



**Tropical Treasure Limited v Mangi & 3 others (Civil Appeal
18 of 2021) [2023] KECA 1187 (KLR) (6 October 2023) (Judgment)**

Neutral citation: [2023] KECA 1187 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MALINDI
CIVIL APPEAL 18 OF 2021
SG KAIRU, P NYAMWEYA & JW LESSIT, JJA
OCTOBER 6, 2023**

BETWEEN

TROPICAL TREASURE LIMITED APPELLANT

AND

CHARO MANYULE MANGI 1ST RESPONDENT

BAYA YAA MANGI 2ND RESPONDENT

P.M. OMWENGA 3RD RESPONDENT

THE LAND REGISTRAR, MOMBASA 4TH RESPONDENT

*(Being an appeal from the Judgment of the Environment and Land Court at Malindi
delivered by J. O. Olola, J. on 24th October 2019 in ELC Civil Suit No 26 of 2015)*

JUDGMENT

THE APPEAL

1. The appeal arises from the judgment of the ELC sitting in Malindi (J. O. Olola, J.) in which the suit by the 1st and 2nd respondents was allowed and judgment entered for the two respondents as sought in the amended Plaintiff. The decree of the ELC shows that judgment was entered as claimed by the 1st and 2nd respondents in their amended Plaintiff dated February 3, 2015 as follows:
 1. A permanent injunction be and is hereby issued against the appellant restraining it from dealing or interfering with the property known as LR No 28534/Kilifi CR No. 53828;
 2. A declaration that the purported transfer of all that property known as LR No 28534/Kilifi CR No 53828 to the Appellant was illegal, null and void and did not confer any proprietary right upon the Appellant and or any other person;



3. A declaration that the purported transfer of all that property known as LR No 28534/Kilifi CR No 53828 executed by the 3rd respondent is fraudulent, null and void;
 4. An order that the 4th respondent do rectify the register and nullify the appellant's registration in respect of all that property known as LR No 28534/Kilifi CR No 53828; and,
 5. The costs of the suit are awarded to the 1st and 2nd Respondents.
2. The appellant, aggrieved by the judgment of the ELC preferred the appeal raising six grounds of appeal. The appeal challenges the judgment and asserts that the ELC Judge erred:
- i. In law for ignoring binding authorities cited by the appellant and lodged with its Submissions of November 24, 2018;
 - ii. In failing to hold that parties are bound by the terms of their contract;
 - iii. In making remarks that were prejudicial to the appellant without any evidence or basis;
 - iv. In failing to uphold the doctrine of estoppel as against the 1st and 2nd respondent who had signed lawful transfer in favour of the suit property to the appellant;
 - v. In failing to hold that the formal agreement which subsequently transferred the suit property to the appellant was enforceable on the basis of the doctrine proprietary estoppel which otherwise extinguishes the Respondents' title rights thereto; and,
 - vi. In failing to uphold the appellant's binding exclusive possession and occupation equitable rights over the suit property which otherwise extinguishes the appellant's title thereto.
3. The appellant sought to have the appeal allowed by setting aside of the judgment dated October 24, 2019, and that the same be substituted with a judgment dismissing the suit with costs, and costs of the appeal.

Background

4. It is important at this stage to give a background of the case. The appellant, on the one hand and the 1st and 2nd respondents, on the other hand entered into a sale agreement dated June 10, 2010, for the sale of the property known as LR No. 28534/Kilifi CR No 53828, hereinafter the suit property, for a consideration of Kshs.41,500,000/= . As the suit land was registered in the name of the deceased kin of the 1st and 2nd respondents, one Manyule Mangi Yaa, M/s A.A. Said & Company Advocates undertook to champion on their behalf the full process of ensuring that they obtain letters of administration of the estate of the deceased. They however agreed to enter a Sale Agreement dated June 10, 2010 before the letters were obtained. It was also agreed that the 3rd respondent, who was the Appellant's advocate, would assist the 1st and 2nd respondents' family to procure letters of administration over the suit property, then registered in their deceased kin's name. The 1st and 2nd respondents signed a series of documents whose contents and effect they later claimed they were unaware of. To their utter surprise, the land was registered in the names of the appellant, after the appellant paid only Kshs.2,002,000/= out of the entire agreed purchase price. The 1st and 2nd respondents sued the appellant before the ELC seeking the orders as stated hereinabove.
5. The appellant and the 3rd respondent defended themselves and averred that the suit land was lawfully purchased by the appellant. It was averred that the requisite documents were executed by the 1st and 2nd respondents, as administrators of the estate of the deceased registered owner, and that therefore



the appellant did not engage in any fraud in acquiring the suit land. The 4th respondent in its defence denied being involved in any fraud and collusion over the transfer of the suit property.

6. The parties in the suit, by consent adopted the 1st and 2nd respondent's witness statements as evidence in the case, and admitted the documents filed by them as exhibits in the case. Likewise, the parties agreed to have the Affidavit sworn by the appellant dated March 18, 2015 admitted as the evidence of the appellant and the 3rd respondent in the case.

Hearing Before This Court

7. The appeal was heard on the February 28, 2023 through this Court's virtual platform. Learned counsel, Ms Mango was present for the 1st respondent, while learned counsel Ms Lutta appeared for the 4th respondent. There was no appearance for the Appellant despite service of the hearing notice upon its counsel on record, on the February 14, 2023. However, A. A. Said advocates for the appellant filed Submissions dated 24th February 2023, which we have considered. Ms Mango informed the Court that the 2nd respondent, who was also her client, was deceased. She also submitted that the 3rd respondent was exonerated in the judgment of the ELC and was not participating in the appeal.
8. Ms Mango submitted that she was relying on her Submissions dated February 21, 2021 and the list and digest of authorities of even date, and did not wish to highlight them. Ms Lutta on her part urged that no Submissions were filed on behalf of the 4th respondent and urged that they opted to leave the appeal for the determination of the Court.

Submissions By Counsel

9. We considered the submissions filed by Mr A. A. Said filed and dated February 24, 2023. As noted earlier, he did not appear at the hearing nor did he send counsel to represent him. In his Submissions, counsel urged that the issue for determination was whether the trial court could re-write the contract between the parties. Mr Said submitted that there was a binding contract between the appellant and the 1st and 2nd respondents where the latter received consideration for the suit property subsequent to the transfer of the suit property to the appellant, and that the appellant went ahead and took possession of the suit property. He relied on the cases of *Trans Mara Sugar Co Ltd & another vs Ben Kangwaya Ayiamba & another* [2020] eKLR; *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR; *Securicor Courier (K) Ltd vs Benson David Onyango & another* [2008] eKLR; *Samuel Kamau Macharia vs Daima Bank Ltd* [2008] eKLR; *Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited* [2014] eKLR for the proposition that a court cannot re-write a contract between the parties.
10. Mr Said's second argument was that his firm received a letter of instruction from Kanyi & Company advocates dated October 27, 2016 signed by the 1st and 2nd respondent. The letter was informing his firm that the 1st and 2nd respondent had received monies as consideration towards the settlement of the matter out of court. That the effect of the letter was to have the suit filed by the 1st and 2nd respondents withdrawn from court in compliance to article 159 of the *Constitution*. He urged that the letter was not brought to the attention of the trial Court and that the entry of the trial Court's judgment without the benefit of the contents of the said letter effectively condemned his client unheard.
11. Messrs Kanyi J & Co Advocates for the 1st respondent based his Submissions on the grounds in the Memorandum of Appeal. In answer to the appellant's ground one and two, that the learned trial Judge ignored binding authorities cited by the appellant, Counsel supported the judgement of the ELC and urged that the learned Judge considered all the authorities cited by the appellant. Mr Kanyi submitted that the cases cited by the appellant: *Eldo City Ltd vs Corn Product (K) Limited & another* [2013]



eKLR; *Abitro vs Thabiti Finance Company Limited & another* HCCC No 1025 of 2000; *Ambala vs Masolia* HCCC No 759 of 1071 and *Kariuki & others vs Republic* HCCC No 1402 of 1986 were all persuasive but not binding. Counsel urged that the rest of the authorities relied upon by the appellant were inapplicable as they gave the position of the law in the case of a first registration, yet the appellant's title was not a first registration. Mr Kanyi submitted that the Appellant failed to prove that it had paid the balance of the purchase price after the suit property was transferred to its name, as per the contract between the parties.

12. In answer to ground three, Mr Kanyi refuted that the learned Judge made remarks in the judgment that were prejudicial to the appellant. Counsel opined that the remarks by the learned Judge that the contract between the parties was lopsided, because the appellant's director was also the advocate that drafted the Sale Agreement between the parties, making provision that consideration would be paid to the 1st and 2nd respondent after the suit property had been transferred to the appellant. Counsel urged that the remarks were justified by the documentary evidence presented at the trial by the Appellant.
13. In answer to ground four of appeal, Mr Kanyi refuted the applicability of the doctrine of estoppel on the grounds that appellant needed to have specifically pleaded estoppel in its Pleint. For that proposition. Counsel relied on the case of *Diamond Trust Bank Kenya Limited vs Said Hamad Haisi & 2 others* [2015] eKLR.
14. In answer to ground five of the appeal, Mr Kanyi urged that for the doctrine of proprietary estoppel to apply, estoppel should have been pleaded. Secondly, the facts did not support the application of the doctrine by virtue of the existence of a formal agreement and transfer. He urged that the agreement provided that the purchase price be paid upon issuance of the title and transfer of the suit property in favour of the appellant. He urged that the appellant neither paid the purchase price nor took possession of the suit property. Counsel placed reliance on the case of *Gideon Mwangi Chege vs Joseph Gachanja Gituti* [2015] eKLR.
15. In answer to ground six that the learned Judge should have upheld the appellant's exclusive possession and equitable rights over the suit land, Mr Kanyi drew our attention to clause 2 of the agreement that provided that possession would be given upon payment of the purchase price. He urged that since the appellant had only paid Kshs.2,020,000/-towards the purchase price to the 1st and 2nd respondent, which both acknowledged. Counsel urged that neither the appellant nor the 1st and 2nd respondent ever set their feet on the suit property due to the hostility of squatters. Counsel drew the Court's attention to the appellant's letters dated November 26, 2013 and March 12, 2014, both part of the Record of Appeal, in which the appellant stated that it had not taken possession of the suit property. Counsel urged that contrary to the appellant's Submission, it did not have exclusive possession of the suit property. Citing *Peter Mbiru Michuki vs Samuel Mugo Michuki* [2014] eKLR, counsel urged that the current position was that the Appellant's registration in respect of the suit property has since been nullified and title issued to the 1st respondent as per the ELC judgment of October 24, 2019.

Analysis And Determination

16. This being a first appeal, it behooves this Court to re- evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the learned trial Judge should hold. In the case of *Kenya Ports Authority vs Kuston (Kenya) Limited* [2009] 2EA 212 this Court espoused that mandate or duty as follows: -

On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect.



Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.” (See *Selle vs Associated Motor Boat Company Ltd* [1968] EA 123 and also *Abok James Odera t/a A J Odera & Associates vs John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR.)

17. Having considered the evidence adduced before the ELC, Submissions by counsel and the cases cited we are of the view that what falls for our determination is:
 - i. Whether there was a valid contract between the parties
 - ii. Secondly whether there was consideration,
 - iii. Thirdly whether proprietary estoppel applies to this case; and,
 - iv. Fourthly whether the Appellant’s appeal ought to be allowed.
18. We shall consider all these issues simultaneously, as they are closely related.
19. There is no dispute that there was a Sale Agreement executed by the parties on the June 10, 2010, wherein the 1st and 2nd respondent agreed to sell the suit property to the appellant at a consideration of Kshs.41,500,000/-. What the 1st and 2nd respondents argued before the ELC was that they did not know the contents of the documents the appellant’s advocate made them sign, and that they only became aware after they realized that using the executed documents, the appellant had caused the land to be transferred to itself. Their case was that the appellant procured the transfer fraudulently without meeting its obligation, a fact that the appellant vehemently denied.
20. The learned ELC Judge considered the 1st and 2nd respondents’ case and expressed himself thus regarding the transfer of the suit land to the appellant’s name:
 - “ 27. A clear reading of those provisions would reveal that the full purchase price was to be paid upon acquisition of the Certificate of Title at which point in time the Purchaser was to be put in possession.

I did not therefore agree with the plaintiffs contention that they never agreed to transfer the suit property to the 1st defendant before the completion of the payment of the agreed purchase price. While there is every possibility that the plaintiffs did not understand fully the consequences of those two clauses that is exactly what they committed to when they executed the Agreement.”
21. The appellant’s case was that it lawfully purchased the suit land, that the requisite documents for the sale and transfer processes were executed by the 1st and 2nd respondents, as administrators of the estate of the deceased registered owner, and the appellant and thus, the appellant did not engage in any fraud in acquiring the suit land.
22. The learned ELC Judge considered the appellant’s case and the evidence before him and opined:
 - 28 As it were, and despite being represented by their advocates during the transaction, the 1st defendant appears to me to have been suffering from the same misapprehension of the terms of the Agreement of Sale. According to the 1st defendant the acquisition of the said title document was a demonstration that it was a *bona fide* purchaser, in good faith, for value.
 29. Unfortunately for the 1st defendant, I was unable to see the value they were referring to. My reading of Clauses 1 and 2 of the Agreement did not give me



the impression that the mere fact that title had issued in the 1st defendant's name, it automatically meant that the 1st defendant had paid the purchase price and was therefore entitled to possession of the land.”

30. I have read and re-read the Replying Affidavit. There is no single paragraph in which the 1st defendant deposes to have paid the sum of Kshs.41,500,000/- which was the agreed Purchase Price. At Paragraph 9 of the Replying Affidavit all that the 1st defendant states is that it paid the sum of Kshs.2,020,000/- through its advocates to the Plaintiff “as part payment towards the agreed purchase price of the suit property herein.” There is no indication in the 21-paragraph-Affidavit when the balance of the purchase price was paid.

31. That part payment is what the plaintiffs acknowledged to have been paid to them and nothing would have been easier if the balance had been paid for the 1st defendant to state so and demonstrate the fact of that payment. I did not think that in a situation like this where the plaintiffs accuse the 1st Defendant of failing to make the agreed payment that it would suffice for the 1st defendant to make the generalized statements of the nature it has made in the Replying Affidavit to demonstrate that it

23. The issue is what constitutes a sale agreement. Part v of the Land Act deals with the administration and management of private land. Section 38 of that Act as amended by section 55 of the Land Laws (Amendment) Act No 28 of 2016 deals with the validity of a contract for sale of land. Section 38(1) provides, in essence, that no suit shall be brought upon a contract for disposition of an interest in land unless the contract on which the suit is founded is in writing, is signed by all parties thereto and the signature of each party has been attested by a witness who was present when the contract was signed. The section in essence sets out the terms of a valid contract of sale of land. Further, Section 38(2), an exemption provision prescribes thus:

“Subsection (1) shall not apply to –

- a. a contract made in the course of a public auction.
- b. the creation or operation of a resulting, implied or a constructive trust; or
- c. any agreement or contract made or entered into before the commencement of this Act, provided that-
 - i. the verbal contracts shall be reduced to writing within two years from the date of the enactment of this Act; and
 - ii. the Cabinet Secretary shall put a notice of the requirement to reduce the contracts in writing in a newspaper of nationwide circulation.”

24. The Law of Contract Act, Chapter 23 of the Laws of Kenya provides in Section 3 that:

“No suit shall be brought upon a contract for the disposition of an interest in land unless-

- a. the contract on which the suit is founded –
 - i. is in writing.
 - ii. is signed by all parties thereto; and



- b. the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.

Provided that this Section shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the *Auctioneers Act* (cap 526); nor shall anything in it affect the creation of a resulting, implied or constructive trust.”

25. The matter of concern to the 1st and 2nd respondents and the ELC Judge was in regard to consideration. A sale cannot be complete before consideration is paid. At this point, it is expedient to set out what the parties agreed in their Sale Agreement, in this regard, which was as follows:

1. The Vendor hereby agrees to sell and the Purchaser hereby agrees to purchase the said property at the price of Kshs.41,500,000/- which sum shall be paid to the Vendor in full and without any deductions (subject to advances if any paid out prior to completion as per the terms of this Agreement) on a acquisition of the Certificate of Title to the property from the Commissioner of Lands and the Transfer of the property in favour of the Purchaser and or nominee respectively.
2. The possession of the said property will be given to the Purchaser immediately upon payment of the purchase price amount hereinbefore described to the Vendor.”

26. The terms of the agreement were clear that acquisition of the Certificate of Title to the property from the Commissioner of Lands and the Transfer of the property in favour of the Purchaser was a prerequisite to payment for the suit land and the taking of possession of the suit land. The evidence before the ELC was that the appellant obtained the Certificate of Title and transfer of the suit and that the land was registered in its favour before consideration was paid for the suit land. In that regard, the learned ELC Judge found:

“ 32. At paragraph 13 of the Replying Affidavit, the 1st defendant denies receiving any demand for payment or completion from the Plaintiffs before this suit was filed. Yet at paragraph 14 thereof, it confirms that it is indeed in actual possession of the suit property. As we have seen, Clause 2 of the Agreement only allowed it to take possession upon payment of the Purchase Price.

While the Transfer of the suit Property was done on November 11, 2011, at pages 163 to 166 of the annexures to the Replying Affidavit are Letters from the 1st defendants Advocates dated November 26, 2013 and March 12, 2014 acknowledging that the balance of the purchase price was yet to be paid on the basis that the 1st defendant was trying to get the National Land Commission to remove some squatters who had invaded the land before they could release the balance.”

27. The learned ELC Judge continued:

“ 29. My reading of Clauses 1 and 2 of the Agreement did not give me the impression that the mere fact that title had issued in the 1st Defendant’s name, it automatically meant that the 1st defendant had paid the purchase price and was therefore entitled to possession of the land.



30. I have read and re-read the Replying Affidavit. There is no single paragraph in which the 1st defendant deposes to have paid the sum of Kshs.41,500,000/- which was the agreed purchase price. At Paragraph 9 of the Replying Affidavit all that the 1st defendant states is that it paid the sum of Kshs.2,020,000/- through its Advocates to the plaintiff “as part payment towards the agreed purchase price of the suit property herein.” There is no indication in the 21-paragraph-Affidavit when the balance of the purchase price was paid.
31. That part payment is what the plaintiff acknowledged to have been paid to them and nothing would have been easier if the balance had been paid for the 1st defendant to state so and demonstrate the fact of that payment. I did not think that in a situation like this where the plaintiffs accuse the 1st defendant of failing to make the agreed payment that it would suffice for the 1st defendant to make the generalized statements of the nature it has made in the Replying Affidavit to demonstrate that it had made the payments.”
28. In its Memorandum of Appeal, the appellant has faulted the learned ELC Judge accusing him of re-writing the contractual terms of the parties herein, ignoring binding authorities it lodged at the trial Court, and failing to hold that the parties were bound by the terms of their contract. However, as the appellant did not substantiate these grounds of appeal in its written submissions, we can only speculate what it could have meant by this indictment, a matter into which, as a first appellate Court we cannot venture. The same argument holds for the Appellant’s other ground of appeal that the learned ELC Judge made remarks that were prejudicial to the appellant without any evidence or basis.
29. In its Written Submission, the appellant posed the question whether by their conduct the parties intended the sale agreement to be binding, and if so, whether this Court could re-write their contractual terms an obligation, and fail to give effect to it.
30. Sections 39, 40, and 41 of the Land Act provides for the rights of a vendor in relation to a contract for sale of land and the procedure for obtaining an order of possession where the purchaser is in breach. Similarly, Section 42 provides for the rights of the purchaser against rescission of a contract for the sale of land and section 42(3) gives the court power to grant relief to the purchaser. If indeed the 1st and 2nd respondents or even the Appellant by their conduct acted against the fruition of the contract, sections 39 to 42 of the Land Act gives the cure.
31. While the Transfer of the suit Property was effected on November 11, 2011, as per the annexures to the Replying Affidavit in the form of Letters from the appellant’s advocates dated November 26, 2013 and March 12, 2014 acknowledging that the balance of the purchase price was yet to be paid
32. As Mwera, J. (as he then was) stated in *Housing Finance Co of Kenya Ltd vs Njuguna*, LLR No 1176 (CCK), referred to in *Margaret Njeri Muiruri vs Bank of Baroda (Kenya) Limited* [2014] eKLR:
 “Courts shall not be the fora where parties indulging in varying terms of their agreements with others will get sanction to enforce the varied contracts. Contracts belong to parties and they are at liberty to negotiate and even vary the terms as and when they choose. This they must do together with the meeting of the minds. If it appears to a court that one party varied the terms of a contract with another, without the knowledge, consent or otherwise of the other, and that other demonstrates that the contract did not permit such variation, this court will say no to the enforcement of such a contract.”



33. The sale agreement was very clear in the terms and obligations of the parties. We do not see any proof that the 1st and 2nd respondents either conducted themselves in a manner contrary to the one agreed between the parties. Neither was there any evidence that the parties, at any time, tried to re-negotiate the contract. Nothing turns on this point.
34. The appellant faulted the ELC Judge of failing to uphold the doctrine of estoppel and of proprietary estoppel as against the 1st and 2nd respondent that otherwise extinguished the Respondents' title rights. The 1st and 2nd respondent's response to this was that as the appellant had not pleaded estoppel in its pleadings, it could not rely on it. The appellant did not expound the doctrine in his Written Submissions. We shall nonetheless consider the same.
35. The appellant's advocate drafted the Agreement of Sale in this case, providing what the learned Judge of the ELC found lopsided terms. Especially Clauses 1 and 2 of the agreement, whose effect was to require the 1st and 2nd Respondents to have the land registered in the Appellant's name and to transfer the suit land to the Appellant before consideration for the suit land was paid to them by the Appellant.
36. The evidence before the Court is clear that the Appellant received the Certificate of Title to the suit land from the Commissioner of Land after the transfer had been executed by the 1st and 2nd Respondents. The record shows that the 1st and 2nd Respondents were paid Kshs.2,020,000/= out of the agreed sum of Kshs.41,500,000/=. The learned Judge of the ELC found that the Appellant had in the replying affidavit used as the Appellant's evidence at the trial contained a letter in which the Appellant acknowledged that it had not paid for the suit land the amount agreed.
37. We have noted from the evidence before the Court that while the Transfer of the suit Property was effected on November 11, 2011, the appellant as per the annexures to the Replying Affidavit sworn by appellant's advocates dated November 26, 2013 and March 12, 2014, it is acknowledged that out of Kshs.2,020,000/= paid, the balance of the purchase price was yet to be paid to the 1st and 2nd respondents. The appellant is attempting to invoke the doctrine of estoppel and or proprietary estoppel to have the Court sanction the Certificate of title it acquired over the suit land even though a substantial part of the purchase price was yet to be paid.
38. This Court in John *Mburu vs Consolidated Bank of Kenya* [2018] eKLR, Waki, Nambuye & Kiage, JJA opined that:

“Estoppel is not easy to define in legal terminology. It is said to be a principle of justice and equity. In the case of 748 *Air Services Limited vs Theuri Munyi* (2017) eKLR, this Court explored the history of the doctrine with Lord Denning in the case of *McIlkenny vs Chief Constable of West Midlands*, [1980] All ER 227, where he stated:

‘...We have so many rooms that we are apt to get confused between them. *Estoppel per rem judicatum*, issue estoppel, estoppel by deed, estoppel by representation, estoppel by conduct, estoppel by acquiescence, estoppel by election or waiver, estoppel by negligence, promissory estoppel, proprietary estoppel, and goodness knows what else. These several rooms have this much in common: they are all under the same roof. Someone is stopped from saying something or other, or doing something or other, or contesting something or other. But each room is used differently from the others. If you go into one room, you will find a notice saying; estoppel is only a rule of evidence. If you go into another room you will find a different notice; estoppel can give rise to a cause of action; Each room has



its own separate notice. It is a mistake to suppose that what you find in one room, you will find in the others.”

39. Either party can invoke these doctrines. In this case, it is the appellant that has invoked it, meaning that the 1st respondent should not be heard to contest the Certificate of Title to the suit land on grounds the appellant has failed to meet its obligation under the Sale Agreement. In our view, and it is trite that the law should not be used as an instrument of fraud or for the purposes of evading one’s contractual liabilities particularly where the party relying on the same is the one whose action or inaction led to the failure in effecting non-compliance with the law. Our position is supported by the decision of the Supreme Court in *National Bank of Kenya Limited vs Anaj Warehousing Limited* [2015] eKLR, where the Court expressed itself as hereunder:

“(62) By virtue of the financial arrangements between the parties in Ndolo Ayah, monies belonging to the appellant are now held by the respondent, and it is held to be irrecoverable, just on the policy ground that the Courts ought to be seen to deter illegality. The illegality stems from the fact that the conveyance was prepared by an advocate who at the material time, did not hold a current practising certificate. However, such illegality, in our view, is by no means as manifest as that of unjust enrichment, conferred upon the borrower. Could Parliament have intended, by section 34 of the *Advocates Act*, the perpetration of such an injustice” The injustice, indeed, multiplies, and subsumes the plane of public interest, in view of the fact that the monies in question were drawn from a public financial institution.

(63) To hold that monies lent in conformity with the provisions of the law, save that the relevant conveyancing instruments were drawn by an advocate who at the time did not hold a practising certificate, are not recoverable, would be to sanction unjust enrichment for unscrupulous borrowers, while depriving innocent lenders creating a wide scope for fraudulent borrowing. Such a position in law, in our view, does not represent an “announced rule” – precedent that should guide the disposal of the matter now before us. Just as the law frowns upon unscrupulous lenders, especially those whose actions would fetter the borrower’s equity of redemption, so also must it frown upon unscrupulous borrowers, whose actions would extinguish the lender’s right to realize his or her security. There is to be, in law, a substantial parity of rights-claims, as between the lender and the borrower.

(66) The Court’s obligation coincides with the constitutional guarantee of access to justice (*Constitution of Kenya, 2010*, Article 48), and in that regard, requires the fulfilment of the contractual intention of the parties. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which money was lent and borrowed, on the security of a charge instrument. It cannot be right in law, to defeat that clear intention, merely on the technical consideration that the advocate who drew the formal document lacked a current practising certificate. The guiding principle is to be found in article 159(2)(d) of *the Constitution*: “justice shall be administered without undue regard to procedural technicalities.”

67. To invalidate an otherwise binding contractual obligation on the basis of a precedent, or rule of common law even if such course of action would subvert



fundamental rights and freedoms of individuals, would run contrary to the values of our Constitution as enshrined in articles 40 (protection against arbitrary legislative deprivation of a person’s property of any description), 20 (3)(a) and (b) (interpretation that favours the development and enforcement of fundamental rights and freedoms) and 10 of the same.”

40. In our view, a party ought not to invoke the law in order to evade his contractual obligations after enjoying the benefits of it, in this case, after the land was transferred to the appellant that is the party invoking the doctrine, before it meets its obligation under the agreement. That is unjust enrichment. In our view, the Court cannot unscrupulously sanction unjust enrichment. While there are occasions when the law may be invoked to shield parties from illegalities, to invoke the law, not as a shield, but as a sword in order to achieve such a goal ought to be frowned upon. It is clear to us that the parties had intended to enter into a binding agreement, pursuant to which the 1st and 2nd respondents executed a Sale Agreement and transfer instruments, only for the Appellant to renege on its obligation. It cannot be right in law, to defeat that clear intention, merely on the ground the appellant is now the registered proprietor of the suit land.
41. Let us consider the submission made by the appellant’s counsel that the appellant was prejudiced because a document, sent to the Appellant’s counsel by the 1st and 2nd respondents counsel, which was fully signed by the two Respondents seeking to have the entire suit before the ELC withdrawn was not admitted in evidence. Counsel urged that his client was highly prejudiced by the in-admission of the letter. We note that the letter was not produced as evidence before the ELC, neither was any reference made to it. The appellant introduced the letter for the first time in its final submission, on appeal to this Court.
42. This Court has had occasion to express itself on the issue in *Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & another* [2014] eKLR where it held that:

“Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

43. The Court in *Avenue Car Hire & Another vs Slipha Wanjiru Mutbegu* Civil Appeal No 302 of 1997 emphasized that no judgement can be based on Written Submissions 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*]. (See also this Court’s decision in *Kenya Meat Commission vs Richard Ambogo Raden* [1990] eKLR).
44. As was aptly put by the Supreme Court of Kenya in *Raila Amolo Odinga & another vs IEBC & 2 others* [2017] eKLR:

In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law



is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

45. In effect, the letter introduced to Court through the final submissions of the appellant on appeal, cannot be admitted by this Court to be used as evidence in the case. With due respect to the appellant’s advocate, the letter does not assist his client.
46. The appellant faulted the ELC Judge of failing to uphold the appellant’s possession and occupation of the suit property, which it claimed gave it exclusive equitable rights over the suit property. The basis of this argument is contested by the 1st respondent that urged that the appellant was never in possession of the suit property. Furthermore, the appellant’s own exhibit in the form of Letters from the appellant’s Advocates dated November 26, 2013 and March 12, 2014 acknowledging that the appellant was trying to get the National Land Commission to remove some squatters who had invaded the land. In the face of the appellant’s own evidence, the contention that the appellant had exclusive possession and occupation equitable rights over the suit property has no legs to stand on.
47. We have carefully considered this appeal and have concluded that the same has no merit. Accordingly, we uphold and confirm the judgment of the ELC dated October 24, 2019 delivered in Malindi ELC No. 26 of 2015 (J. O. Olola, J.). The appeal is dismissed with costs to the 1st respondent.

DATED AND DELIVERED AT MOMBASA THIS 6TH DAY OF OCTOBER, 2023

S. GATEMBU KAIRU, FCIArb

.....

JUDGE OF APPEAL

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

