to pay the stand premium within 30 days. However, in this case it was the testimony of DW2 that the 2nd Defendant paid the statutory levies alluded to, inter-alia, the Stand Premium, at the foot of the letter of allotment in September 2010.

235. For brevity, it suffices to reproduce the salient aspects of the testimony of DW2 whilst under cross examination by learned counsel for the 4th Defendant.

236. Same stated as hereunder;

> " The letter of allotment is dated the 16th April 2010. The 2nd Defendant paid for the letter of allotment in the year September 2010. I do confirm that we paid after the 30 days period. I wish to add that even though the payment was made out of time but the payment were acknowledged by the Government"

237. In my humble view, a Letter of allotment constitutes an offer letter issued by the Commissioner of land on behalf of the Government and addressed to a designated offeree/ allotee; and who is called upon to signaled acceptance of the terms of the offer and thereafter meet the conditions attendant thereto.

238. Additionally, I hold the position that once the offer is conveyed to the offeree, the offeree must act and/or abide by the terms of the offer as stipulated thereunder, without variation, unless the person responsible for the offer, in this case the Commissioner of lands, varies the timelines albeit in writing.

239. Instructively, once the terms contained at the foot of the letter of allotment, which I have hitherto pointed out constitutes an offer, lapses/expires, the entire letter of allotment is rendered redundant and otiose and thus becomes incapable of being acted upon ex-post-facto.

240. To my mind, by the time the 2nd Defendant was purporting to make payments (sic) on account of the letter of allotment in September 2010, there was no Letter of allotment capable of attracting payment, whatsoever.

241. To buttress the foregoing exposition of the law, it is appropriate to restate and reiterate the dictum of the Supreme Court of Kenya in the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), where the court held thus;

> " 62. Back to the facts of this case, the allotment letter issued to Renton company limited was subject to payment of stand premium of Kshs. 2,400,000.00, annual rent of Kshs. 480,000.00 amongst others. Moreover, the letter was granted on condition that Renton Company Limited would accept it within thirty (30) days from the date of the offer, failure to which it would be considered to have lapsed.
>
> 63. While the allotment letter is dated December 19, 1999, Renton company limited made the specified payments on April 24, 2001, one hundred and twenty- seven (127) days from the date of the offer. It is not in question that Renton had not complied with the terms and conditions of the allotment letter. Therefore, the letter ought to have been deemed as lapsed at the time it purported to transfer the same to the appellant. The respondent submitted that a letter of allotment does not confer any property rights unless it is perfected, failure to which it is rendered inoperative and of no legal import.
>
> We have already declared that an allotment letter, even if perfected, cannot by and in itself confer transferable title to the Allottee, unless the latter completes

the process by registration. Therefore, the grim reality is that all transactions between Renton company limited and the appellant were a nullity in law."

242. The fourth perspective that merits deliberation is whether the suit property, if at all, was unalienated Government Land and thus capable of being alienated to and in favor of the 2nd Defendant.

243. In this respect, it is worthy to recall that the 4th Defendant who was the registered owner of the suit property is indeed a Governmental body/ State Corporation, and duly created and established under statute by Parliament.

244. To the extent that the 4th Defendant is a Government body, it is evident and apparent that the allocation of the suit property to and in her favor constituted a complete allocation thereto and the land in question became reserved for Public use. For good measure, the public use for which the suit property was allocated remains in existence despite the lapse/expiry of the lease term.

245. In my humble view, even though the Lease in favor the 4th Defendant was to expire and indeed expired in January 2010, the expiry of that lease and reversion of the land to the Government, did not ipso facto render the land unalienated Government land capable of being alienated to (sic) the 2nd Defendant.

246. To be able to understand the import, tenor and scope of what constitute unalienated Government Land, it suffices to adopt the dictum of the Supreme Court of Kenya in the case of Torino Enterprises Limited v Attorney General (Petition 5 (E006) of 2022) [2023] KESC 79 (KLR) (22 September 2023) (Judgment), where the court held thus;

> " 53. This Court in Kiluwa Limited & another v Business Liaison Company Limited & 3 others, (Petition 14 of 2017); [2021] KESC 37 (KLR) had this to say about un-alienated government land:“(55)A number of conclusions can be derived from the foregoing provisions as quoted. Firstly, un-alienated government land is public land within the context of article62of *the Constitution* and the Government Lands Act (repealed). This notwithstanding the fact that, the expression “Public Land” only came to the fore with the promulgation of the 2010 Constitution. What article 62 of *the Constitution* does is to clearly delimit the frontiers of public land by identifying and consolidating all areas of land that were regarded as falling under the province of “public tenure”. The retired constitution used the term “government” instead of “public” to define such lands”.

247. Arising from the foregoing, I hold the view that what comprises of the suit property, did not constitute unalienated Government land, which [sic] the Commissioner of land, could purport to allocate in favor of the 2nd Defendant, by dint of the provisions of Section 7 of the Government *Land Act*, now repealed.

248. Finally, there is the aspect that touches on and/or concerns the fact that the 4th Defendant (Kenya Meat Commission) wrote a letter dated 1st December 2009 and in respect of which same sought for extension of the lease term.

249. Suffice it to point out that the letter in question was addressed to the Commissioner of land, who by dint of the provisions of the Government *Land Act*, now repealed was mandated to act albeit on behalf of the President.

250. Having generated and issued the Letter dated the 1st December 2009, which sought for extension of the lease term, one would have expected that the Commissioner of land would not act in any adverse manner until and unless same duly reverted back to the 4th Defendant vide a response of sorts.

251. Nevertheless, there is no gainsaying that the letter by the 4th Defendant dated the 1st December 2009 was never acted upon and/or responded to and thus provoking the 4th Defendant to write and issue a subsequent letter dated the 17th September 2012.

252. In view of the fact that the 4th Defendant had indeed sought for extension of the Lease in her favor; and coupled with the fact that the Commissioner of land, had not responded to the request for extension of the lease, it is my position that during the intervening period, the 4th Defendant held and heard a Legitimate expectation that the lease in her favor could be renewed. [See the holding of the Supreme Court in the case of Martin Wanderi and 106 Others versus Engineering Registration Board and Others [2018] eklr]

253. Instructively, for as long as the Legitimate expectation held sway and no objection to extension issued, the Commissioner of land could not purport to generate and issue the Letter of allotment (sic) in favor of the 2nd Defendant.

254. Furthermore, there is also evidence that in proceeding to and (sic) issuing the impugned letter of allotment, the Commissioner of land did not comply with the statutory requirement, which were pre-requisite before (sic) endeavoring to issue a letter of allotment.

255. To this end, it suffices to take cognizance of the evidence of DW1 whilst under cross examination by Learned counsel for the Plaintiff.

256. Same stated thus;

> " I have stated that there is a process to be followed when one wants to acquire a new Grant/Lease. I don't have any application for new Lease/Grant that was made by the 2nd Defendant. Before a new Grant/Lease is done, there would be a report to be prepared and thereafter the physical planning department would year-mark the land for purposes for alienation. The report would confirm whether the plot at the foot of the intended alienation is available for such alienation. I don't have any report before the court to show whether the suit property was available for alienation to the 2nd Defendant".

257. Suffice it to point out that DW1 is the Deputy Chief Land Registrar and hence his testimony, which confirms that the requisite procedures were not followed, must certainly negates the propriety of the Letter of allotment (sic) issued to and in favor of the 2nd Defendant.

258. In view of the foregoing, what becomes apparent is the fact that the Letter of allotment which was issued to and in favor of the 2nd Defendant was issued albeit in respect of no existing property. Simply put, it was a paper transaction which albeit did not attach to any land and thus same was an exercise in futility.

259. Moreover, it is my humble position that where a Letter of allotment is issued albeit in respect of non-existent land or plot, such issuance cannot create and/or convey any legal rights and/or interests whatsoever. In any event, the issuance of a letter of allotment in respect of a non-existent or unavailable land is defeated by the Doctrine of Ex-Nihilo-Nihil-Fit [out of nothing comes nothing].

260. To anchor the position that a Letter of allotment that is issued to and in respect of non-existent/unavailable land is a nullity, it suffices to echo and reiterate the holding of the Court of Appeal in the

case of Benja Properties Limited v Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR, where the court held thus;

> " 25. In arriving at our decision, we note that an interest in land cannot be allotted, alienated or transferred when the specific parcel of land allotted is not in existence. Allotment of an interest in land is a transaction in rem attaching to and running with a specific parcel of land. In the instant case, the allotment by the Commissioner of Land to the original allottees did not attach in rem to any land since there was no parcel upon which the allotment could attach. What the 5th respondent, the appellant and the original allottees did was to engage in paper transactions without a parcel of land upon which any interest in land would attach and vest – it was paper transactions without any parcel of land as its substratum."

261. The totality of the deliberation highlighted and amplified in the preceding paragraphs underscore the position that the suit property was neither available for allocation to and in favor of the 2nd Defendant; nor was same unalienated government land or at all.

262. Consequently and in view of the foregoing, it is therefore my position that the 2nd Defendant neither accrued nor acquired any lawful or legal rights to the suit property and to the extent that the 2nd Defendant did not acquire any lawful rights to the suit property, then same had no rights, if at all, capable of being conveyed to and in favor of the Plaintiffs either in terms of the impugned sale agreement dated 1st March 2011 or otherwise.

263. For coherence, it is common ground that a void action, in this case void allocation of the suit property to the 2nd Defendant, cannot birth a valid transaction, if at all, between the 2nd Defendant and the Plaintiffs.

264. To buttress the foregoing position, it is instructive to recall and to reiterate the holding of the Court in the case of Macfoy vs. United Africa Co. Ltd [1961] 3 All E.R. 1169, where Lord Denning delivering the opinion of the Privy Council at page 1172 (1) said;

> " If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."

265. In a nutshell, the 2nd Defendant herein accrued and/or acquired no property rights over and in respect of the suit property, which could (sic) be conveyed to the Plaintiff's or at all. In this regard, the purported sale agreement in favor of the Plaintiffs was vitiated and thus void ab initio,

266. To surmise, my answer to issue number one [1] is therefore twofold. Firstly, the 2nd Defendant neither acquired nor obtained any lawful rights to and in respect of the suit property.

267. Secondly, the 2nd Defendant had no rights or at all capable of being conveyed in favor Plaintiffs.

Issue Number 2 - Whether the prayer/claim for Specific Performance by the Plaintiffs is Legally tenable or otherwise.

268. Having found that the 2nd Defendant had no lawful rights and/or interest over and in respect of the suit property, it is therefore evident and apparent that the 2nd Defendant would not be in a position

to pass a better title to the Plaintiff than what he (2nd Defendant) has. [See the Doctrine of Nemo dat quod non habet]

269. Be that as it may, the Plaintiffs herein have sought for a plethora of relies, inter-alia, an order for Specific Performance and thus it behooves the court to interrogate whether the Plaintiffs herein have met and/or satisfied the threshold for grant of an order for specific performance or at all.

270. However, before venturing to interrogate whether the Plaintiffs have met the threshold, it is appropriate to appreciate the legal ingredients that underpin a claim for [sic] specific performance and in particular, the circumstances under which same can and often do issue.

271. In this respect, it suffices to adopt, restate and reiterate the holding in the case of Reliable Electrical Engineers (K) Ltd –vs- Mantrac Kenya Ltd (2006) eKLR, where the court held as hereunder;

> " The jurisdiction of specific performance is based on the existence of a valid, enforceable contract. It will not be ordered if the contract suffers from some defect, such as failure to comply with the formal requirements or mistake or illegality, which makes the contract invalid or unenforceable. Even where a contract is valid and enforceable specific performance will, however, not be ordered where there is an adequate alternative remedy. In this respect damages are considered to be an adequate alternative remedy where the claimant can readily get the equivalent of what he contracted for from another source. Even where damages are not an adequate remedy specific performance may still be refused on the ground of undue influence or where it will cause severe hardship to the defendant."

272. Back to the matter herein. Even though the Plaintiffs have sought for an order for specific performance, the Plaintiffs themselves have confirmed and acknowledged at the foot of the Re-amended Plaint that the suit property belongs to the 4th Defendant. For coherence, paragraph 9 of the Re-amended Plaint states as hereunder;

> " (c) It has come to attention of the Plaintiffs that the same property may have been reserved and in fact owned by the Kenya Meat Commission hence the inability of the 2nd Defendant to perform its part of the contract.
>
> (d) It is probable that the fact of (c) above explains the missing deed file. In fact, the Plaintiffs has tumble on a letter by the 2nd Defendant to the commissioner of lands acknowledging the fact that the suit property is reserved for Kenya Meat Commissioner and the agreement for sale is accordingly null and void"

273. Quiet clearly, the Plaintiffs herein have acknowledged that the suit property indeed belonged to the 4th Defendant and by extension that the attempted sale of sale unto them was indeed void and a nullity.

274. Having taken the foregoing position, the Plaintiffs herein cannot be heard to turn around and at the foot of the Re-amended Plaint seek to persuade the court to grant an order of specific performance. Instructively, the conduct of the Plaintiffs in seeking an order of specific performance albeit on the face of their acknowledgement cited, is tantamount to approbate and reprobating; blowing of hot and cold; or fast and loose, albeit simultaneously.

275. With respect, the position taken by the Plaintiffs and which underpins the claim for specific performance constitutes and amounts to an abuse of the due process of the court. In this regard, the holding in the case of Republic versus Institute of Certified Public Secretaries of Kenya Ex-parte Mundia Njeru Geteru (2010)eKLR, is instructive, succinct and apt.

276. For coherence, the the court stated and held thus

> " It is obvious that Mundia is approbating and reprobating which is an unacceptable conduct. Such conduct was considered in Evans vs Bartlam (1973) 2 ALL ER 649 at page 652, where Lord Russel of Killowen said; The doctrine of approbation and reprobation requires for its foundation inconsistency of conduct, as where a man having accepted a benefit given him by a judgment cannot allege the invalidity of the judgment which conferred the benefit. Again in Banque De Moscou vs Kendersley (1950) ALL ER 549, Sir Evershed said of such conduct. This is an attitude of which I cannot approve, nor do I think in law the defendants are entitled to adopt it. They are, as the Scottish lawyers (frame it) approbating and reprobating or, in the more homely English phrase blowing hot and cold."

277. Secondly, the Plaintiff is also on record as stating that arising from the inability to have the suit property transferred and registered in their name, same proceeded to and issued a termination notice. For good measure, PW1 stated as hereunder during his evidence in chief;

> " I did issue the termination notice, the suit property could not be transferred to the Plaintiff and it is because of that I issued a termination notice".

278. Furthermore, whilst under cross examination by Learned counsel for the 2nd Defendant, PW1 stated as hereunder;

> " I issued a termination notice. It is at page 52 of my (Plaintiff's budle) by the time of issuing the termination notice I had paid all the monies to my advocates. The full payment was made to our (Plaintiff's advocate) on 23rd May 2011. The termination notice was complaining about the unavailability of the record at the lands office"

279. From the foregoing, there is no gainsaying that the Plaintiffs' by themselves voluntarily and freely proceeded to and issued a Termination Notice, whose import was to terminate the sale agreement.

280. On the other hand, neither of the Parties before the court and in particular, the 2nd Defendant has challenged the termination notice and in the absence of any challenge, it must be taken that same indeed took effect.

281. Consequently and in view of the foregoing, can the Plaintiffs' herein be now heard to say that same are desirous to partake of and/or benefit from specific performance, yet the very contract, which would have underpinned the claim to that effect, was [sic] terminated at their own instance.

282. Finally, there is also evidence that the title to the suit property was surrendered back to Chief Land Registrar by the 2nd Defendant and that henceforth, even assuming that the sale agreement/contract had not been terminated then the 2nd Defendant, would not be having any title capable of being transferred in favor of the Plaintiffs.

283. As concerns the surrender of the certificate of title of the suit property back to the Chief Land Registrar, it is important to take cognizance of the evidence of DW2 (Kenneth Boit), a Director of the 2nd Defendant.

284. Same testified and stated thus whilst under cross examination by Learned counsel for the 4th Defendant;

> " Referred to the letter at page 98 of the Plaintiff's bundle of documents and the witness confirms that same was authored by the 2nd Defendant. The document is a letter and the

contents of the letter was surrendering the certificate of title. The certificate of title that was being surrendered was in respect of the suit property. I don't have the original certificate of title"

285. Furthermore, the issue or question of surrender was also highlighted/ amplified by DW4 who whilst under cross examination by Learned counsel for the Plaintiffs testified and stated as hereunder;

> " The 2nd Defendant surrendered the certificate of title on 14th September 2012. The surrender was duly endorsed vide entry number 1496 of 14th September 2012. Subsequent to the surrender on the 14th September 2012, thereafter the 4th Defendant was issued with a letter of allotment".

286. In my view, the 2nd Defendant through her witness DW2, has conceded that the certificate of title which was hitherto issued in favor of the 2nd Defendant was surrendered.

287. Consequently and in view of the foregoing, even assuming for the sake of arguments only that the Plaintiffs herein are entitled to an order of specific performance, would it be legally tenable and/or otherwise achievable.

288. To my mind, the prayer for [sic] specific performance is not only premature and misconceived; but otherwise constitute an abuse of the Due process of the court.

Issue Number 3 - Whether the 3rd Defendant issued any Professional Undertaking in favor of the Plaintiffs and if so, whether same has been breached or otherwise.

289. There is no dispute that the Plaintiffs herein entered into and executed a sale agreement dated the 1st March 2011 with the 2nd Defendant. For good measure, the 2nd Defendant, who was the vendor was being represented by the 3rd Defendant, himself an Advocate of the High Court of Kenya.

290. Furthermore, there is no gainsaying that the Plaintiffs themselves who were the purchasers of the suit property, retained/ were being represented by M/s P.J Kakad Advocates.

291. Arising from the foregoing scenario, it is evident and apparent that the 3rd Defendant herein was never the advocates for the Plaintiffs nor did he (3rd Defendant) act for and on behalf of the Plaintiffs.

292. In any event, PW1 himself whilst giving Evidence in chief stated as hereunder;

> " The 3rd Defendant was not my advocate".

293. Other than the foregoing, whilst under cross examination by Learned counsel for the 3rd Defendant, PW1 is on record as stating as hereunder;

> "I have a complaint against the 3rd Defendant. I have correspondence to the nature of the complaint that I have against the 3rd Defendant. The 3rd Defendant was in breach of professional duty. I don't have any professional undertaking from the 3rd Defendant in respect of the sum of kes.37, 318, 063/= only".

294. From the testimony of PW1, it is evident and apparent that the 3rd Defendant neither acted for nor owed any professional duty to and in favor of the Plaintiffs.

295. Additionally, the Plaintiffs' through PW1 admits and acknowledges that there was no professional undertaking that was ever issued by the 3rd Defendant, in his capacity as an advocate, to and in favor of the Plaintiffs.

296. Notwithstanding the foregoing, the Plaintiffs herein have courageously and relentlessly prosecuted the suit as against the 3rd Defendant; and in any event, same continued to demand that the 3rd Defendant pays and/or refunds the sum of Kes.37, 318, 063/= only unto the Plaintiffs.

297. In my humble/ considered view, the 3rd Defendant was never instructed by the Plaintiff in the course of the sale transaction and having not been so instructed, the 3rd Defendant owed unto the Plaintiffs' no professional duty or at all.

298. Secondly, even though the Plaintiffs have contended at the foot of the Re-amended Plaint that the 3rd Defendant is unjustly enriching himself with the sum of Kes.37, 318, 063.20/= only, there is evidence on record and indeed DW2 admitted that the entire monies that was paid out to and in favor of the 3rd Defendant were released unto her with the concurrence and permission of the Plaintiffs.

299. For the sake of brevity, it is suffices to reproduce the relevant portions of the evidence by DW2 which confirms that the amount being claimed as against the 3rd Defendant was indeed released to and paid out in favor of the 2nd Defendant.

300. Whilst under cross examination by Learned counsel for the Plaintiff, DW2 stated as hereunder;

> " The sale agreement is dated the 1st March 2011. The deposit of the sale price was remitted to the 2nd Defendant. The deposit was remitted in accordance with the close of the agreement"

301. Furthermore, the witness proceeded and stated as hereunder;

> " The second part of the payments were released to the 2nd Defendant".

302. Surely, there is express admission and confirmation that the monies at the foot of the subject dispute were remitted to and released to the 2nd Defendant with the knowledge and concurrence of the Plaintiffs. In this respect, there is no gainsaying that the 3rd Defendant cannot [sic] be held liable to refund monies, whose custody/ domicile is common knowledge to the Plaintiffs.

303. Lastly, it is also important to underscore that the sale agreement entered into and executed on the 1st March 2011 was between two known Parties, namely, the Plaintiffs on one hand and the 2nd Defendants on the other hand.

304. Quiet clearly, the said agreement was therefore only binding to the Parties thereof and not otherwise. Instructively, the Doctrine of privity of contract highlights the position that a contract only binds the Parties thereto and not otherwise.

305. To this end, I am obliged to cite and quote the holding of the Court of Appeal in the case of Savings & Loan (K) Limited versus Kanyenje Karangaita Gakombe & another [2015] eKLR, where the court held as hereunder;

> " Thus in Agricultural Finance Corporation v Lengetia LTD (supra), quoting with approval from Halsbury's Laws of England, 3rd Edition, Volume 8, paragraph 110, Hancox, JA, as he then was, reiterated:
>
> > "As a general rule a contract affects only the parties to it, it cannot be enforced by or against a person who is not a party, even if the contract is made for his benefit and purports to give him the right to sue or to make him liable upon it. The fact that a person who is a stranger to the consideration of a contract stands in such near relationship to the party from whom the consideration proceeds that he may

be considered a party to the consideration does not entitle him to sue upon the contract."

306. In a nutshell, my answer to issue number three herein before is threefold. Firstly, the 3rd Defendant was not privy to the contract/sale agreement entered into between the Plaintiffs on one hand and the 2nd Defendant; and hence same is not bound by the Doctrine of privity of contract.

307. Secondly, the 3rd Defendant was neither retained nor instructed by the Plaintiffs herein to act for them in the impugned transaction and to the extent that the 3rd Defendant did not act for the Plaintiffs, same therefore owes no professional duty to and in favor of the Plaintiffs.

308. Thirdly, that the 3rd Defendant admittedly did not issue any Professional undertaking in favor of the Plaintiffs and hence the claim for breach of Professional undertaking, was made in bad taste and in any event, was intended to bring the name of the 3rd Defendant to disrepute.

Issue Number 4 - What Reliefs, if any, ought to be granted.

309. The Plaintiff herein have sought for a plethora of reliefs and remedies at the foot of the Re-amended Plaint dated the 16th January 2017.

310. However, in the course of deliberating upon the preceding issues, this court has since found and held that the 2nd Defendant did not acquire any lawful and/or legitimate title over and in respect of the suit property. Consequently, the court went ahead and held that the 2nd Defendant therefore had no title capable of anchoring the sale agreement dated the 1st March 2011.

311. Similarly, the court also proceeded to and established that the plea for specific performance was premature, misconceived and otherwise constituted an abuse of the due process of the court.

312. Be that as it may, it is not lost on this Honourable court that the Plaintiffs herein paid out a total of Kes.37, 318, 063.20/= only to in favor the 2nd Defendant herein, which monies were duly acknowledged and confirmed by DW2. [See the excerpts highlighted whilst discussing issue number three].

313. The question that remains to be addressed and remedied is whether the 2nd Defendant, who had no valid title to sell, can now retain and hold the monies which were paid as part of the consideration.

314. In my humble view, the sale agreement which was entered into between the 2nd Defendant and the Plaintiffs was vitiated, nay frustrated by various factors, inter-alia want of title. In this regard, it then behooves the 2nd Defendant to refund and/or restitute the monies which were paid out to and acknowledged by her.

315. Consequently and in the premises, I am inclined to find and do hereby hold that the 2nd Defendant is obliged to refund the entire sum of Kes.37, 318, 063.20/= only to the Plaintiffs.

316. Additionally, there is also the claim pertaining to payment of interest. Whereas the Plaintiffs has sought to be awarded interests at 20% per annum from the 21st February 2011, the Plaintiff has however not tendered evidence to vindicate the plea of interests at 20% per annum, which is not the court rates.

317. Suffice it to point out that any one, the Plaintiffs not excepted, who seeks interests beyond the court rates, bears the obligation to place before the Honourable court plausible and cogent evidence, either of custom or practice or otherwise, to warrant such an award.

318. To the contrary, the court is obligated to decree suitable indemnity and atonement for the depreciation in the value of money [inflation], so as to enable the Claimant to be put/ placed in as near position

as same would have been, had it not been the events complained of. For coherence, this is what Economists, would refer to as Opportunity Cost.

319. To underscore the obtaining legal position anchoring and/or underpinning award of interests, it suffices to cite and quote the decision in the case of Highway Furniture Mart Limited v Permanent Secretary Office of The President & another [2006] eKLR, where the court held thus;

> " The relief claimed by the appellant was specifically pleaded in paragraph 3 (1) of the plaint "as the principal sum of Shs.11,257,118/= together with interest thereon at court rate from the date of the plaint until payment in full". The Chief Justice from time to time fixes the ceiling of the court rate interest under section 26 of the *Civil Procedure Act*. The prevailing court rate is 14% p.a. which is the rate applied by Okwengu J.
>
> The justification for an award of interest on the principal sum is, generally speaking, to compensate a plaintiff for the deprivation of any money, or specific goods through the wrong act of a defendant. In Later v Mbiyu [1965] EA 592, the forerunner of this Court said at page 593 paragraph E:
>
> "In both these cases the successful party was deprived of the use of goods or money by reason of the wrongful act on the part of the defendant, and in such a case it is clearly right that the party who has been deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest".

320. Other than the enunciation of the legal position that underpins the award of interests, it is also crystal clear that the applicable interests rate is 14% per annum and not otherwise.

321. On behalf of the 2nd Defendant, same also filed a Counterclaim and in respect of which same has sought for an order to compel the Plaintiffs to pay the balance Kes.30, 712, 960.80/= only.

322. However, this court has found and held that the 2nd Defendant did not hold any valid title to the suit property and hence had no title to convey to and in favor of the Plaintiffs.

323. Further and in any event, the 2nd Defendant herself conceded and admitted that same was unable to grant vacant possession of the suit property, obviously because the suit property was and remains under the occupation of the 4th Defendant.

324. Pertinently, the 2nd Defendant herein is the one culpable for breach of the contract/sale agreement with the Plaintiffs and to purport to grant the counterclaim, would tantamount to adding salt into injury.

325. In my humble view, the counterclaim by and on behalf of the 2nd Defendant is clearly misconceived and legally untenable.

326. Finally, the 4th Defendant had also filed a counterclaim and in respect of which same sought for a cocktail of reliefs, but essentially a declaration that the 4th Defendant is the lawful proprietor of L.R No. 4275/40.

327. Other than the foregoing, the 4th Defendant also sought an order to have the Grant No. I.R No. 26044 issued to and bearing the name of the 2nd Defendant to be revoked, canceled and/or nullified.

328. Without belaboring the point, there is evidence on record that the impugned certificate of title that was hitherto issued in favor of the 2nd Defendant and which was conceded by DW1 (Deputy Chief Land Registrar) to have been issued in error was surrendered.

329. Moreover, the Plaintiffs herein also conceded that same discovered that the suit property belongs to the 4th Defendant and furthermore highlighted the concession by the 2nd Defendant in terms of the Letter contained at page 98 of the Plaintiff's bundle of documents.

330. In short, the counterclaim by and on behalf of the 4th Defendant has been duly proved/ established to the requisite standard.

331. Consequently, same is meritorious.

Final Disposition:

332. Having reviewed, analyzed and appraised the various issues that were highlighted in the body of the Judgment herein, it must have become crystal clear that the Plaintiffs have partially proved their claim albeit as against the 2nd Defendant.

333. On the other hand, it is also instructive to underscore that the 4th Defendant has also established and demonstrated that same is the lawful and legitimate owner of the suit property.

334. Consequently and in the premises, the Court now proceeds to and do hereby make the following orders;

    i. The Plaintiff's claim for refund of Kes.37, 318, 063.20/= only as against the 2nd Defendant be and is hereby allowed with costs.

    ii. The Refund in terms of clause (i) hereof shall attract Interests at court rate of 14% w.e.f 30th May 2011.

    iii. The Plaintiff's claim as against the 3rd Defendant be and is hereby Dismissed with costs.

    iv. The claim as against the 1st Defendant is similarly dismissed with costs.

    v. The 2nd Defendant's counterclaim be and is hereby dismissed with the costs to the Plaintiffs.

    vi. The 4th Defendant's counterclaim be and is hereby allowed as hereunder;

        a. A declaration be and is hereby made to the effect that Grant No. I.R No. 26044 issued to and bearing the name of the 2nd Defendant and which was issued on the 1st April 2010 is fraudulent, unlawful and void.

        b. An order be and is hereby granted directing the 1st Defendant (Chief Land Registrar) to revoke, nullify and/or cancel Grant No. I.R No. 26044.

        c. The 1st Defendant herein (Chief Land Registrar) shall thereafter proceed to and publish a gazette notice relating to the cancelation of Grant No. I.R No. 26044 in the Kenya gazette within 60 days from the date hereof, albeit at the expense of the 4th Defendant.

        d. A declaration be and is hereby made that the 4th Defendant (Kenya Meat Commission) is the lawful and legitimate proprietor of L.R No. 4275/40, situate on riverside drive, within the City of Nairobi.

        e. There be and is hereby granted an order of Permanent injunction to restrain the 2nd Defendant either by herself, servants, agents employees and/or anyone acting on her instructions from trespassing onto and/or otherwise interfering with the 4th Defendant rights to and/or interest over L.R No. 4275/40.

vii. Costs of the 4th Defendant's counterclaim shall be borne by the 2nd Defendant herein.

viii. Any other Reliefs not expressly granted is hereby Declined.

335. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25TH DAY OF JANUARY 2024.

OGUTTU MBOYA,

JUDGE.

In the Presence of

Ms. Anyango Opiyo for the Plaintiffs.

Mr. Allan Kamau [Principal Litigation Counsel] for the 1st Defendant.

Mr. Otieno Okeyo for the 2nd Defendant.

Mrs. Maina for the 3rd Defendant.

Mr. Cohen Amanya for the 4th Defendant.