



REPUBLIC OF KENYA



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Wataari & 11 others v egistered Trustees of Telposta Pension Scheme (Civil Appeal 390 of 2019) [2023] KECA 1171 (KLR) (6 October 2023) (Judgment)

Neutral citation: [2023] KECA 1171 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 390 OF 2019
HM OKWENGU, MA WARSAME & JM MATIVO, JJA
OCTOBER 6, 2023

BETWEEN

BENARD KARIUKI WATAARI 1ST APPELLANT
REBECCA LETANGULE 2ND APPELLANT
REMGIOUS OKEYO 3RD APPELLANT
FAITH NJOROGE 4TH APPELLANT
JACQUILINE KEZIA 5TH APPELLANT
BEATRICE KALENDA 6TH APPELLANT
CATHERINE KIRARA 7TH APPELLANT
KENNEDY BWOSI 8TH APPELLANT
JENNIFER BWOSI 9TH APPELLANT
JENNIFER OKOTH 10TH APPELLANT
LAWRENCE MUGAMBI 11TH APPELLANT
PAUL M. GITAU 12TH APPELLANT

AND

REGISTERED TRUSTEES OF TELPOSTA PENSION SCHEME .. RESPONDENT

(An Appeal from the Judgment dated 29th day of April, 2019 in Nairobi Environment & Land Court at Milimani, (Ochieng, J. in ELC No.157 of 2016 Consolidated with ELC 381 of 2014)



JUDGMENT

1. This appeal seeks to overturn the judgment rendered on April 29, 2019 (Ochieng, J) in Milimani ELC No 157 of 2016 consolidated with ELC No 381 of 2014, Caroline Nyakiringa Ndungu & Others v Registered Trustees of Telposta Pension Scheme and Bernard Kariuki Wataari and 11 Others (third parties).
2. The appellants, who were named as third parties in the consolidated judgment, were the plaintiffs in ELC No 381 of 2014. Their claim was that in 2003, the respondent offered to sale residential houses to its members who occupied some of its residential houses at the material time. It was their case that the offer of the said units to them was subject to the purchaser(s) paying stamp duty and registration fees, and that they were to be given first priority before the houses could be offered to the public because they were members of Telposta Pension Scheme. They claimed that upon receipt of the offer, they promptly completed the prescribed form 'A' thereby expressing interest to purchase house Nos. 3B, 5A, 7A, 9A, 1B, 2B, 5B, 6B, 7B, 9B and 4A Kangundo road, Kileleshwa. They asserted that they forwarded the duly completed form 'A' to the respondent trusting that it would issue them with letters of offer to sale the houses to them.
3. It was their case that the respondent's decision to disregard their expression of interest and to offer the houses to third parties amounts to discrimination. Further, in 2005, Telkom (K) stopped the check off system and advised them to pay rent to the respondent, who, in return advised them to channel their rent through a company called GIMCO Ltd. Further, the said company required them to sign fresh tenancy agreements, which they declined because they had already signed form 'A'. They conceded refusing to vacate their respective houses but instead they sued the respondent seeking to compel it to sell the houses to them.
4. In ELC No 157 of 2016, the plaintiffs, Caroline Nyakiringa Ndungu and Others were the 8 members of the Telposta Pension Scheme whose offers were accepted and the respondent sold their respective units to them. In the above mentioned case, Caroline Nyakiringa Ndungu and others sought the following orders-
 - (a) a mandatory injunction to compel the respondent to repair leaking water tanks, and water and waste water pipes;
 - (b) a permanent injunction restraining the respondents by themselves, their servants, agents or otherwise howsoever from continuing to maintain the premises;
 - (c) an order directing the respondent to incorporate a corporation in terms of sections 17 and 27 of the Sectional Property Act No 21 of 1987, in default, they be permitted to establish a corporation;
 - (d) general damages, special damages, costs of the suit, interests and such other orders the court may deem fit to grant.
5. In ELC 381 of 2014, the appellants herein prayed for-
 - (a) a declaration that the respondent's decision not to offer them first priority to purchase the said houses is unlawful, discriminatory and ultra vires the respondent's terms of offer for the said houses;



- (b) an order stopping the respondent from interfering with their priority right to purchase the said houses;
 - (c) a permanent injunction restraining the respondent or its agents from in any manner interfering with their quiet enjoyment of the said premises;
 - (d) an order compelling the respondent to issue them with letters of offer for their respective units;
 - (e) costs of the suit.
6. On its part, the respondent's case was that the appellants failed to satisfy the requisite terms for the offer, which included signing fresh tenancy agreements; paying outstanding rent; signing a letter of offer; paying deposit of 10% of the purchase price and the balance within 90 days. Further, members who adhered to the said terms had their units sold to them. Lastly, though the respondent could give its members priority to purchase their respective houses, it was not a policy.
 7. On October 29, 2018, the parties in ELC No 157 of 2016 recorded a consent to the effect that both parties bore the responsibility of repairing the common areas; that the respondent would repair suit premises but subject to the court's determination of the proceedings between the appellant herein and the respondent; that the parties herein would form a corporation in terms of sections 17 and 27 of the Sectional Property Act within 90 days from the date of the order; and that the question of costs would await the determination of the third party proceedings.
 8. In the impugned judgment dated April 29, 2019, Ochieng, J. found that the appellants had not proved their case on a balance of probabilities and dismissed the suit with costs to the respondent. Regarding ELC No 157 of 2016 in which a consent had been recorded, the learned judge condemned the respondent to bear the costs of the suit.
 9. In their notice of appeal dated April 30, 2019, the appellants state that they are dissatisfied with the whole of the judgment, and in their quest to overturn it, they have cited 11 grounds in their memorandum of appeal dated August 19, 2019.
 10. Miss Muya, the appellants' counsel combined grounds 1, 2, 5 and 8 under the issue whether there was a valid offer and acceptance forming a valid contract. She submitted that the respondent requested the appellants to express interest to purchase the suit properties, which they occupied as per the terms provided. Counsel argued that the appellants expressed their interest by filling form "A". Further, the respondent's decision to sell the units to the appellants was communicated vide a letter dated 16th May 2005, confirming that the appellants would be given first priority to purchase the houses. Counsel maintained that the respondent indicated there was a delay in formalizing the sale due to unavailability of titles. She argued that the intention of the parties as evidenced by the communication was that of willing seller and a willing buyer; therefore, there was offer and acceptance because there was request for expression of interest, and completion of form "A".
 11. Miss Muya combined grounds 4, 6 and 9 in support of her argument that the appellants had a legitimate expectation that the respondent would sell the houses to them. Counsel referred to the respondent's letter dated 16th May 2005 and argued that the respondent informed the appellants that it was their policy to give its members first priority to purchase the properties they occupied. Nevertheless, on 22nd July 2005, the respondent walked out of the legitimate expectation created by the said letter. She argued that in a bid to deprive the appellants the said properties, the appellant required them to sign a tenancy agreement stipulating that they would pay revised rent, and the tenancy term would be 1-year renewable upon issuing 2 months' notice and either party could terminate the tenancy



by issuing one months' notice. The appellants were also given an option to vacate the premises and surrender their keys if they were not in agreement with the terms of the tenancy.

12. Miss Muya submitted that conscious that their first priority right to purchase the units depended on being in occupation, and trusting that if they vacated the premises or signed the tenancy agreement they risked losing that right, the appellants opted to challenge rent increment in court and filed ELC No 381 of 2014. Counsel contended that during the pendency of the said suit, the respondent secretly offered 8 members first priority to purchase their units. Further, the 8 members filed ELC/157/2016 seeking to compel the respondent to repair the premises contrary to the letter of offer. This, she argued prompted the respondent to enjoin the appellants' in the said suit as third parties claiming that they were unable to repair the houses because the appellants were in occupation of the premises.
13. The appellants' counsel also submitted that the respondent mislead the court by coming up with five preconditions they were required to satisfy to acquire first priority, which were only contained in the offer letter communicated to the aforesaid 8 members. Counsel also submitted that it was impossible to meet the said conditions because the respondent refused to accept the appellants' cheques for rent and in any event, they had not signed the letter of offer. Counsel argued that the alleged rent arrears and failure to sign tenancy agreements was a ploy to conceal the respondent's failure to grant the appellants first priority.
14. Counsel faulted the learned judge for failing to consider the letter dated October 25, 2005, the form "A", and all the evidence presented before the Court especially the letter dated May 16, 2005, which created the legitimate expectation. Counsel relied on *R v Devon County Council ex-parte P Baker* [1955] 1 All ER which held:

"...expectation arises not because the claimant asserts any specific right to a benefit but rather because his interest in it is one that the law holds protected by the requirements of procedural fairness; the law recognizes that the interest cannot properly be withdrawn (or denied) without the claimant being given an opportunity to comment and without the authority communicating rational grounds for any adverse decision."

15. In addition, Miss Muya submitted that the decision to deny the appellants first priority to purchase the units and to give 8 of their members letters of offer to buy their units on first priority basis after fulfilling some preconditions amounts to discrimination.
16. Miss Muya submitted that the evidence tendered shows that the parties entered into an implied contract for the sale of the units. According to counsel, the contract can be inferred from the correspondence between the parties. She argued that the letter dated 14th May 2003, shows the negotiations for the sale of the houses. In addition, the letter dated October 25, 2003, shows the offer made while form "A" shows acceptance by the appellants and the consideration to be satisfied on a future date. She alluded to the letter dated 16th May 2005, which she argued confirms the contract and the terms, namely, offer, acceptance and consideration and clarifies that the formalization of the contract was a formality. To buttress her argument, she cited *Caleb Onyango Adongo v Bernard Ouma Ogun* [2020] eKLR where this Court while quoting *RTS Flexible Systems Ltd v Molkerel Alois Muller GmbH & Co, KG (UK Production)* [2010] UKSGI4. [45] stated:

"...Whether there is a binding contract between the parties and if so, upon what terms depends upon what they have agreed. It depends not upon their subjective state of mind. but upon a consideration of what was communicated between them by words or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential



for the formation of legally binding relations. Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a precondition to a concluded and legally binding agreement.”

17. In conclusion, Miss Muya maintained that there exists a valid contract between the parties and the respondent is in breach of its contractual obligations by not formalizing the contract. Consequently, counsel faulted the learned judge for finding that the respondent was not in breach of its obligations.
18. Miss Mathenge, the respondent’s counsel submitted that the appellants filled form “A” entitled “Possible sale of Kangundo Road-Kileleshwa flat no...” and therefore the expression of interest did not constitute a legally binding contract between the parties since there is absence of the three essential elements, namely, offer, acceptance and consideration. It was her submission that the learned Judge rightfully observed and held at page 16 of her judgment that “.... I do not find the defendant’s failure to sell the houses to them as a breach of its obligation.” Counsel relied on the dictum in *William Muthee Mutbaami v Bank of Baroda* [2014] eKLR where this Court held:

“In the law of contract, the aggrieved party to an agreement must, in addition, prove that there was offer, acceptance and consideration. It is only when those three elements are available that an innocent party can bring a claim against the party in breach. ”
19. On legitimate expectation, Miss Mathenge cited *Communication Commission of Kenya & 5 Others v Royal Media Services & 5 Others*, SC Petition Nos. 14, 14 A, 14B & 14C of 2014 in which the Supreme Court held that legitimate expectation arises when a body by representation or by past practice, has aroused an expectation that is within its power to fulfil. For an expectation to be legitimate, therefore, it must be founded upon a promise or practice by a public authority that is expected to fulfil the expectation.
20. Miss Mathenge also referred to the holding in the above case that for legitimate expectation to arise:
 - (a) there must be an express, clear and unambiguous promise given by a public authority;
 - (b) the expectation itself must be reasonable;
 - (c) the representation must be one which it was competent and lawful for the decision- maker to make; and
 - (d) there cannot be a legitimate expectation against clear provisions of the law or the *Constitution*.
21. Counsel maintained that legitimate expectation cannot arise in this case because the letter dated 10th October 2003, and form “A” was an invitation to express interest while the form was a mere possibility of sale with no certain assurance. Learned counsel maintained that the conditions required the appellants to sign a fresh tenancy agreement; pay the outstanding rent; sign a letter of offer among others before the houses could be sold to them. Further, the appellant failed to meet the said conditions and even during cross-examination, they admitted that they had never paid the required rent to the appellants since 2005 and no evidence was provided showing that the respondents refused to receive rent. Consequently, it is against the maxims of equity for the appellant to seek the aid of equity with unclean hands. In conclusion, the respondent submitted that the appellants’ expectations were unreasonable because they could not expect to purchase the houses without meeting the set conditions.
22. We are cognizant that as a first appellate court we are empowered to subject the evidence tendered before the trial Court to a fresh and exhaustive scrutiny and make our own conclusions, bearing in mind that we did not have the opportunity of seeing and hearing the witnesses first hand. (See *Selle*



£ another v Associated Motor Boat Co. Ltd £ Other [1968] EA 123, and *Peters v Sunday Post Limited* [1958] EA 424).

23. A first appeal is a valuable right of the parties and unless restricted by law, the whole case is open for rehearing both on questions of fact and law. The judgment of the Appellate Court, must, reflect its conscious application of mind and record findings supported by reasons, on all the issues arising along with the contentions put forth, and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the first Appellate Court had discharged the duty expected of it.
24. We will start by addressing a pertinent issue which none of the parties addressed. This is the applicability or otherwise of the doctrine of Legitimate Expectation in contract cases. Undeniably, the doctrine of legitimate expectation pertains to the field of Public Law. This doctrine was first adapted into the Common Law jurisdiction through an obiter dictum of Lord Denning, in *Schmidt v Secretary of Home Affairs* [1969] 2 Ch. 149 in which he emphasized on the necessity of an administrative body allowing an individual affected by their decision with an opportunity of representation. He said it depends on whether the individual has a right or interest or even a legitimate expectation, which he was deprived of. Since then, the doctrine has proven to be a ground of Judicial Review in administrative law, to prevent an abuse of discretionary power.
25. In India, the Calcutta High Court in *D. Wren International Ltd. and Another v Engineers India Ltd and Others* AIR 1996 Cal 424 answered the question whether the doctrine of Legitimate Expectation applies to contract cases in the negative. It held that the doctrine cannot be applied in a contractual filed of law and particularly when the contract stands concluded. It reasoned “as a contract becomes concluded, the expectation, if any, comes to an end; where after the parties will be bound only by the terms thereof.” In its view, the application of this doctrine in contracts would result in an absurdity, as the specific performance of the same is not possible.
26. The Supreme Court of Seychelles in *Allen Jean £ Another v Wellington Felix £ another*, Civil Side No 15 of 2008 taking aid from a decision rendered by Lord Denning LJ in *Packer v Packer* [1954] P 15 at 22[7], extended the scope and applicability of the doctrine of Legitimate Expectation to the domain of private contract law. It accepted the plea of ‘legitimate expectation’ and awarded damages to the Plaintiff. The reasoning, upon which, the said court was driven to award damages is extracted herein under:

“ 19. At the outset, I note that the instant case breaks a new ground in our contract law. The court is called upon to determine in this matter, whether a “legitimate expectation” of a party based on fairness/reasonableness and to an extent, based on an implied consensus ad idem would give rise to an implied term in a private contract and vice versa. This new question is an inevitable development in the evolution of contract law. This development though seemingly a new vista in contract law, is necessary for the advancement of justice in this time and age, especially when we are embarking on the voyage of revising our Civil Code and to meet the changing and challenging needs of time and society. Indeed, all social contracts governing the individual interactions in society eventually metamorphose into legal contracts or relationships such as marriage, family, trade unions, associations, government (vide Rousseau’s - 1712- 1778 - social contract theory), etc. Hence, Contract Law has to evolve as society progressively evolves more and more from Status to Contract as Henry



Sumner Maine observed in his book *Ancient Law* (1861) thus “we may say that the movement of the progressive societies has hitherto been a movement from Status to Contract.

20. The concept of legitimate expectations originally developed in English law. It is generally applied only in matters of Judicial Review and falls within the domain of public law. It is truism that this concept is not traditionally applied in matters of contracts, which entirely falls within the domain of private contract law. This concept cannot on its own constitute a valid cause of action in contract; and the courts cannot directly apply this concept to do justice in contracts invoking the principle of fairness or reasonableness.
21. However, now time has come to rethink, remold and extend its application to other branches of law such as Contract, as it constantly evolves. In my considered view, a legitimate expectation of a party to a contract and a breach thereof shall constitute a valid cause of action in law provided that:
 - i. the said expectation is based on an implied term of the contract;
 - ii. such terms are implied on the ground of fairness or reasonableness; or an implied consensus ad idem;
 - iii. the aggrieved party to that contract had relied and acted upon that implied term (as has allegedly happened in this matter); and
 - iv. There had been a breach thereof, by the other party to the contract.

The courts of the 21st century cannot deny justice to anyone for lack of precedents or case law in a particular branch of jurisprudence due to stagnancy in adaptation and advancement. We cannot afford our civil law to remain stagnant in the statute-books; simply because our jurisprudence is not advancing with the rest of the legal world. As judges, we cannot simply fold our hands on the bench to say that no case has been found in which it has been done before on the ground of legitimate expectations in contract law.

25. However, the concept of legitimate expectations in the private law of contract as claimed by the plaintiffs in the instant case, presents some difficulty in tailoring it to suit our needs, jurisprudence and to accord with our civil code. This concept as such is unknown to our jurisprudence. It is nowhere to be seen in the Civil Code of Seychelles. Our judges by and large do not apply or use the language of “legitimate expectations” in the context of any private law of contract particularly, in breach of contracts.
26. This is not, however, the end of the story. Once we have understood the purpose and the role played by the concept of legitimate expectations in other jurisdictions, where it was conceived and developed, we will be able to circumvent the difficulty in our jurisdiction and deliver justice by applying the underlying principles of fairness and reasonableness to the situation where a person had an expectation or interest in his or her dealings or interactions with others in pursuance of any contractual or other legal relationships. The underlying principles or ideas behind this concept can indeed be found as a hidden-treasure in our law of contract, particularly, in our Civil Code though



it appears in different names and forms and using a different language of description.

27. In fact, Article 1135 of the Civil Code articulates this principle that “terms in a contract may be implied inter alia, for fairness/reasonableness” and a party to that contract may legitimately expect, rely and act upon that implied term, in respect of all consequences and in accordance with its nature. The Courts have unfettered jurisdiction to impute or imply a term which is reasonable and necessary - as suggested by Scrutton LJ in *Reigate v Union Manufacturing [1918] 2 KB 592 at 605* - in the interest of justice and fairness and grant remedies accordingly.
29. Coming back to the case on hand, I find on evidence that the defendants through their conduct, consent and approval impliedly agreed that the plaintiffs might take a bank-loan and invest on the improvement and restructuring of their building and thereby convert its use from that of a supermarket to a restaurant. The defendants also signed the necessary documents for change of use as required by the government authorities such as Licensing and Planning. Furthermore, I find it quite strange on part of the defendants that the property which they offered to sell for Rs3.5 million to the plaintiffs, was sold to a third party for Rs 2 million, which is an improbably generous discount. All these swing the balance of probabilities in one clear direction.”
27. As a general common law principle, Legitimate Expectation applies to every public authority making an administrative decision which is not of a legislative nature and which affects the rights, privileges, or interests of an individual (subject of course to clear statutory language or necessary implication to the contrary). On the other hand, creation of contract is governed by the *Law of Contract Act*, which falls in the domain of private law. However, it can correctly be argued that the doctrine of Legitimate Expectation is no longer a common law doctrine, but a constitutional tool to enforce both substantive justice and procedural fairness. Actually, the doctrine has found recognition in modern Constitutions. In Kenya, the doctrine enjoys constitutional and statutory underpinning, courtesy of Article 47 of the *Constitution* and the *Fair Administrative Action Act*. Section 2 of the *Fair Administrative Action Act* defines an “administrative action” to include– (i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or (ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.
28. Section 3 of the *Fair Administrative Action Act* provides for the application of the Act as follows:
- 3.
- (1) This Act applies to all state and non-state agencies, including any person–
- (a) exercising administrative authority;
- (b) performing a judicial or quasi-judicial function under the *Constitution* or any written law; or
- (c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.
29. However, the *Constitution* does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. The



governing law in the instant dispute is the Law of Contract Act. This brings into focus the doctrine of constitutional avoidance, which is defined as a preference of deciding a case on any other basis other than one, which involves a constitutional issue being resolved. (See S. Woolman & M Bishop, Constitutional Law of South Africa (2013) 3-21). The doctrine of constitutional avoidance was fortified in *Sports and Recreation Commission v Sagittarius Wrestling Club and Anor* 2001 (2) ZLR 501 (S) in which Ebrahim JA said the following:

“...courts will not normally consider a constitutional question unless the existence of a remedy depends upon it; if a remedy is available to an applicant under some other legislative provision or on some other basis, whether legal or factual, a court will usually decline to determine whether there has been, in addition, a breach of the declaration of rights.”

30. Courts are generally loathe to determine a constitutional issue in the face of alternative remedies. Courts would rather skirt and avoid the constitutional issue and resort to the available alternative remedies. (See the Constitutional Court of Zimbabwe in Chawira & Ors v Minister of Justice Legal and Parliamentary Affairs & Ors CCZ 3/17). In Ashwander v Tennessee Valley Authority, 297 U.S. 288, 347 [1936] the U.S. Supreme Court held that it would not decide a constitutional question which was properly before it if there was also some other basis upon which the case could have been disposed of.
31. We reject the appellants’ attempt to invoke the doctrine of Legitimate Expectation in a contract dispute, and proceed to lay it down as a general principle that where it is possible to decide any case, criminal or civil, without reaching a constitutional issue, that is the course which should be followed.
32. We now address the appellants’ argument that the several letters written by the respondent constituted “offer and acceptance.” Two basic principles should be kept in mind whenever evidence is evaluated. Firstly, evidence must be weighed in its totality (and therefore not in a piece-meal fashion) and secondly that ‘probabilities’ must be distinguished from ‘conjecture or speculation.’ A very prominent role is therefore attached to the concept of ‘probabilities’ here. In the process of adjudication two factors are constant, namely what must be proved and to what degree of persuasion, but there is a third factor, namely the quantum and quality of the probative material required so to persuade the court.
33. As the trial judge correctly pointed out in the impugned judgment at page 824 of the record, the appellants heavily relied on two documents, namely the respondent’s letter dated October 31, 2003, and the much cited form “A”. Documents cannot be read in isolation nor can part of the evidence be ignored. All the evidence must be weighed together so as to ascertain the real intention of the parties. Lord Denning’s well-known statement in the Court of Appeal in Gibson v Manchester City Council [1978] 1 WLR 520, where, in discussing the question whether Mr Gibson’s correspondence with the Council had led to a binding contract, stated:

“ ... You should look at the correspondence as a whole and at the conduct of the parties and see therefrom whether the parties have come to an agreement on everything that was material.” (Emphasis added)

34. Previously in 1977, Lord Denning had expressed a similar view. First, in Port Sudan Cotton Co v Chettiar [1977] Lloyd’s Rep 5, where Lord Denning commented that (at p 10):

“I do not much like the analysis in the text-books for inquiring whether there was an offer and acceptance, or a counter-offer, and so forth. I prefer to examine the whole of the documents in the case and decide from them whether the parties did reach an agreement upon all



material terms in such circumstances that the proper inference is that they agreed to be bound by those terms from that time onwards.” (Emphasis added)

35. We will now examine some of the letters submitted before the trial court. At page 43 is a letter dated May 14, 2003 authored by one J. K. Tanui in which the respondent stated that it was negotiating with its board of trustees on the sale of the houses in question to the staff who were occupying the houses. According to the said letter, the respondent was to accept 50% tenant purchase price and then the staff would pay the balance through a check-off system on a monthly basis up to 15 years. At page 44 of the record is a letter dated May 16, 2005, confirming the respondent’s policy to grant the staff first priority to purchase the houses. The letter is clear that the offer was to an individual and it was upon the individual to decide whether to take the offer.

36. Another crucial document is a letter dated November 14, 2003, appearing at page 47 of the record. This is a letter authored by the appellants herein in response to the respondent’s letter dated October 25, 2003, in which the respondents had called upon the appellants to express interest. Curiously, instead of expressing interest as requested by the said letter, the appellants in their reply only enumerated complaints. They complained that the price quoted was high, that most of the units needed repair and even listed 18 items, which required repairs and called upon the respondent to consider their complaints. The appellants also requested that the units be valued. Under the law of contract, the said letter was a counter offer and not an acceptance.

37. Importantly, the respondent’s letter dated October 31, 2003 which the appellants heavily relied upon simply invited the appellants to express interest to purchase their respective houses. It reads: The filling and returning of the attached form to the Scheme is merely an expression of interest and does not constitute a sale contract between the scheme and yourself.

The foregoing clause is self-explanatory. It communicated a carefully drafted disclaimer that the completion and submission of the said document did not constitute a contract between the parties. In addition, the said letter was clear that sale price was provisional and the actual price was to be confirmed at the time of sale. It follows that mere completion of Form “A” was subject to the terms stated in the said letter, which included payment of 10% deposit and the balance thereof as expressly provided in the said form.

38. Whether there is a binding contract between the parties and, if so, upon what terms depends upon what they have agreed, but not upon their subjective state of mind. It depends upon a consideration of what was communicated between them by words (oral or written) or conduct, and whether that leads objectively to a conclusion that they intended to create legal relations and had agreed upon all the terms which they regarded or the law requires as essential for the formation of legally binding relations. We do not think the facts of this case satisfy this threshold. As was stated by the Supreme Court of India in *Union of India v Hindustan Development Corporation and Others* [JT 1992 (Suppl.) SC 314] (Para 13):

“... For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences...”

39. The written communication between the parties does not support the argument that there existed an offer and acceptance. A reading of the record shows that appellant admitted in evidence that their employer Telkom (K) stopped the check off system in 2005. As mentioned earlier, upon payment of the 50%, the balance was to be paid through the check off system for up to 15 years. So candid



were the appellants that they admitted refusing to sign the fresh tenancy agreements arguing that they had already signed form “A” and therefore they had “already expressed an interest to purchase their respective houses.” This argument is self-defeating because the said form required them to inter alia, pay the 10% deposit which none of them paid. The appellants admitted refusing to vacate their respective houses. Instead, they sought the court’s intervention to direct the respondent to offer them the said houses for sale.

40. On April 15, 2005, the appellant’s employer informed them in writing that the respondent had appointed GIMCO LTD to manage their residential houses with effect from 1st July 2005. Their employer also informed them that the respondent had increased the rent and even communicated the amounts payable. The appellants unsuccessfully challenged the rent increment in HCC 969 of 2005. Further, the appellants admitted that to date they have not paid rent despite their employer having stopped the check off system and having instructed them to enter into a new tenancy agreement.
41. Clearly, the foregoing account confirms that the offer was conditional and that the appellants never accepted the conditions. It also confirms that the landlord/tenant relationship ceased to exist after the appellants refused to enter into a new tenancy agreement with the respondent’s agent and refused to pay rent. It follows that as at 1st July 2005, the relationship between the appellants and the respondent was no longer that of landlord and tenant but that of landlord and trespasser. In summation, the argument that there was offer and acceptance collapses.
42. The other argument mounted by the appellants is that the offer and acceptance can be inferred or implied from the correspondence between the parties. The South African Court of Appeal in *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA), (Brand JA) dealt at some length with the concept of an implied term explained that, unlike tacit terms, which are based on the inferred intention of the party, implied terms are ‘imported into contracts by law from without’. He pointed out that the Courts have the inherent power to develop new implied terms stating as follows:

“...It follows, in my view, that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general...” (Emphasis added)

43. Also, the South African Court of Appeal in *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration*, (Corbett AJA, as he then was), discussed at length the concept of an ‘implied term’ pointing out that in legal parlance the expression ‘implied term’ is an ambiguous one in that it can be used to denote two or three distinct concepts. For present purposes, we only need concern ourselves with the second category or concept which was described by Corbett AJA as follows:

“In the second place, “implied term” is used to denote an unexpressed provision of the contract which derives from the common intention of the parties, as inferred by the Court from the express terms of the contract and the surrounding circumstances. In supplying such an implied term, the Court, in truth, declares the whole contract entered into by the parties. In this connection the concept, common intention of the parties, comprehends, it would seem, not only the actual intention but also an imputed intention. In other words, the Court implies not only terms which the parties must actually have had in mind but did not trouble to express but also terms which the parties, whether or not they actually had them in mind, would have expressed if the question, or the situation requiring the term, had been drawn to their attention.”



44. The learned judge elected to refer to such a term as a tacit term and went on to state:

“The tacit term, on the other hand, is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties. ... The court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term, the court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.”

45. The reason for this reluctance is closely linked to the postulate that the courts can neither make contracts for people nor supplement their agreements merely because it appears reasonable or convenient to do so. It follows that a term cannot be inferred because it would, on the application of the well-known “officious bystander” test, have been unreasonable of one of the parties not to agree to it upon the bystander’s suggestion. Nor can it be inferred because it would be convenient and might therefore very well have been incorporated in the contract if the parties had thought about it at the time. A proposed tacit term can only be imported into a contract if the court is satisfied that the parties would necessarily have agreed upon such a term if it had been suggested to them at the time. If the inference is that the response by one of the parties to the bystander’s question might have been that he would first like to discuss and consider the suggested term, the importation of the term would not be justified.

46. In deciding whether the suggested term can be inferred, the court will have regard primarily to the express terms of the contract and to the surrounding circumstances under which it was entered into. Whether a contract contains such a term is a question of interpretation. Generally, a court would be very slow to import a tacit term in a contract particularly where, as in the instant case, the parties have concluded a comprehensive written communication that deals in great detail with the subject matter of the intended contract, and the term is not necessary to give the contract business efficacy. The first step in the enquiry as to the existence of such a term is whether, regard being had to the express terms of the agreement, there is any room for importing the alleged tacit term.

47. As is stated in *Halsbury's Laws of England*, 4th Edition, Vol. 9 paragraphs 228 and 230:

“228. ..., the formation of a contract is frequently preceded by preliminary negotiation. Some of the exchange in these negotiations contain no declaration at all, as where one party simply asks for information. Others may amount to invitations to the recipient to make an offer, these being invitations to treat.

Thus, a distinction must be drawn between the declarations which amount to offers, and those which only amount to invitations to treat. Sometimes, a particular type of declaration is, at least prima facie, put into one or the other category by statute or by common law; but in all other cases it is a question of intention. An express statement that a declaration is not an offer is effective to prevent it being an offer, but the mere use of the terminology “invitation to treat” or “offer” in the declaration may not be conclusive one way or the other. Otherwise, the vital question is the intention of the declarant, though his actual intention must give way to a contradictory apparent intention at the time of the declaration.



48. In *Tritel's Law of Contract*, it has been stated thus: -

“When parties negotiate with a view to making a contract, many preliminary communications may pass between them before a definite offer is made. One party may simply respond to a request for information (e.g. by stating the price at which he might be prepared to sell a house), or he may invite the other to make an offer; he is then said to make an "invitation to treat". The question whether a statement is an offer or an invitation to treat depends primarily on the intention with which it was made.”

49. Bingham LJ in *The Aramis* [1989] 1 Lloyd’s Rep 213 made some general observations about the circumstances in which a contract might be implied. At p.224 col. 1, he said:

“As the question whether or not any such contract is to be implied is one of fact, its answer must depend upon the circumstances of each particular case - and the different sets of facts which arise for consideration in these cases are legion. However, I also agree that no such contract should be implied on the facts of any given cases unless it is necessary to do so; necessary that is to say, in order to give business reality to a transaction and to create enforceable obligations between parties who are dealing with one another in circumstances in which one would expect that business reality and those enforceable obligations do exist.” (Emphasis added).

50. We find no basis upon which this Court can infer terms to the intended contract between the parties without risking delving into the arena of the dispute and re-write the parties intended contract, which we cannot. In conclusion, we find and hold that this appeal lacks merit. Accordingly, we dismissed it with costs to the respondent. We uphold the judgment and decree of (Ochieng, J.) delivered on the April 29, 2019, in ELC No157 of 2016 (Consolidated with ELC 381 of 2014).

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

HANNAH OKWENGU

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JUDGE OF APPEAL

M. WARSAME

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

