Kiema & another v LA Nyavu Gardens Limited (Environment & Land Case E330 of 2022) [2024] KEELC 4667 (KLR) (13 June 2024) (Judgment)

Neutral citation: [2024] KEELC 4667 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E330 OF 2022

JO MBOYA, J

JUNE 13, 2024

BETWEEN

KEVIN JONATHAN KIEMA ..... 1ST PLAINTIFF

JACQUELINE TERESA ADELA ..... 2ND PLAINTIFF

AND

LA NYAVU GARDENS LIMITED ..... DEFENDANT

JUDGMENT

Introduction and Background

1. The Plaintiffs herein [who are husband and wife] have approached the court vide Plaint dated the 26th September 2022; and in respect of which same have sought for various reliefs. For coherence, the reliefs at the foot of the Plaint under reference are as hereunder;

    i. Disgorgement of profits derived by the Defendants from revoking the offer to the Plaintiffs;

    ii. The admitted value of the subject matter of Kshs. 15,000,000.00 as at 4/05/2017;

    iii. Damages for deceit and loss of chance;

    iv. In the alternative to b) an excision measuring ¾ of an acre on LR. 12064.487;

    v. Costs of this suit together with interest on prayer a) and c) thereon at court rates from 4/05/2017 until payment in full.

    vi. Any other or further relief as this Honourable court may deem appropriate.

2. Upon being served with the Plaint and summons to enter appearance, the Defendant herein duly entered appearance and thereafter filed a statement of defense and counterclaim dated the 27th June 2023. For good measure, the Defendant sought for the following reliefs at the foot of the counterclaim;

i. That the suit be dismissed with costs;

ii. The matter be referred to a mediator and /or arbitrator as per the agreement;

iii. Damages for breach of the agreement.

3. Instructively, the Plaintiffs herein were obliged to and indeed filed a Reply to the statement of defense and defense to the counterclaim. Suffice it to point out that the Reply to defense and defense to counterclaim is dated the 25th July 2023.

4. Following the close of pleadings, the instant matter was listed for pre-trial direction[s] with a view to ascertaining the filling and exchange of the requisite pleadings; list and bundle of documents and the witness statements and thereafter to issues directions as pertains to the hearing of the main suit.

5. It is worthy to point out that indeed the parties herein duly confirmed compliance with pre-trial directions and thereafter the suit was confirmed ready for hearing.

Evidence by the parties:

a. Plaintiffs' Case:

6. The Plaintiffs' case gravitates and revolves around the evidence of two [2] witnesses, namely, Kevin Johnathan Kiema and Jaqueline Teresah Adela who testified as PW1 and PW2, respectively.

7. It was the evidence of the PW1 [Kevin Johnathan Kiema] that the same is the 1st Plaintiff herein and thus conversant with the facts of the instant matter. Furthermore, the witness [PW1] averred that same has since recorded a witness statement dated the 26th September 2022 and which statement same [witness] sought to adopt and to rely on.

8. Suffice it to point out that witness statement dated the 26th September 2022 by and on behalf of the Witness herein was thereafter adopted and constituted as the evidence in chief of the witness.

9. Additionally, the witness averred that same [witness] has also filed a list and bundle of documents dated the 26th September 2022. For good measure, the witness pointed out that the list and bundle of documents adverts to 18 documents and which documents the witness sought to adduce and produce before the court as exhibits.

10. There being no objection to the production of the documents at the foot of the list [details in terms of the preceding paragraph] the documents thereunder were duly produced and tendered in evidence as Exhibits P1 to P18, respectively.

11. On the other hand, the witness also adverted to the Plaint dated the 26th September 2022; and the verifying affidavit attached thereto and thereafter implored the court to adopt the contents thereof. Besides, the witness also invited the court to proceed and grant the reliefs sought at the foot of the Plaint.

12. On cross examination by learned counsel for the Defendant, the witness averred that same got to know of the sale of the suit property through his wife, namely, the 2nd Plaintiff herein. Besides, the witness stated that upon receipt of the information pertaining to and concerning the availability of the suit plot same [witness] was thereafter taken to the suit property for viewing.

13. It was the further testimony of the witness that subsequently same [witness] applied for the land by filling and signing the requisite application form that was provided for by the Defendant herein. In any event, the witness averred that same was thereafter issued with a letter of offer.

14. Other than the foregoing, it was the testimony of the witness that the 2nd Plaintiff and himself proceeded to and made payments towards and on account of the purchase of the designated portion of land which the Defendant had offered to sell.

15. Whilst under further cross examination, the witness averred that after making the payments as pertains to the purchase price same [witness] was advised on further payments relating to infrastructure costs whose amounts had not been stipulated at the foot of the application letter.

16. Be that as it may, the witness averred that same [witness] thereafter proceeded to and sought for extension of time within which to pay and settle the infrastructure costs. In this regard, the witness adverted to a letter dated the 13th August 2008.

17. On further cross examination, the witness averred that same also received a letter from the law firm of M/s P M Kamara and Company Advocates and wherein same [witness] was requested to execute the letter of offer. However, the witness clarified that same declined and/or did not execute the letter of offer.

18. On the other hand, it was the testimony of the witness that later on same [witness] proceeded to and executed the letter of offer.

19. Whilst under further cross examination, the witness stated that same did not complete the payments towards the purchase price and more particularly the amounts at the foot of the infrastructural costs.

20. On re-examination, the witness averred that same [witness] paid a total of Kes.4, 603, 083/= only towards and on account of the purchase of the designated portion of land that was being sold by the Defendant.

21. Furthermore, the witness averred that the monies [purchase price] which was paid by the Plaintiff himself were duly received and acknowledged by the Defendant.

22. On further re-examination, the witness averred that same did not execute the letter of offer that was generated by and on behalf of the Defendant. Other than the foregoing, the witness averred that same is aware that he requested for an extension of time to pay the amounts at the foot of the infrastructure costs. In any event, the witness added that the request for extension of time was duly granted by the Defendant.

23. The second witness who testified on behalf of the Plaintiffs was Jaqueline Teresa Adela. Same testified as PW2.

24. It was the testimony of the witness [PW2] that same is the wife of the 1st Plaintiff herein. Furthermore, the witness averred that same is similarly conversant with and knowledgeable of the facts pertaining to the subject matter.

25. On the other hand, the witness averred that same has since recorded a witness statement dated the 26th September 2022 and a further witness statement dated the 5th September 2023. For good measure, the witness sought to adopt and rely on the contents of the two [2] witness statement[s] as her evidence in chief.

26. Pertinently, the contents of the two witness statements [details in terms of the preceding paragraph] were thereafter admitted and constituted as the evidence in chief of the witness [PW2].

27. Other than the foregoing, the witness [PW2] also adverted to the list and bundle of documents dated the 26th September 2022 and sought to adopt and rely on same. Notably, the documents at the foot

of the list dated the 26th September 2022 had hitherto been produced and tendered before the court by PW1.

28. On cross examination by learned counsel for the Defendant, the witness averred that the 1st Plaintiff and herself paid the sum of Kes.4, 603, 088.30/= only towards and on account of the purchase price of the designated parcel portion of land which was being sold by the Defendant.

29. Furthermore, the witness averred that the payment which were made by the 1st Plaintiff and herself were duly acknowledged and receipted by the Defendant.

30. Whilst under further cross examination, the witness averred that the 1st Plaintiff and herself received a letter of offer from the Defendant's advocates and thereafter proceeded to execute the letter of offer.

31. On the other hand, it was the testimony of the witness that the designated portion of land which the Defendant was selling unto the 1st Plaintiff and herself was never processed and transferred to them. In any event, the witness averred that subsequently the Defendant offered to give unto the 1st Plaintiff and herself another piece of land.

32. On further cross examination, the witness averred that the alternative piece of Land which the Defendant offered to give to and in favor of the 1st Plaintiff and herself was agreed to be worth Kes.15, 000, 000/= only. However, it was the testimony of the witness that the offer to give the alternative parcel of land did not materialize.

33. Additionally, the witness averred that after the proposal to give the alternative land worth kes.15, 000, 000/= fell apart, the Defendant again proposed to give unto the 1st Plaintiff and herself another portion of land situate at Mwiki within the City of Nairobi. However, the witness pointed out that the subsequent promise also did not materialize.

34. Whilst under further cross examination, the witness averred that it is the Defendant who breached the terms of the offer letter.

35. With the foregoing testimony, the Plaintiffs' case was duly closed.

b. Defendant's Case:

36. The Defendant's case revolves around the evidence of one witness, namely, Harun Gekonge. Same testified as DW1.

37. It was the evidence of the witness [DW1] that same is a Quantity Surveyor [QS] by profession and besides same is also conversant with and knowledgeable of the facts of the subject matter.

38. Furthermore, the witness averred that same has since recorded a witness statement dated the 27th June 2023 and which witness statement same [witness] has sought to adopt and rely on. For good measure, the contents of the witness statement were thereafter adopted and constituted as the evidence in chief of the witness.

39. Additionally, the witness adverted to the list and bundle of documents dated the 27th June 2023 and thereafter sought to adopt and produce the documents thereunder as exhibit[s] before the court. Instructively, the documents at the foot of the said List, were thereafter adopted and admitted as exhibit[s] D1 to D18, respectively.

40. Other than the foregoing, the witness averred that the Defendant herein has since filed a statement of defense and counterclaim, which statement of defense and counterclaim the witness sought to adopt and rely on.

41. At any rate, the witness implored the Honourable court to proceed and grant the reliefs enumerated and highlighted at the foot of the counterclaim.

42. On cross examination by learned counsel for the Plaintiff, the witness [DW1] averred that the Plaintiffs herein indeed paid the purchase price that had been alluded to. However, the witness clarified that the purchase price which was paid by the Plaintiffs herein was a tentative purchase price.

43. Whilst under further cross examination, the witness averred that purchase price that was paid by the Plaintiffs herein was indeed acknowledged and receipted. It was the further testimony of the witness that thereafter the Plaintiffs herein were informed about the infrastructural costs which had been alluded to at the foot of the application letter. However, the witness added that the Plaintiffs herein did not pay the infrastructural costs.

44. On the other hand, the witness averred that the Plaintiffs herein proceeded to and requested for the extension of time within which to pay the infrastructural costs which request the witness confirmed was granted.

45. Nevertheless, it was the testimony of the witness that despite the extension of the timeline within which to pay the infrastructural costs, the Plaintiffs herein failed to comply. Whilst under further cross examination, the witness averred that after the collapse of the transaction relating to the sale of the designated plot at Karen, which the Plaintiffs had applied for, the parties herein entered into further negotiations and in respect of which the Defendant intimated her willingness to settle the dispute with the Plaintiffs. Besides, the witness averred that same [Defendant] is still willing and keen to settle the dispute with the Plaintiffs.

46. On re-examination, the witness averred that same is aware that the parties herein have been negotiating in an endeavor to settle the dispute. In any event, the witness added that same [witness] is ware that the Defendant had offered to give the Plaintiffs herein another parcel of land situate at Mavoko Sub-county.

47. It was the further testimony of the witness that the intention to give the Plaintiffs the land at Mavoko did not materialize but nevertheless, the Defendant has since given the Plaintiff yet another offer to give same [Plaintiffs] two [2] plots at Mwiki in Nairobi.

48. Whilst under further re-examination, the witness averred that one of the plots which the Defendant is desirous to give to the Plaintiffs measures 0.22 HA whilst the other plot measures 0.04 HA. However, the witness [DW1] averred that the process relating to the subdivision and issuance of titles has not been concluded.

49. Finally, the witness pointed out that the Defendant indeed received the monies from the Plaintiffs herein.

50. With the foregoing testimony, the Defendant's case was duly closed.

Parties' Submissions:

a. Plaintiffs' Submissions:

51. The Plaintiffs herein filed written submissions dated the 8th April 2024; and in respect of which the Plaintiffs have reiterated the pleadings filed as well as the contents of the witness statements filed therewith. Furthermore, the Plaintiffs have also adopted and reiterated the contents of the witness statement which were tendered and admitted as evidence in chief before the court.

52. Other than the foregoing, learned counsel for the Plaintiffs has isolated, highlighted and canvassed two [2] salient issues for consideration and determination by the court. Firstly, learned counsel for the Plaintiffs has submitted that it is the Defendant herein who offered to sell to and in favor of the Plaintiffs a portion of L.R No. 2259/66 [hereinafter referred to as the suit property] at the proposed purchase price of Kes.4, 000, 000/= only.

53. Besides, learned counsel for the Plaintiffs has pointed out that arising from the offer by and on behalf of the Defendant, the Plaintiffs herein proceeded to and indeed filled the application letter to and in respect of the intended plot.

54. It was the further submissions by learned counsel for the Plaintiffs that after filling and submitting the application letter, the Plaintiff proceeded to and paid the sum of Kes.4, 603, 088/= only towards and on account of the purchase price.

55. Nevertheless, learned counsel for the Plaintiffs has submitted that despite payments of the purchase price, the Defendant herein came up with additional costs and/or charges which were stated to be infrastructural costs. At any rate, learned counsel for the Plaintiffs pointed out that the infrastructural costs had neither been stipulated nor specified at the foot of the application letter.

56. On the other hand, it was the further submission of the Learned Counsel that the Defendant herein also generated a letter of offer dated the 30th November 2010 and whose contents included additional charges amounting to Kes.2, 341, 500/= only, which amounts were not part of the transaction at the onset.

57. Furthermore, learned counsel for the Plaintiffs has submitted that the Plaintiffs and the Defendant herein engaged in various correspondence in an endeavor to settle the dispute but the dispute has not been settled and/or sorted out culminating to the filing of the suit beforehand.

58. In a nutshell, learned counsel for the Plaintiffs has submitted that it is the Defendant who failed to conclude the intended transaction pertaining to and/or concerning the sale of a portion of the suit property and thus the Defendant is guilty of breach of the contract.

59. Secondly, learned counsel for the Plaintiff has submitted that in an endeavor to settle the dispute between the Plaintiffs and the Defendant; the Defendant herein generated a letter dated the 4th May 2017 and wherein the Defendant proposed to give to and in favor of the Plaintiffs 3 acres piece of land at Mavoko Sub-County whose value amounted to Kes.15, 000, 000/= only. For good measure, learned counsel pointed out that the proposal was indeed arrived at after several meetings and consultations with the Plaintiffs.

60. Additionally, learned counsel for the Plaintiffs has submitted that having generated the letter under reference and whose contents were clear and explicit, the Defendant herein is duly bound by the contents of the said letter and same cannot now be heard to resile [renege] from the contract thereof.

61. In any event, learned counsel for the Plaintiff has invoked the application of the doctrine of Equitable and promissory estoppel and thereafter invited the court to find and hold that the Defendant is indeed liable to and in favor of the Plaintiffs for the sum of Kes.15, 000, 000/= only.

62. To vindicate the submissions pertaining to and anchored on equitable and promissory estoppel, learned counsel for the Plaintiffs has cited on and relied on the holding in the case of Civil Appeal No. 314 of 2009 Serah Njeri Mwobi v John Kimani Njoroge [2014]eKLR and Carol Construction Engineers Limited & another v National Bank of Kenya [2020] eKLR, respectively.

63. In a nutshell, learned counsel for the Plaintiffs has invited the court to find and hold that the Plaintiffs have indeed placed before the court plausible and credible [believable] evidence to warrant the grant of the reliefs sought at the foot of the Plaint.

b. Defendant's Submissions:

64. The Defendant filed written submissions dated 13th May 2024 and in respect of which same has adopted and reiterated inter-alia the statement of defense and counterclaim; the witness statements which were adopted and constituted as the evidence on behalf of the Defendant; as well as the various exhibits which were tendered and produced before the court.

65. Additionally, learned counsel for the Defendants has highlighted and canvassed three [3] salient issues for consideration by the Honourable court.

66. First and foremost, learned counsel for the Defendant has submitted that it is the Plaintiffs herein who breached and violated the terms of the contract that was entered into between the Plaintiffs and the Defendant herein pertaining to and concerning the sale [purchase] of a portion of L.R No. 2259/66.

67. It was the further submissions by learned counsel for the Defendant that the Plaintiffs herein entered into the contract knowing that the sum of Kes.4, 000, 000/= only which was alluded to at the foot of the application was a tentative purchase price and not otherwise. Furthermore, learned counsel for the Defendant has submitted that the application letter which was filled and executed by the Plaintiffs herein clearly stipulated that the sum of Kes.4, 000, 000/= was a tentative price and in any event same [purchase price] was exclusive Government taxes, administrative charges and infrastructural costs.

68. It was the further submissions by learned counsel for the Defendant that other than the foregoing, the Plaintiffs herein were subsequently advised about the additional charges arising from infrastructural costs, but which charges the Plaintiffs failed and/or neglected to pay and/or settle.

69. Moreover, it was the submissions of learned counsel for the Defendant that the Plaintiffs herein equally failed and refused to execute the letter of offer which was sent to same [Plaintiffs] by the Defendant's advocate.

70. Owing to the foregoing, learned counsel for the Defendant has therefore submitted that it is the Plaintiffs herein who failed to comply with and/or adhere to the terms of the contract [whose details] were well known to the Plaintiffs.

71. Pertinently, learned counsel for the Defendant has therefore implored the court to find and hold that it is the Plaintiffs herein who breached the terms of the contract and thus same [Plaintiffs] are guilty of breach of contract and thus amenable to pay the damages sought at the foot of the counterclaim.

72. To this end, learned counsel for the Defendant has cited and relied on the holding in the case of Stancom Sacco Society Ltd v Alliance [1] Tobacco Ltd [2018]eKLR and RTS Flexible System Ltd vs Molkerei Alloys Muller GmbH [2010] UKSC 14, respectively to support the contention that the Plaintiffs are guilty of breach of contract.

73. Secondly, learned counsel for the Defendant has submitted that the Plaintiff herein are not entitled to refund of the sum of Kes.15, 000, 000/= Only, either as sought or at all. In any event, learned counsel for the Defendant has contended that even as the parties negotiated a swap wherein the Defendant offered to and in favor of the Plaintiffs herein land at Mavoko, namely, L.R No. 1261/4, no valuation was ever undertaken in respect of the said land or at all.

74. Additionally, learned counsel for the Defendant has submitted that it is the Defendant who floated the figure of Kes.5, 000, 000/= Only, per acre and thus culminating to the proposed sum of Kes.15, 000, 000/=.

75. Be that as it may, learned counsel for the Defendant has contended that there is no agreement and/or contract wherein the Defendant covenanted that the land at Mavoko was worth Kes.15, 000, 000/= only.

76. Other than the foregoing, learned counsel for the Defendant has also submitted that the Plaintiffs herein are also not entitled to Three Quarter[s] of an acre of LR. No.12064/487 – Mwiki or at all.

77. Finally, learned counsel for the Defendant has also submitted that the Plaintiffs' suit beforehand is time barred and thus same ought to be struck out. For good measure, learned counsel has pointed out that the Plaintiffs' suit is premised on a transaction which was entered into in the year 2007 and hence same is barred by the provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya.

78. Owing to the foregoing, learned counsel for the Defendant has implored the court to find and hold that the Plaintiffs suit is devoid of merits and thus same ought to be dismissed with costs.

79. Curiously, learned counsel for the Defendant has ventured forward and termed the Plaintiffs' suit and/or claim beforehand as [sic] broad daylight robbery without violence.

Issues for Determination:

80. Having considered the pleadings on record; the witness statements and the bundle of documents which were tendered in evidence and upon consideration the written submissions filed by the parties, the following issues crystalize [emerge] and are thus worthy of determination;

    i. Whether the Plaintiffs' suit is time barred and thus prohibited by dint of Section 7 of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya; or otherwise.

    ii. Whether there was any lawful or legitimate contract between the Plaintiffs on one hand and the Defendant on the other hand or at all.

    iii. Whether there was breach of any contract.

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

Analysis And Determination

Issue Number 1. Whether the Plaintiffs' suit is time barred and thus prohibited by dint of Section 7 of the *Limitation of Actions Act*, Chapter 22, Laws of Kenya or otherwise.

81. The dispute beforehand traces its origin to an application by the Plaintiffs herein to be allocated a plot by the Defendant which application was received on the 23rd May 2007. For coherence, the Defendant herein promised to sell to and in favor the Plaintiffs a portion of land measuring half acre within L.R No. 2259/66.

82. Nevertheless, despite the fact that the Plaintiffs herein paid to and in favor of the Defendant the sum of Kes.4, 603, 088/= only, the transaction under reference did not materialize culminating into the filing of the instant suit.

83. Given that the transaction culminating into the filing of the instant suit arose in the year 2007, learned counsel for the Defendant has contended that the suit beforehand which essentially seeks to recover

land is barred and prohibited by dint of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya.

84. Arising from the foregoing, learned counsel for the Defendant has invited the court to find and hold that the suit beforehand ought to be dismissed on the basis of Limitation of Actions.

85. Despite the fact that Learned counsel for the Plaintiff was duly served with the Submission[s] by and on behalf of the Defendant, same learned counsel for the Plaintiffs did not file any rejoinder submissions and hence the court has not benefited from the Plaintiffs' response as pertains to the question of limitation of actions.

86. Nevertheless, it is not lost on this court that the issue of limitation of actions which has been canvassed by and on behalf of the Defendant herein is a question of law and which must thus be determined and/or disposed of on the basis of the evidence on record and not otherwise.

87. Furthermore, it is also imperative to point out and underscore that though the issue of limitation of actions is a question of law, it is trite and hackneyed that whosoever wishes to invoke and canvass limitation of actions as a defense is obligated and enjoined to implead same [limitation of actions] in his or her defense.

88. Having highlighted the two sub-issues in terms of the preceding paragraph, it is now appropriate to venture forward and to determine whether the plea of limitation that has been canvassed and ventilated by learned counsel for the Defendant, is legally tenable taking into account the law and the evidence on record.

89. I propose to start with the provisions of the law that govern the pleadings of the plea of limitation of actions. Pertinently, any litigant who desires to canvass and ventilate a plea of limitation of actions is legally enjoined to implead and particularize the plea of limitation.

90. To this end, it is instructive to take cognizance of the provisions of Order 2 Rule 4 of the Civil Procedure Rules, 2010. For coherence, the said provisions states as hereunder;

> 4. Matters which must be specifically pleaded [Order 2, rule 4]
>
> (1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—
>
> (a) which he alleges makes any claim or defence of the opposite party not maintainable;
>
> (b) which, if not specifically pleaded, might take the opposite party by surprise; or
>
> (c) which raises issues of fact not arising out of the preceding pleading.
>
> (2) Without prejudice to subrule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient.

91. From the contents of the provisions [supra], there is no gainsaying that any party, the Defendant not excepted, desirous to canvass the question of limitation of actions is statutorily obliged to implead the plea of limitation.

92. Be that as it may, I have perused and examined the statement of defense that was filed by and on behalf of the Defendant herein and nowhere has the Defendant adverted to and/or highlighted the plea of limitation of actions or at all.

93. Consequently, the question that then does arise, is whether learned counsel for the Defendant can sneak in and endeavors to canvass the plea of limitation vide the written submissions either in the manner adverted to or at all.

94. To my mind, it is incumbent upon the parties to capture and espouse all the issues that same desire to canvass before the court in their pleadings and thus enable the adverse party [in this case the Plaintiff] to respond appropriately to any such issue in accordance with the law.

95. In any event, where an issue is neither captured nor highlighted in the pleadings before the court, a party the Defendant herein not excepted, cannot be allowed to steal a match on the adverse party by seeking to sneak in and canvass such a new [foreign] issue by way of written submissions and in any event, at the tail- end of the hearing.

96. In my humble view, such a conduct, where a party to a litigation sneaks in a new and completely foreign issue at the tail end of the proceedings constitutes a breach and violation of the right to Fair Hearing and thus such an endeavor, cannot be countenanced or at all.

97. To be able to understand the extent and scope of what Fair hearing entails, it suffices to take cognizance of the holding of the Supreme Court of Kenya [the Apex Court] in the case of Anuar Loitiptip v Independent Electoral & Boundaries Commission & 2 others [2019] eKLR, where the court stated as hereunder;

> (79) It is the Appellant's, 1st and 2nd Respondents case that the appellate Court in allowing the 3rd Respondent to canvass issues on the applications without the due notice, their right to fair trial had been violated.
>
> (80) Fair hearing is a tenet of international law that is a fundamental safeguard to ensure that individuals are protected from unlawful or arbitrary deprivation of their human rights and freedoms. The notion of a "fair" hearing is an inalienable right enshrined in Article 10 of the Universal Declaration on Human Rights, Article 6 and Article 14(1) of the International Covenant on Civil and Political Rights, Article 6(1) of the European Convention on Human Rights, Article 8(1) of the American Convention on Human Rights and Article 60 of the Charter on the African Commission on Human and Peoples' Rights " encompasses these where it states that it shall draw inspiration" from other international instruments for the protection of human and peoples' rights.
>
> (81) This right is a cornerstone of justice and our Constitution guarantees it under Article 50(1), which encompasses the right to fair hearing, a non – derogable right protected under Article 25(c) of *the Constitution*.
>
> (82) The essential elements of a fair hearing include equality of arms between the parties to a proceeding, whether they be administrative, civil, criminal, or military, the right to adduce and challenge evidence, as well as an entitlement to have a party's rights and obligations affected only by a decision based solely on evidence presented to the judicial body."

98. Duly nourished by the holding [supra], it is my finding that the endeavor by the Defendant to sneak in the question of limitation of actions through the Written submissions yet same had not been impleaded in the statement of defense and counterclaim, constitutes a violation of the right to Fair hearing. On this account, the invitation to apply and deploy the Limitation of Action Act to non-suit the Plaintiffs is misconceived.

99. Other than the foregoing, it is also not lost on this court that parties are bound by their pleadings. Consequently, the Defendant herein and by extension her counsel are bound by the defense and counterclaim which was filed before the court.

100. Pertinently, the doctrine of departure which is an attribute of parties being bound by their pleadings prohibits and frowns upon a party venturing outside the scope of the pleading filed. [See Order 2 Rules 6 of the Civil Procedure Rules, 2010].

101. Furthermore, the import and tenor of the doctrine of departure [parties being bound by their pleadings] was succinctly highlighted and elaborated upon by the Court of Appeal in the case of Independent Electoral and Boundaries Commission v Stephen Mutinda Mule [2014]eKLR, where the court stated and observed as hereunder;

> The appellant submits that by unilaterally framing new issues for determination not pleaded or responded to by the parties, the learned Judge abandoned her role as an independent and impartial adjudicator and descended into the arena of conflict. To support its contention, the appellant cited the decision of the Malawi Supreme Court of Appeal in Malawi Railways Ltd v Nyasulu[1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in [1960] Current Legal problems, at P174 whereof the author had stated;
>
> "As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties.
>
> To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....
>
> In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business" in the sense that points other than those specific may be raised without notice."

102. To my mind, the contention hinged and anchored on the Plaintiffs' suit being barred by the Limitation of Action Act would equally have failed and or collapsed on the basis of the Doctrine of departure.

103. Notwithstanding the foregoing, it is also important to take into account the totality of the evidence that was tendered and wherein the Plaintiffs and the Defendant herein continued to engage in various discussions and negotiations whose net effect was to arrive at a mutual settlement as pertains to the dispute beforehand.

104. Instructively, the parties herein continued to exchange a plethora of correspondence inter-alia the letter dated 4th May 2017, 6th March 2019, 2nd October 2020 and a host of email correspondence resting with the email dated the 19th August 2021; which was generated by the Defendant's own advocates.

105. Furthermore, it is also not lost on this court that DW1 [Harrun Gekonge Nyakundi] testified and confirmed to the court that the parties herein have engaged in various negotiations prior to the filing of the instant suit.

106. To this end and to disabuse learned counsel for the Defendant of the contention that the suit beforehand is barred by Limitation of Action Act, it suffices to reproduce the evidence of DW1 on re-examination.

107. Same stated as hereunder;

> " I am aware that the parties herein endeavored to negotiate the dispute. I am also aware that the Defendant offered to give unto the Plaintiffs another parcel of land. I do confirm that the Defendant is still willing to negotiate and settle the matter herein".

108. Furthermore, DW1 proceeded and stated thus;

> " In any event, we [Defendant] have offered to give the Plaintiffs two pieces of plots at Mwiki-Nairobi. One of the plots is 0.22HA and the other is 0.04HA. the Defendant is willing to settle the matter"

109. My reading and understanding of the evidence on behalf of the Defendant [whose contents have been reproduced herein before] drives me to the conclusion that the Defendant herself is acknowledging the existence of a transaction between herself [Defendant and the Plaintiffs]. Instructively, what is discernable is an acknowledgment which thus operates to defeat the application of Limitation of Actions.

110. Finally, it is important to point out that the provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya which learned counsel for the Defendant has invoked and deployed; relates to an endeavor to recover land. However, in this case the Plaintiffs herein are not seeking to recover any land insofar as no land has hitherto been registered in their name and neither have same [Plaintiffs] been disposed by a third party.

111. Put differently, the provisions of Section 7 [supra] only relates to proceedings by a land owner who has been disposed of the land by a trespasser and who is desirous to commence proceedings towards recovery of the land and not otherwise.

112. For the sake of brevity, it is imperative to reproduce the provisions of Section 7 of the Limitation of Action Act.

113. Same are reproduced as hereunder;

> 7. Actions to recover land

> An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

114. From the foregoing analysis, my answer to issue number one [1] herein before is fourfold. Firstly, the plea of limitation was neither impleaded nor captured in the body of the statement of defense and counterclaim and hence same cannot be sneaked in vide submissions.

115. Secondly, parties are bound by their pleadings and to this end the Defendant cannot seek to canvass that which was not impleaded. In any event, such an endeavor constitutes a violation of the Doctrine of Departure.

116. Thirdly, the attempt by the Defendant to agitate the plea of limitation if allowed shall be tantamount to breach and/or infringement of the right to Fair hearing. Simply put, same must be frown upon.

117. Fourthly, the totality of the evidence on record does not support the plea of limitation either as canvassed by the Defendant or at all.

Issue Number 2 And 3:

Whether there was any lawful or legitimate contract between the Plaintiffs on one hand and the Defendant on the other hand or at all.

Whether there was breach of any contract.

118. Learned counsel for the Defendant has contended that the Defendant offered to sell to and in favor of the Plaintiffs a portion of land out of L.R No. 2259/66 and wherein the purchase price was stated as Kes.4, 000, 000/= only. Nevertheless, learned counsel for the Defendant has added that the said purchase price was clearly indicated to be a tentative purchase price.

119. On the other hand, learned counsel for the Defendant has also submitted that even though the purchase price was indicated to be a tentative purchase price, the application letter which was executed by the Plaintiffs also clarified that the stipulated purchase price was exclusive of Government taxes, administrative charges and infrastructural costs.

120. Other than the foregoing, learned counsel for the Defendant has also posited that though Plaintiffs paid the sum of Kes.4, 603, 088/= only, which monies were duly acknowledged and receipted by the Defendant, the Plaintiffs however failed to pay the infrastructural costs which formed part and parcel of the contract.

121. Furthermore, the Defendant also contended that the Plaintiffs herein failed and declined to execute the letter of offer which was forwarded unto same by the Defendant's advocate. In this regard, the Defendant contend that such a failure constituted a breach of the contract.

122. Other than the foregoing, learned counsel for the Defendant has also submitted that despite the fact that the Plaintiffs herein requested the Defendant for extension of time within which to pay the infrastructural costs, the Plaintiffs failed and neglected to comply or at all. In any event, it has also been contended that the Plaintiffs herein breached the terms of the contract without giving notice to the Defendant. [See paragraph 3.17 and 3.18 of the Defendant's submissions].

123. Arising from the foregoing, learned counsel for the Defendants has therefore implored the court to find and hold that the Plaintiffs herein are the ones who are guilty of breach of the contract and not otherwise.

124. Having considered and evaluated the submissions by learned counsel for the Defendant, it is important to point out and underscore that the transaction that was being entered into by the Plaintiffs on one hand and the Defendant on the other hand, touched on and concerned disposition of an interest in land and not otherwise.

125. Consequently and to the extent that the transaction in question concerned disposition of an interest in land, it behooves the parties to comply with the provisions of Section 3[3] of the *Law of Contract Act*, Chapter 23 of the Laws of Kenya which governs contracts pertaining to disposition of an interest in land.

126. Suffice it to point out that as between the Plaintiffs and the Defendant herein there was no written contract duly executed by the parties chargeable thereto and witnessed by a person present at the time of the execution thereof.

127. To my mind, in the absence of a contract in the manner envisaged by the provision of Section 3[3] of the Act [supra], I am unable to discern the existence of a legal and lawful contract, if at all between the disputants herein.

128. Corollary, in the absence of a lawful contract in the manner known to law, one, the Defendant not excepted cannot now be heard to advert to and/or contend that there was a contract which has since been breached by the Plaintiffs or otherwise.

129. In any event, it is not lost on the court that the Defendant herself has confirmed and acknowledged that the Plaintiffs declined to execute the letter of offer which was forwarded by the law firm of M/s P. M Kamara & Co. Advocates.

130. Simply put, the contention that the Plaintiffs herein have breached the contract as propagated by the Defendant is indeed anchored on quicksand and in any event misconceived.

131. Finally, I beg to point out that the parties herein were engaged in a transaction and in respect of which same [parties] were in the process of actualizing a contract but same did not materialize, even though same [Defendant] was paid and received the sum of Kes.4, 603, 088/= only from the Plaintiffs.

132. In a nutshell, my answer to issue number two and three hereof is to the effect that there was no lawful contract entered into and binding on the parties herein in the manner envisaged by dint of Section 3[3] of the Law of Contract.

133. Secondly, in the absence of such a contract, the contention anchoring breach of the non-existent contract is erroneous and misleading.

Issue Number 4

What reliefs if any, ought to be granted.

134. The parties beforehand [both the Plaintiffs and the Defendant] have sought for various reliefs before the court pertaining to and arising from the aborted transaction which was being entered into by the said parties.

135. On the part of the Plaintiffs, same have sought for various orders inter-alia disgorgement of profits made by the Defendant by revoking the offer to the Plaintiffs; payment of the admitted value of the subject matter of Kes.15, 000, 000/= as at 4th May 2017 and damages for deceit and loss of chance.

136. To start with, the claim christened as disgorgement of profit [whatever it means], speaks to a claim pertaining to special damages, which to my mind ought to have been particularly pleaded and

thereafter specifically proved. Unfortunately, there is no pleading or at all anchoring the claim of [sic] disgorgement of profit[s].

137. Without belaboring the point, it is my finding and holding that the claim premised on [sic] disgorgement of profit[s] is misconceived, misplaced and otherwise legally untenable. [See David Bagine vs Bundi [1997]eKLR and Capital Fish Kenya Ltd v Kenya Power & Lighting Ltd [2016]eKLR.

138. In respect of the claim for payment of the sum of Kes.15, 000, 000/= only being the value of the property at Mavoko which the Defendant had offered to give to and in favor of the Plaintiffs in an endeavor to settle the dispute beforehand, I hold the opinion that same is tenable and thus payable.

139. To start with, it is the Defendant herein who instructed their agents [advocates] to generate an agreement in respect of which the Defendant had agreed/covenanted to allocate to the Plaintiffs a three acre portion of land at Mavoko. Even though the details of the land at Mavoko was neither captured nor mentioned at the foot of the letter dated 4th May 2017, it was however clarified that the value thereof translated to Kes.15 Million.

140. Pertinently, it is the Defendant who came up with the issue of three acre land and ventured forward to state that the value thereof was Kes.15 Million or better still, translated to Kes.15 Million.

141. Having come up with the offer, proposal and an endeavor to settle the dispute and having voluntarily affixed the value of Kes.15 Million to the land at Mavoko which was to be given to the Plaintiffs and coupled with the fact that the endeavor to allocate the land at Mavoko to the Plaintiffs did not materialize, the Defendant herein cannot now renege on the aspect pertaining to the monetary value therein.

142. In my humble view, the Defendant herein came out clearly and intimated to the Plaintiffs that the land which same [Defendant] was offering translated Kes 15 Million and now that the land was never given to the Plaintiffs, the Defendant herein cannot have it both ways.

143. To my mind, the Defendant herein quite clearly made representation[s] to the Plaintiffs about her [Defendant's] commitment either in terms of giving the land at Mavoko or the monetary equivalent thereof.

144. To this end, it is my humble view that the Doctrine of Estoppel suffices to prohibit the Defendant from reneging on and/or circumventing the clear and unequivocal representation[s] contained at the foot of the Letter dated the 4th May 2017. [See Section 120 of the *Evidence Act*, Chapter 80 Laws of Kenya].

145. Furthermore, the extent and scope of the doctrine of estoppel has been highlighted and amplified in various cases inter-alia 748 Air Services Limited v Theuri Munyi [2017] eKLR.

146. For coherence, the court stated and observed as hereunder;

> Estoppel is not easy to define in legal terminology. In his customary innovativeness, Lord Denning in the case of McIlkenny vs Chief Constable of West Midlands, [1980] All ER 227 gave the history of its evolution from French origins and compared it to a house with many rooms. Let us hear him:
>
> "..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 notices. It is a mistake to suppose that what you find in one room, you will find in the others."

147. At any rate, it would also be inequitable and unjust for the Defendant herein [which is an organization affiliated to a church] to be allowed to run away from the clear representation[s] contained at the foot of the letter dated 4th May 2017.

148. Instructively, Equity and Social justice frowns upon such an endeavor. In this regard, I beg to adopt and reiterate the holding of the Court of Appeal in the case of Mwangi Macharia & 87 Others v Davidson Mwangi Kagiri [2014]eKLR.

149. For coherence, the court stated and observed as hereunder;

> 26. Article 159 (2) (b) of *the Constitution* requires that justice should not be delayed. This matter has been in the courts since 1993. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. Article 159 (2) (a) of *the Constitution* requires justice to be administered to all, irrespective of status; Article 159 (2) (g) of *the Constitution* stipulates that justice shall be administered without undue regard to procedural technicalities.

27. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property.

150. The other claim that has been raised by the Plaintiffs touch on and/or concern damages for deceit and loss of chance. In my humble view, the loss if any arising from what has been termed as deceit and loss of chance needed to be specifically pleaded and proved. In the absence of the requisite pleadings and there being no evidence that was tendered to prove same, the claim adverted to in this respect is legally untenable.

151. On behalf of the Defendant, same filed a counterclaim wherein two [2] principal reliefs were sought. Firstly, the Defendant sought to have the matter referred to a mediator and/or a arbitrator as per [sic] the agreement. However, it is worth noting that no agreement containing an arbitration clause was ever tendered and produced before the court.

152. Secondly, even if any such agreement was tendered and produced before the court [which is not the case] the question of reference to mediator and arbitrator are interim measures which can only be dealt with during the interlocutory stages and not otherwise.

153. Thirdly, it is also not lost on this court that if there was any agreement containing an arbitral clause [which has not been tendered before the court] then it behooved the Defendant to deploy the provisions of Section 6 of the *Arbitration Act*, 1995. For good measure, the contents of the said Section are explicit and distinct in terms on what ought to be done and at what stage of the proceedings.

154. As concerns the claim for damages for breach of the agreement, my answer is twofold. Firstly, I have found and held elsewhere herein before that there was no agreement or at all that was entered into and executed by the parties [See Section 3[3] of the *Law of Contract Act*].

155. Secondly, even if there was an agreement [which is not the case], breach of an agreement [contract] can only give rise to special damages. In this regard, the Defendant would thus be obliged to plead the damages suffered and thereafter tender credible evidence to vindicate same. [Sundowner Lodge Limited v Kenya Tourist Development Corporation [2019] eKLR and Dharamshi –vs Karsam, 1974 E.A. 41].

156. In view of the foregoing, it is my humble position that the counterclaim by and on behalf of the Defendant is stillborn and misconceived.

Final Disposition:

157. Having analyzed and considered the thematic issues [details in terms of the preceding paragraphs], it must have become apparent and evident that the Plaintiffs herein have proved their case albeit to a limited extent.

158. Other than the foregoing, the Defendant's counterclaim is not only misconceived and legally untenable; but same is similarly devoid of merits.

159. Consequently and in view of the foregoing, I proceed to and do hereby make the following orders;

    i. Judgment be and is hereby entered in favor of the Plaintiff for the sum of Kes.15, 000, 000/= only being the monetary value of the plot at Mavoko which was being offered by the Defendant in the settlement of the dispute beforehand but which did not materialize.

    ii. The award in terms of clause [i] shall attract interests at court rates at 14% w.e.f 4th May 2017 [being the date when the offer was to take effect].

    iii. The Defendant's counterclaim be and is hereby dismissed.

    iv. The Plaintiffs be and are hereby awarded costs of the suit.

    v. The Plaintiffs be and are hereby awarded costs of the counterclaim.

    vi. Costs in terms of clause [iv] and [v] to be taxed by the Deputy Registrar in the usual manner.

    vii. Any other relief not expressly granted is declined.

160. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE, 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant

Ms. Angwenyi for the Plaintiffs

N/A for the Defendant.