



**Athi Paper Mills Limited v Dakawou Transport Limited (Environment & Land
Case 214 of 2016) [2024] KEELC 60 (KLR) (18 January 2024) (Judgment)**

Neutral citation: [2024] KEELC 60 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 214 OF 2016
OA ANGOTE, J
JANUARY 18, 2024**

BETWEEN

ATHI PAPER MILLS LIMITED PLAINTIFF

AND

DAKAWOU TRANSPORT LIMITED DEFENDANT

JUDGMENT

Introduction

1. By a Plaint dated 3rd March, 2016 and filed in court on 7th March 2016, the Plaintiff prays for judgment against the Defendant for:
 - a. A declaration that the Plaintiff is discharged from further performance of the said contract.
 - b. A declaration that the Plaintiff is entitled to retain the deposit for its own use and benefit.
 - c. A permanent injunction do issue to permanently restrain the Defendant and or any other third parties by themselves and or their servants and or agents and or employees and or howsoever from either entering upon occupying constructing on or developing or selling, transferring, charging, mortgaging, or in any other manner whatsoever and howsoever interfering with all that portion of land measuring three decimal one seven eight (3.178) hectares or thereabouts situate in Mavoko Township in Machakos District of the republic of Kenya that is to say L.R. No. 337/1208 together with all rights, easements advantages and privileges appertaining or belonging thereto or usually held and enjoyed therewith and all buildings and improvements being thereupon (if any) (which is hereinafter referred to as the “suit premises”) and or in any other manner whatsoever from dealing with or interfering with and or remaining on or continuing in occupation of all.



- d. An interlocutory injunction do issue to restrain the Defendant and or any other third parties by themselves and or their servants and or agents and or employees and or howsoever from either entering upon occupying constructing on or developing or selling, transferring, charging, mortgaging, or in any other manner whatsoever and howsoever interfering with all that portion of land measuring three decimal one seven eight (3.178) hectares or thereabouts situate in Mavoko Township in Machakos District of the republic of Kenya that is to say L.R. No. 337/1208 together with all rights, easements advantages and privileges appertaining or belonging thereto or usually held and enjoyed therewith and all buildings and improvements being thereupon (if any) (which is hereinafter referred to as the “suit premises”) and or in any other manner whatsoever from dealing with or interfering with and or remaining on or continuing in occupation of all, pending hearing and determination of this suit.
 - e. An interlocutory order do issue directing the Commissioner of Lands, the Chief Registrar and the Registrar of Titles to ensure that no other titles or transfers or sub-divisions in respect of the suit premises are registered that derogate from or subtract from or in any other manner whatsoever diminish or take away from or negate the title of the Plaintiff in the aforesaid suit premises or alters the status quo hereinabove described.
 - f. An order directing the Commissioner of Lands, the Chief Registrar or their replacements or equivalent and the Registrar of Lands and or their servants, agents and or employees to ensure the he rectifies the register by cancellation of all the entries relating to the transfer of the suit premises from the Plaintiff to the favour of the Defendant and issuance of the title and or conveyance and or proprietary interests complained of to the Defendant in respect of the above stated suit premises and reverse and or rectify the same and or do any act necessary and in all manners required so as to ensure the intended objective and result of the Plaintiff’s reinstatement and registration as the sole legal and beneficial owner thereof is achieved.
 - g. Eviction of the Defendants, their servants, agents employees and or proxies and any other parties connected to them from the aforesaid suit premises.
 - h. An order directing the Defendant, their directors, servants, employees, and or agents or any one of them and all of them to deliver up vacant possession of the suit premises to the Plaintiff.
 - i. General damages for breach of contract.
 - j. Costs of an incidental to this suit.
 - k. Interest on (i) and (j) above at the rate of 14% per annum.
 - l. Further and or other relief as this Honourable Court may deem fit to grant.
2. The Plaintiff’s case is that it was at all times the registered, legal and beneficial owner entitled to possession of all that portion of a parcel of land in Mavoko Township, formerly Machakos District, known as L.R. No. 337/1208 for a term of 99 years from the 1st day of April, 1992 together with all rights and privileges thereto; that by a written contract dated 16th April, 2009 incorporating the Law Society Conditions of Sale (1989 Edition), it agreed to sell to the Defendant the suit premises at the price of KShs. 16,500,000 and that the Defendant paid a deposit of KShs. 1,650,000 to its Advocates as stakeholders.
 3. The Plaintiff averred that the completion period was provided as not later than 120 days from the date of the agreement and that time would be of the essence; that under the contract, in default of payment of the balance of the purchase price by the completion date or failure to provide a suitable undertaking



- thereto, the vendor would be at liberty to inter-alia rescind the agreement by giving 14 days' notice to complete and that on failure to comply with the completion notice, the contract would be deemed rescinded and an equivalent of 10% deposit be forfeited as the only remedy available to the Vendor.
4. The Plaintiff alleged that being ready and willing to complete the contract, it signed a transfer and delivered it into the custody of their advocate who caused it to be registered in the Defendant's favour on 31st July, 2012 despite the Defendant's failure to pay the balance of the purchase price as stipulated in the contract.
 5. The Plaintiff further averred that on various dates including 30th April, 2013, it served the Defendant with a completion notice which expired on or about 14th May, 2013 but the Defendant failed to comply with the Notice; that the Plaintiff was thus entitled to treat the failure as repudiation of the contract and by a letter, they accepted the repudiation and that consequently, the Plaintiff is discharged from further performance of the contract and entitled to retain the deposit for its use and benefit.
 6. On 15th June, 2016, the Defendant filed a Statement of Defence admitting that the suit premises was owned by the Plaintiff; that the Plaintiff agreed to sell the suit premises at the stated price and that it paid deposit as stated in the Plaintiff.
 7. However, it was averred that the completion date of the Agreement was varied and deferred at the Defendant's instance; that the Defendant, unlike the Plaintiff, has always been willing to complete the contract but was prevented by internal disagreements between the Directors of the Plaintiff company; that the Plaintiff first asked for payment of the balance, then sought half of the land in lieu of the balance and finally declined to receive the balance, and that these shifting of positions made it impossible to perform its obligations.
 8. The Defendant averred that the transfer of the suit property was authorised by the Plaintiff who voluntarily executed the transfer forms in favour of the Defendant; that the Plaintiff never became entitled to repudiate the contract as alleged in the Plaintiff and that the Defendant lawfully gained possession of the suit premises and has expended KShs. 10,000,000 rehabilitating the land.

Hearing and evidence

9. PW1 testified that the Plaintiff was at all material times the registered proprietor of the suit property and that the Plaintiff entered into an Agreement for Sale of the suit property dated 16th April, 2004 with the Defendant, which agreement incorporated the Law Society Conditions of Sale (1989) Edition.
10. PW1 testified that the sale was to finance the purchase of six paper bag manufacturing machines from Chandaria Industries Ltd; that the Defendant paid a deposit of KShs. 1,650,000 to the Advocate acting for both parties to hold as a stakeholder and that the Plaintiff being ready and willing to complete the transaction, executed a Transfer and deposited it with their Advocate.
11. According to PW1, before the balance of the purchase price was paid and without the Plaintiff's knowledge and consent, the transfer was fraudulently, maliciously and irregularly lodged and effected in favour of the Defendant, when it was not entitled to such registration under the contract at the time.
12. PW1 stated that the Plaintiff served upon the Defendant completion notices in line with condition 12 of the Agreement, including one served on 30th April, 2013 and the last one expiring on 14th May, 2013 or soon thereafter and that the Defendant failed to comply with the said notices, and therefore, the Plaintiff was entitled to treat the failure as a repudiation of the contract.



13. It was the evidence of PW1 that the Defendant having breached the agreement, by a letter dated 30th April, 2013, the Plaintiff accepted the repudiation; that the Plaintiff was discharged from its obligations thereunder and is entitled to retain the suit premises for its use and benefit.
14. PW1 further stated that the Defendant is not entitled to ownership of the suit property or to be registered as a proprietor thereto; that the Defendant is and continues to trespass upon the Plaintiff's land being the suit property and that since the Defendant has no known assets or fixed abode/known place of business apart from the suit property, the suit property is in danger of being sold, transferred, wasted, damaged or alienated by the Defendant to defeat the main prayer of the suit and dispose of the only asset that could be attached to realize any judgment of this court.
15. It is PW1's testimony that under the contract, the Plaintiff is entitled to rescind the contract and has already done so; that disposal of the suit property will be to the financial detriment of the Plaintiff, causing it irreversible and irreparable loss which cannot be compensated by way of damages as the Defendant is unable to make good any such loss and that the Defendant had in fact threatened and attempted to fraudulently dispose of the property to unsuspecting third parties by holding itself out as the owner of the suit property.
16. On cross-examination, PW1 testified that he was not aware that the National Land Commission had revoked the Plaintiff's title; that he was also not aware of the decision of the High Court; that he wanted to retain the deposit; that the Plaintiff never transferred the suit property, but the Defendant fraudulently transferred the land to itself without the Plaintiff's consent; and that the land was to be transferred upon payment of the entire purchase price.
17. PW2 stated that he was involved in the operations of and was familiar with the Plaintiff herein; that the Plaintiff was the registered owner of the suit property; and that he wished to repeat and reiterate the contents of the statement of PW1.
18. PW3 testified that he was a Private Investigator and knew PW1 who was the owner of the suit property; that sometime in the year 2009, PW1 asked him to source for a buyer for the suit premises; that through advocate Saad Mikdad Saad, he met Ahmed Abdulle Noor at his transport yard known as Dakawou Transport Limited at city Kabanas area and that they agreed at a purchase price of Kshs. 16,500,000.
19. PW3 stated that after some time, PW1 informed him that the Defendant had failed to comply with the agreed timelines for payment of the purchase price; that he met with Ahmed Abdulle Noor and asked him about the balance and that Ahmed Abdulle Noor informed him that he needed time but he promised to pay which he never did.
20. On the part of the Defence, DW1 stated that the Defendant fulfilled its obligations under the contract and was ready and willing to complete it, but one of the Directors of the Plaintiff expressly notified the Defendant not to conclude payment due to internal conflicts of the Plaintiff's Directors regarding the sale herein and that the Plaintiff duly, wilfully and voluntarily executed the transfers to the suit property which was first registered on 3rd December, 2009 and subsequently on 31st July, 2012 7 in the name of the Defendant.
21. DW1 further stated that the main issue in this suit was litigated in Machakos High Court Civil Suit No. 214 of 2010 which affirmed Oil City as legal and absolute proprietor of the suit property before the subsequent transfer to the Defendant; that the Machakos High Court suit was necessitated by the Plaintiff's refusal to give vacant possession, and the substratum of the suit was for orders that Oil City Limited was entitled to exclusive and unimpeded possession of the suit property and that the said suit was decided in the Defendant's favour.



22. DW1 stated that the Plaintiff failed to disclose that it had dumped black cotton soil on the suit property; that the Defendant was still willing to pay the balance of the purchase price despite this misrepresentation and the fact that it spent KShs. 10,000,000/- to render the land usable; that by virtue of being the registered and legal proprietor of the suit property, the Defendant was entitled to quiet possession and ownership, and was in possession thereof and that the Transfer was executed and registered within the parameters of and in compliance to the law.
23. It was the evidence of DW1 that the matter having already been litigated, the instant suit was brought with malice to derogate the Defendant's good name. In cross-examination, DW1 stated that the parties had agreed that the Plaintiff would take care of the black cotton soil and the squatters on the suit property, but the land was transferred before this was done and that the Defendant dealt with the issue of the black cotton soil at its costs, thus the delay in payment of the balance of the purchase price.

Submissions

24. The Plaintiff's counsel submitted that there was a contract for sale of the suit property, a copy of which was produced in court; that the Defendant wrongfully and in breach of contract failed to pay the Plaintiff the balance of the purchase price in the sum of Kshs. 14,850,000 or at all and that the conduct of the Defendant is illegal, unlawful, and reprehensible and ought to be stopped and punished by the law.
25. The Plaintiff's counsel further submitted that the Defendant clearly and unequivocally admits that the balance of the purchase price is unpaid and that it was willing to offset the balance if and when the Plaintiff is ready to accept it, yet the Plaintiff is and has always been ready to accept the payment.
26. It was submitted that the proceedings in Machakos High Court Civil Case No. 214 of 2010 were between different parties known as Oil City Limited vs Athi River Paper Mills Limited; that Oil City Limited is not a party to this suit; that the Defendant is not a party to the Machakos High Court suit; that the Defendant has produced no evidence of the payment of the balance of KShs. 14,850,000 and that since the Defendant is no longer in possession of the suit premises or hold title thereto, they ought to pay the outstanding balance of KShs. 14,850,000.00 plus costs and interest to the Plaintiff.
27. In response, the Defendant's advocate submitted that the existence of the sale agreement relating to the suit property was not disputed; that in the Agreement for Sale, the Plaintiff was referred to as both Athi Paper Mills Limited And Athi River Paper Mills Limited and that pursuant to clause 12 of the said agreement, parties could renegotiate the terms thereto.
28. It was submitted that the Defendant paid the 10% deposit and a further sum of KShs. 6,850,000; that the Defendant was always willing and able to pay the balance but due to internal wrangles among the Plaintiff company's Directors, the Plaintiff sought a variation of the agreement and the Defendant accepted the variation; that parties further negotiated and the Plaintiff voluntarily signed the transfers and authorised the transfer of the suit property to the Defendant and that the Defendant has since spent KShs. 10,000,000 to rehabilitate the land.
29. The Defendant's counsel submitted that after obtaining possession of the land, it realised that there was misrepresentation by the Plaintiff as the Defendant was confronted by a suit that successfully challenged the legality of the title obtained from the Plaintiff; that the title obtained from the Plaintiff was therefore a bad title surrounded by fraud, misrepresentation, and illegalities and that the title was cancelled by the Chief Land Registrar who allocated the suit property to another person.
30. It was submitted that the Defendant challenged the Chief Land Registrar's decision vide Environment and Land Case Miscellaneous Application 56 of 2018 (J.R.) Republic vs National Land Commission



& 2 Others; Raphael Musyoka Ndeti (Interested Party) Ex parte Dakawou Transporters Limited [2020] eKLR; and that the Defendant was not successful as the court upheld the decision of the Chief Land Registrar in cancelling and reallocating the title.

31. The Defendant's counsel submitted that the investment of Kshs. 10,000,000 in rehabilitating the land's suitability for its intended purpose is proof of the Defendant's commitment to fulfilling its obligations; that the twist in the narrative emerged when the title to the property was revoked after a series of legal battles and that when the completion date was extended, time ceased to be of essence and the Plaintiff is estopped from claiming as such (Charles Rickards Ltd vs Oppenheim (1950) 1 KB 616).
32. It was submitted by the Defendant's counsel that the Defendant fulfilled its obligations under the contract through performance, in contrast to the Plaintiff's claim of breach and that the Plaintiff conceded in its letter of 22nd November, 2012 to the Defendant's Advocate that it had received Kshs. 7,470,000 from the Defendant, and was demanding the outstanding sum of KShs. 9,030,000 contrary to the Plaintiff's allegation that it only received the deposit of KShs. 1,650,000.
33. According to the Defendant's counsel, in acknowledgment of the large sum paid, the Plaintiff willingly signed the transfer and authorised the suit property to be registered in favour of the Defendant and that if the transfer in favour of the Defendant was marred with illegality and fraud, as alleged, the Plaintiff should have instituted a legal action against the Advocate on record or criminal proceedings against the parties engaging in the fraud.
34. It was also submitted that despite willingness to pay, the Plaintiff's stance on payment of the balance kept changing, which went on until the title was cancelled by the Chief Land Registrar; that it is unjust and unfair to demand that the Defendant pay the outstanding balance, considering that the title has been cancelled due to the Plaintiff's fraud and illegal activities in acquiring it and that the principle that no action can arise from deceit requires the court not to entertain a party who founds its cause of action on an illegal or immoral act (Standard Chartered Bank Kenya Ltd vs Intercom Services Ltd & 4 Others (2004) eKLR).
35. In light of the above the Defendant's counsel asked the court to issue the following remedies to rectify the injustice caused by the Plaintiff and compensate the Defendant for their substantial losses:
 - a. A declaration that the Plaintiff vitiated the Contract through misrepresentation, fraud, and illegalities, rendering it unenforceable.
 - b. Special damages in the sum of KShs. 18,500,000/-, representing the money paid by the Defendant, including:
 - i. KShs. 1,650,000/- being a deposit paid upon signing the agreement.
 - ii. KShs. 6,850,000/- being a further deposit paid as part of the purchase price.
 - iii. KShs. 10,000,000/- being the amount spent to render the parcel usable.

Analysis and Determination

36. From the pleadings filed by the parties, the testimonies, the evidence tendered and the submissions herein, the issues that arise for determination are:
 - a. Whether there is any merit in the Plaintiff's claim.
 - b. Whether the Defendant is entitled to the claims as set out in its submissions.
 - c. Who should bear the costs of the suit.



37. The facts as admitted by the parties herein are that by an agreement for sale dated 16th April, 2009, the Plaintiff sold the suit property to the Defendant. The agreed purchase price was KShs. 16,500,000 and the Defendant paid the agreed 10% deposit of KShs. 1,650,000. Thereafter, the Plaintiff voluntarily signed the transfer documents of the suit property as proof that he was ready and willing to complete the transaction. However, to date, the balance of the purchase price has not been paid by the Defendant.
38. This notwithstanding, the Defendant took possession of the suit property and commenced excavation works thereon. The court's attention has been drawn to the existence of Machakos HCCC No.214 of 2010, Oil City Limited vs Athi Paper Mills Limited and the consent order of 14th September, 2010 against the Plaintiff herein who was the Defendant in that suit.
39. In the said suit, the Plaintiff purportedly consented to be evicted from the suit property therein L.R. No. 337/1208, which is the same property subject matter of this suit. The court notes that on the cover page of the agreement for sale, the Plaintiff is referred to as "Athi Paper Mills Limited", while at page 1 thereof, it is described as "athi River Paper Mills Limited".
40. That being so, the Defendant is right in its allegation that the two names referring to the Plaintiff were both used in the Agreement for Sale. Caution must be had when dealing with a consent order where a party purportedly agrees to be "evicted" from a suit property, because the full purchase price had not been paid. Notably also, the consent order was made in an interlocutory application, and the Plaintiff herein alleges that it was never served with the summons in the said suit.
41. At the time of commencement of this suit, the Defendant, through its sister company, Oil City Limited, held title to the suit property. By a decision rendered by the National Land Commission on 28th April 2017, the Chief Land Registrar was directed to revoke the allocation over L.R. No. 337/1208, the suit property therein (also the suit property herein) to one Onesmus Kimani who was alleged therein to be the initial allottee of the land, as well as all subsequent transfers up to and including the Defendant's title herein.
42. The Defendant herein, by way of Judicial Review sought to challenge the decision of the National Land Commission in Republic vs National Land Commission & 2 Others; Raphael Musyoka Ndeti (Interested Party) Ex parte Dakawou Transporters Limited [2020] eKLR. This Court, in its decision delivered on 21st February, 2020, found that the Defendant's application was unmeritorious thereby upholding the decision of the NLC.
43. It is not in dispute that the Plaintiff and the Defendant entered into a sale agreement in respect of the suit property. The bone of contention is whether the said contract is valid and enforceable, and whether or not it was rescinded.
44. The parties herein hold contradictory positions. On the one hand, the Plaintiff alleges that the contract was rescinded or repudiated and therefore the suit property should revert back to it. The Defendant on the other hand alleges that it has paid a substantial amount of the purchase price to the Plaintiff and it is still able, willing and ready to pay the balance. It is the Defendant's case that it was only prevented from completing the payment because of internal wrangles among the Directors of the Plaintiff.
45. DW1 did testify that they were informed of the internal wrangles verbally by one of the Directors of the Plaintiff who indicated that the balance should not be paid. DW1 did not testify as to which of the Plaintiff's Directors issued the said communication and to whom the said communication was made. Thus, this evidence can only be treated as hearsay and unreliable.



46. Although there is no denial of execution of the transfer by the Plaintiff, the Plaintiff denies knowledge or issuance of consent for lodging and effecting the transfer. In the letter produced in court dated 21st May, 2009 from the Defendant's Advocate in the transaction to the Plaintiff, requesting for the executed Transfer, the Advocate was clear that he would effect the transfer and undertook not to release the Original documents to his client until payment is made in full.
47. This communication is proof that the Plaintiff was aware that the transfer was lodged before completion of payment. It appears however that despite the said registration, the Defendant was still to finalise payment before the original documents were released to it.
48. In addition, apart from the deposit of KShs. 1,650,000, the Defendant claims to have paid a further sum of KShs. 6,850,000, which would leave a balance of KShs. 8,000,000. However, the Defendant has offered no evidence of the purported further payments as claimed.
49. This Court has a hard time believing the contents of a letter from an advocate who claimed in his letter dated 14th February, 2013 to the Plaintiff's Advocate on record, when asked to furnish the entire file relating to the sale, stated that apart from an unsigned agreement, he had no other document in his file. This, despite him handling the entire transaction between the parties herein.
50. That aside, under the Sale Agreement between the Plaintiff and the Defendant, the purchase price was KShs. 16,500,000. However, the Transfer that was registered in favour of the Defendant's sister company shows the value of the land to be KShs. 8,000,000, and not KShs. 16,500,000.
51. This court sitting at Machakos, in its Judgment delivered in Republic vs National Land Commission & 2 Others; Raphael Musyoka Ndeti (Interested Party) Ex parte Dakawou Transporters Limited [2020] eKLR also noted the discrepancies in the sale of the suit property to the Defendant herein.
52. In this case, the title to the suit property having been successfully challenged by the Interested Party and revoked by the NLC, the Defendant herein sought to quash the decision to revoke his title. In its decision, the NLC made the following finding:
 - “ 27. The property had been allocated to Elizabeth Nzuki Ndeti family and was not available for allocation to the Respondent.
 28. There was a moratorium in place restricting disposal of land by any Local Authority and the National Government.
 29. The Director of Physical Planning having reviewed the Part Development Plan attached to the letter of allotment observed that the same was not properly approved. There is no approved PDP. Note that approved PDP No. 85 Ref. PDP NRB/891/5 of 12th June, 1991 fails to correlate with the shape reflected in Deed Plan for L.R. No. 337/1208.
 30. All the area surveyed as L.R. No. 337/1208 measuring five decimal three two (5.232) Ha has no approved PDP.
 31. The SPRO report in the file ascertained that the same had been earlier committed and not available for allocation.
 32. The Commissioner issued authority to the Claimants to make late payment for the allotment letter to enable processing of the title. The Claimant has indicated that her failure to accept the offer and pay for the same was



occasioned by the fact that the files went missing hence they were not able to process payment and the grant.

33. The title currently held by Onesmus Kimani Ngunjiri and subsequent transfers should be revoked and the Claimants be allowed to continue their quiet possession of their property without the interference from the Respondents.”

53. The findings of the Court in Republic vs National Land Commission (Supra) were that:-

“76. That being the case, I am of the view that the recommendation by the 1st Respondent to Chief Land Registrar to revoke the title in respect of L.R. No. 337/1208 and allocate the same to the Ndeti’s considered all the relevant factors and was proportional, reasonable, lawful and legal...”

54. As a result, the title at the time held by the Defendant was consequently revoked, for among other reasons, that the property had already been allocated to a third party and was not available for re-allocation. Evidently, the root title as well as the resulting transfers thereto culminating in the title being issued to the Defendant was found by the NLC, and the court, to be tainted with illegality and, by extension the sale of the suit property herein.

55. From the foregoing, it is clear that the contract between the parties herein is tainted by illegality. In the case of Kenya Airways Limited vs Satwant Singh Flora [2013] eKLR, the Court, on enforcement of illegal contracts, stated as follows:

- “(i) No person can claim any right or remedy whatsoever under an illegal transaction in which he/she has participated. The Court is bound to veto the enforcement of a contract once it knows that it is illegal whether that knowledge comes from the statement of the guilty party or from outside.
- (ii) If the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not.
- (iii) No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of the contract or transaction which is illegal, if the illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves the illegality, the Court ought not to assist him.
- (iv) No Court ought to enforce an illegal contract where the illegality is brought to its notice and if the person invoking the aid of the Court is himself implicated in the illegality.
- (v) In order for the doctrine to act as a defence to the claim, there must be illegal performance of the contract by one party to the contract and knowledge that illegal performance and participation in it by the other party to the contract.”



56. A claim based on an illegal transaction is therefore not sustainable or enforceable by the parties because a court of law cannot enforce an illegality. In *Mistry Amar Singh vs Kulubya* 1963 E.A. 408, the Court cited the following passage from *Scott vs Brown Doering Mc Nab & Co*(3) 1892 2QB 724:
- “ Ex turpi Causa non oritur action. ... No Court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if illegality is duly brought to the notice of the Court, and if the person invoking the aid of the Court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence adduced by the plaintiff proves illegality, the Court ought not to assist him.”
57. A contract for sale of land that was acquired illegally is itself illegal, and thus un-enforceable. The title to the suit property herein was revoked for reason that it was acquired illegally and through fraud. It thus follows that the contract made thereon is equally illegal because the Plaintiff essentially had no title to pass to the Defendant.
58. One of the considerations in deciding whether or not to grant relief, is the effect of doing so. In the instant suit, the Plaintiff’s title to the suit property was illegal and invalid to begin with hence its revocation, and for that reason, the Plaintiff cannot have passed a valid title to the Defendant, because one cannot sell what he does not have.
59. Making a determination on the said Agreement for Sale as prayed by the Plaintiff herein would be tantamount to enforcing the Agreement, yet it is a well-known principle that the court cannot be used to enforce illegalities through the back door. Similar sentiments were echoed by the Court of Appeal in *Standard Chartered Bank Kenya vs Intercom Services Limited*, Civil Appeal No. 37 of 2003 when it quoted the case of *Holman vs Johnson* (1775-1802) All ER where Lord Mansfield, CJ said as follows:
- “ The principle of public policy is the Ex dolo malo no oritar action. No court will lend its aid to a man who found his cause of action on an immoral or illegal act. If from the plaintiffs own stating or otherwise, the cause of action appears to arise ex turpi causa, or the transgression of a positive law of the Country, there the court goes not for the sake of the defendant but because they will not lend their aid to such plaintiff.”
60. Therefore, as a consequence of the recommendation by the National Land Commission (NLC) to revoke the title which was initially registered in the Plaintiff’s name, and which the Defendant currently holds, the Plaintiff’s suit herein is not sustainable because, other than from the illegality of the sale agreement, the prayers as set out in the Plaint have been overtaken by events, the title to the suit property having been revoked on the basis of the recommendation of the National Land Commission.
61. Therefore, there can be no order made in this suit as to the alleged vitiation of the contract by the Plaintiff. However, in the event the Court of Appeal overturns the decision of the National Land Commission, the Plaintiff is at liberty to institute a fresh suit.
62. As to whether the Defendant is entitled to special damages as claimed in its submissions, it is well known that parties are bound by their pleadings. The reasoning for not allowing parties to depart from their pleadings is to ensure that parties are able to prepare their evidence on the issues raised in pleadings and avoid trial by ambush.



63. The Court of Appeal in the case of David Sirona Ole Tukai vs Francis Arap Muge & 2 Others Civil Appeal No. 76 of 2014 [2014] eKLR held that;

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case as is pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”

64. As such, the contents of the Defence rightfully bind the Defendant herein. In *Law Society of Kenya vs Hillary Mutyambai Inspector General National Police Service & 4 Others; Kenya National Commission on Human Rights & 3 others (Interested Parties)* [2020] eKLR, the court held as follows:

“145. Parties are bound by their pleadings and any case constructed outside the pleadings cannot be the subject of the court’s determination. In *Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others* [2014] eKLR, the Court of Appeal extensively discussed the jurisprudence on the importance of pleadings in court disputes and concluded that:-

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce. The learned Judge, no matter how well-intentioned, went well beyond the grounds raised by the petitioners and answered by the respondents before her and thereby determined the petition on the basis of matters not properly before her. To that extent, she committed a reversible error, and the appeal succeeds on that score.”

146. The submissions made by the parties on the issue of the alleged abdication of constitutional duty by the Judiciary cannot assist the Petitioner. It has been held that submissions cannot take the place of evidence. I should think that submissions cannot replace pleadings and will not activate matters not raised in the pleadings.”

65. Further, in *Robert Ngande Kathathi vs Francis Kivuva Kitonde* [2020] eKLR the court held that:

“The Court of Appeal in *Avenue Car Hire & Another vs Slipha Wanjiru Muthegu* Civil Appeal No. 302 of 1997, held that no judgement can be based on written submissions, and that such a judgement is a nullity since written submissions is not a mode of receiving evidence set out under Order 17 Rule 2 of the Civil Procedure Rules [now Order 18 rule 2 of the Civil Procedure Rules]. The same Court in *Muchami Mugeni vs Elizabeth Wanjugu Mungara & Another* Civil Appeal No. 141 of 1998, found the practice of making awards on the basis of the submissions rather than the evidence deplorable.”



66. The law is also clear that special damages must be pleaded and proved before they can be awarded by the Court. The Court of Appeal in *Hahn vs Singh*, Civil Appeal No. 42 Of 1983 [1985] KLR 716 held as follows:

“Special damages must not only be specifically claimed (pleaded) but also strictly proved... for they are not the direct natural or probable consequence of the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the acts themselves.”

67. In *Tracom Limited & Another vs Hasssan Mohamed Adan* [2009] eKLR, the Court of Appeal explained the need for pleading certain claims in the following terms:-

“The purposes of requiring certain claims to be pleaded is to forewarn the defendant that there are other claims to be made which may not be the necessary and immediate consequence of the wrongful act as those claims are in respect of losses which the law does contemplate as arising naturally from the infringement of the plaintiff’s legal right.”

68. In its Defence, the Defendant did not plead any special damages. Instead, the Defendant claimed the sum of KShs. 18,500,000 as special damages being the deposit of KShs. 1,650,000; Kshs. 6,850,000 paid as further deposit on the purchase price and Kshs. 10,000,000 as expenses incurred in rehabilitating the suit property in its submissions, and not Defence. That being the case, the same cannot be awarded.

69. The last issue is on the issue of costs. Costs are awarded to compensate a party for the trouble taken in prosecuting or defending a suit. Costs are provided for under Section 27 of the *Civil Procedure Act* as follows:

“27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.”

70. Under the above provision, it is evident that costs follow the event. However, a court has the discretion to rule otherwise, which discretion is explained in the *Halsbury’s Laws of England*; 4th Edition (Re-issue), {2010}, Vol.10. para 16 as follows:

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”



71. The Court in Machakos ELC Pet No. 6 of 2013 Party of Independent Candidate of Kenya & Another vs Mutula Kilonzo & 2 Others [2013] eKLR quoted the case of Levben Products vs Alexander Films (SA) (PTY)Ltd 1957 (4) SA 225 (SR) at 227 where it was held:

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

72. Good reason that justifies departure from the general rule that ‘costs follow the event’ will vary from case to case, and the Supreme Court of Kenya in Jasbir Singh Rai & Others vs Tarlochan Rai & Others [2014] eKLR observed that:

“In the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs...”

73. “Good reason”, thus, will depend on the facts of each case, and some circumstances that may constitute “good reason” could include the conduct of the parties, the subject of litigation, the circumstances which led to the institution of the proceedings among others.

74. In the circumstances of this case, bearing in mind the illegality of the contract subject matter hereto, the court finds that there is good reason to refuse to award costs to either of the parties hereto.

75. For those reasons, the court proceeds to strike out the Plaintiff’s suit with no order as to costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 18TH DAY OF JANUARY, 2024

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Oduor holding brief for Noor for Defendant

Ms Aisha for Taib for Plaintiff

Court Assistant - Tracy

